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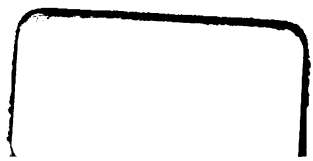

XI

CHITTY'S

TREATISE ON PLEADING

AND

PARTIES TO ACTIONS,

WITH

A SECOND VOLUME CONTAINING

MODERN PRECEDENTS OF PLEADINGS,

AND

PRACTICAL NOTES.

Nihil simul inventum est et perfectum. — Co. Lit. 230 *a*.

IN TWO VOLUMES.

VOL. II.

THE SEVENTH ENGLISH EDITION,

CORRECTED AND ENLARGED, BY

HENRY GREENING, ESQ.,

OF LINCOLN'S INN.

SIXTEENTH AMERICAN EDITION,

WITH NOTES, AND REFERENCES TO THE ENGLISH AND AMERICAN DECISIONS,

By J. C. PERKINS, LL. D.

SPRINGFIELD, MASS.
PUBLISHED BY G. & C. MERRIAM.
1876.

Entered, according to Act of Congress, in the year 1876, by
G. AND C. MERRIAM,
in the Clerk's Office of the Librarian of Congress, at Washington.

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY

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PRECEDENTS, ETC.

PART I.

COMMENCEMENTS AND CONCLUSIONS OF PLEADINGS.

I. OF DECLARATIONS.

1. IN ACTIONS COMMENCED IN THE SUPERIOR COURTS.

ORS. (A.) The form of the commencement and conclusion of declarations is prescribed by the common law procedure act, 1852, s. 59. The 2d section enacts that all *personal* actions shall be commenced by writ of summons. The non-observance of the new form can only be taken advantage of by an application to a judge (or the court) to set aside the declaration as irregular, or to compel the plaintiff to amend. See notes, *infra*, Marshall *v.* Thomas, 3 M. & Sc. 98, 2 Dowl. 208; White *v.* Feltham, 3 C. B. 658.

(B.) *Title of the Court.* — The declaration must be entitled in the proper court. Com. Law P. Act, 1852, s. 54. It is irregular to entitle it at the back only; Ripling *v.* Watts, 4 Dowl. 290; or in the *wrong* court, or not at all. And the defendant may get it set aside as irregular, or compel plaintiff to set it right.

(C.) *The Date of the Declaration.* — By common law procedure act, 1852, s. 54, "every declaration and other pleading shall be entitled of the day of the month in the year when the same was pleaded, and shall bear no other time or date." It need not be entitled as of any term. A declaration or other pleading bearing date on a different day from that on which it is delivered, might be set aside as irregular; Hodson *v.* Pennell, 4 M. & W. 373; S. C. 7 Dowl. 208; Mills *v.* Brown, 9 Dowl. 151; but the application must be made promptly, *i. e.* within the time allowed for pleading; Newnham *v.* Hanney, 5 Dowl. 259; but it is not a ground of demurrer; Neal *v.* Richardson, 2 Dowl. 89; Harsant *v.* Busk, 6 Jur. 1102. The omission of the words "in the year of our Lord" would be irregular. Holland *v.* Tealdi, 8 Dowl. 320. The plaintiff *cannot* declare until the expiration of eight days after the service of the writ of *summons*, inclusive of the day of service, unless the defendant have appeared in the mean time. When an appearance is entered, the plaintiff *must*, in order to prevent judgment of *non pros.*, declare before the end of the term next after such appearance. Foster *v.* Pryme, 8 M. & W. 664; S. C. 9 Dowl. 749. If there be no *non pros.* signed (after a four days' written demand of declaration), the writ is in operation, so as to enable the plaintiff to declare within a year next after the writ is returnable, *i. e.* the *service* of the process. Com. Law P. Act, 1852, ss. 53, 58; Unite *v.* Humphrey, 3 Dowl. 532; Johns *v.* Sanders, 16 L. J. Q. B. 340; Hodgson *v.* Mee, 5 N. & M. 302; 3 Ad. & E. 765; 1 Chit. Arch. 203. The declaration must be filed where no appearance has been entered; but notice of declaration need not, it seems, be given, unless ordered by the court or judge. Com. Law P. Act, 1852, s. 28. Although the *writ* is now in all the courts the commencement of the action from the time it was issued; Alston *v.* Underhill, 2 Dowl

Obs. P. C. 26; Thompson *v.* Dicas, 1 Cr. & M. 768; yet it may often be material for the defendant, for the purposes of pleading, that the declaration should be properly entitled.

(D.) *Venue.* — By the pleading rules, Trinity T. 1853, reg. 4, "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the *venue* intended by the plaintiff; and no venue shall be stated in the *body* of the declaration, or in any subsequent pleading, provided that in cases where *local description* is now required, such local description shall be given." Therefore, even in cases where the venue is local, the statement of the venue in the margin will suffice, unless local description be also essential from the nature of the action, as in ejectment, trespass, and replevin. See those forms of action, *post;* Tremeere *v.* Morison, 1 Bing. N. C. 89; S. C. 4 M. & Sc. 609; Buckworth *v.* Simpson, 1 Cr., M. & R. 834. [If, when an action is local, there is no local description in the declaration, the name of the county in the margin is to be taken as repeated in the declaration, and as amounting to a material averment. Richardson *v.* Locklin, 6 B. & S. 777; S. C. 34 L. J. Q. B. 225.] Venue is either local or transitory (see the notes to the different forms of action, *post*), and generally (1 Saund. 76, note (2); 1 Chit. Pl. 7th ed. 279) the neglect to state *any* venue in any part of the declaration, either in the margin or body, may, it should seem, be visited by a demurrer. Remington *v.* Taylor, 1 Lutw. 235; 1 Chit. Arch. 207. Since the assizes for the northern and southern divisions of Lancashire have been held at different places, it would seem to be proper to state the venue in actions to be tried in that county thus: "*Lancashire, Southern* [or *Northern*] *Division.*" Atkinson *v.* Hornby, 2 Car. & K. 335; Thomson *v.* Hornby, 9 Q. B. 978. By the pleading rule 18 Tr. T. 1853, in actions for trespass to land, the close or place in which, &c. must be designated in the declaration by name or abuttals, or other description, in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the court or a judge may think reasonable, *post.* The insertion of venue in the *body* of the declaration is not the subject of demurrer; the defendant can only apply by summons to a judge at chambers to strike out such superfluous statement of the venue at the plaintiff's expense. Farmer *v.* Champneys, 1 Cr., M. & R. 369; 4 Tyr. 859; S. C. 2 Dowl. 680; Fisher *v.* Snow, 3 Dowl. 27; Townsend *v.* Gurney, Ib. 108; 1 Cr., M. & R. 590; 5 Tyr. 214, S. C. If the venue, when local, be laid in the wrong county, the defendant may demur, if the objection appear on the face of the record; Tremeere *v.* Morison, 1 Bing. N. C. 97; 4 M. & Sc. 609; S. C. Simmons *v.* Lillystone, 8 Ex. 431; otherwise, the objection should, it seems, be pleaded. Boyes *v.* Hewetson, 2 Bing. N. C. 575; S. C. 2 Scott, 831; Richards *v.* Easto, 15 M. & W. 244. But a nonsuit will not lie on a wrong venue if there be no issue in the pleadings on the locality. Hitchings *v.* Hollingworth, 7 M. P. C. C. 228. But after judgment by default, or verdict for the plaintiff, the defect is cured. 16 & 17 Car. 2, c. 8; 4 & 5 Ann. c. 16, s. 2; 1 Saund. 241, and note; Tidd, 9th ed. 427. Where, under common law procedure act, 1852, s. 41, two or more causes of action, which are local and arise in different counties, are joined in the declaration, the venue may be laid in either county. As to changing the venue, see Index, tit. "Venue." [Right of the attorney general for the crown, or the Prince of Wales, to lay and retain the venue. Attorney General for the Prince of Wales *v.* Crossman, L. R. 1 Ex. 381.]

(E.) *The Plaintiff's Name, &c.* — The Christian and surname of the plaintiff should be correctly stated. It is necessary to state the names of all the parties suing or being sued, however numerous they may be, and although they constitute a trading firm or company, unless they be incorporated, or authorized by the statute to sue as a company or body by a given title. [1 Chitty Pl. 265, 271, and notes.] Formerly the misnomer of the plaintiff or defendant might have been pleaded in abatement; but the statute for the amendment of the law, 3 & 4 W. 4, c. 42, s. 11, provides "that no plea in abatement for a *misnomer* shall be allowed in any personal action; but that in all cases where it would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such

Obs. summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit. This enactment, it seems, applies to a misnomer of the plaintiff. Kitchen *v.* Brooks, 5 M. & W. 522; 8 Dowl. 282, S. C.; *sed vide* Lindsay *v.* Wells, 4 Scott, 471; 3 Bing. N. C. 777, S. C. The misnomer of the *plaintiff* (although there be a person of the name erroneously used) is no ground of nonsuit, if he identify himself as the real creditor or claimant, and show that he is the party actually enforcing the proceedings, and defendant be not deceived. Boughton *v.* Frere, 3 Campb. 29; Moody *v.* Aslat, 3 Dowl. 486; and see Fisher *v.* Magnay, 1 D. & L. 40; [1 Chitty Pl. 266; Scanlan *v.* Wright, 13 Pick. 530.] Where the writ is wrong, it will be proper to commence the declaration thus: "*A.* B., at whose suit the writ of summons was issued in this cause by the name of *E.* B., by, &c. sues," &c. The general rule is that the declaration must not *contradict* the writ in describing the *character* in which the plaintiff states in his writ that he is suing. If the process be by the plaintiff in a *representative capacity*, thus — "*as* executor" (see 1 Chit. Arch. 206; Ashworth *v.* Ryal, 1 B. & Ad. 19; Delves *v.* Strange, 6 T. R. 158; Attwood *v.* Rattenbury, 5 Moore, 209), or "*as* assignee of a bankrupt" (Ib.); or if the writ be at the suit of the plaintiff *qui tam* (Ib.; Canning *v.* Davis, 4 Burr. 2417), the declaration, though it will not be demurrable, may be set aside for irregularity, if the plaintiff declare generally in his individual character. But it seems that if the process be *general*, the plaintiff may declare specially, or in *autre droit*. Ashworth *v.* Ryal, 1 B. & Ad. 19; Marzetti *v.* Jouffroy, 1 Dowl. 44; Knowles *v.* Johnson, 2 Dowl. 653; Ilsley *v.* Ilsley, 3 Cr. & J. 330; 1 Dowl. 310, S. C.; Tidd, 9th ed. 450. And the superfluous description in the writ of the plaintiff, as holding a representative character, without stating that he sues "as" such (viz. "*as* executor," &c.), but merely alleging "A. B. executor, &c." will not, it seems, bar or prevent a general declaration thereon by the plaintiff upon a cause of action accruing to him personally in his private character. Lloyd *v.* Williams, 2 Bl. R. 722; 1 B. & P. 383, note (*b*); Anon. 1 Dowl. 97; Watson *v.* Pilling, 6 Moore, 66; 3 B. & B. 4, S. C.; Knowles *v.* Johnson, 2 Dowl. 653. Although the plaintiff describe himself in the commencement of the declaration thus, "A. B. executor," &c. or "assignee," &c. without showing in the body of the declaration any cause of action accruing to him in such character; and the body of the declaration state a right of action resulting to the plaintiff individually, yet the defendant cannot demur, or take any objection; for the description of the plaintiff's special capacity may be rejected as surplusage. Reynolds *v.* Welsh, 1 Cr., M. & R. 580; Hargreaves *v.* Holden, Ib. note (*a*); Free *v.* White, 1 Dowl. N. S. 586. If the writ be at the suit of two parties, and the declaration be by one only, it will be set aside for irregularity; Rogers *v.* Jenkins, 1 B. & P. 383; unless one dies before declaration, and then the death should be suggested. And in general the name of a party not mentioned in the writ cannot be added as a plaintiff in the declaration; but where the name of the official assignee of a bankrupt had been omitted in the writ and declaration at the suit of the assignees, the court allowed his name to be introduced as a joint plaintiff, as an amendment, on payment of costs; Baker *v.* Neaver, 1 Dowl. 616; 1 Cr. & M. 112, S. C.; and a name of a plaintiff may now be added or struck out before or at the trial. Com. Law P. Act, 1852, ss. 34, 35. See *post*, "Non-joinder." [But the court has no power to amend when parties are altogether wrong. Clay *v.* Oxford, L. R. 2 Ex. 54. Under the New York Code, §§ 173, 175, the court may, before or after judgment, amend any pleading, process, or proceeding, by adding or striking out the name of any party. An amendment of this kind may be made in Massachusetts, under the practice act, at any time before final judgment. Genl. Sts. c. 129, § 41.] And where, in an action by executors, the defendant pleaded in abatement the non-joinder of one executor who had not proved, the court allowed the proceedings to be amended by adding his name, on payment of costs, as the statute of limitations would have barred a fresh action; but they intimated that in future no amendment of that kind would be allowed, except to avoid the operation of that statute. Lakin *v.* Watson, 2 Dowl. 663. It is not unusual to state, A. B. "the plaintiff in this suit," by, &c. sues, &c.; but this is not necessary, although the plaintiff is afterwards called "the plaintiff" in the declaration.

OBS. [In Vermont the writ and declaration are blended and made one instrument, by statute; Genl. Sts. c. 33, § 1; and in pleading the writ may be referred to, to help out a defective averment, or the want of a material averment in the declaration. Church *v.* Westminster, 45 Vt. 380.]

(F.) *Declaration by Attorney or in Person.* — The omission to state whether the plaintiff sues or declares by attorney or in person, may be made the subject of an application to a judge to set aside the declaration as not being in conformity with the prescribed form. White *v.* Feltham, 3 C. B. 658 ; 4 D. & L. 454. All persons except married women, infants, and idiots, may sue and declare by attorney. 1 Chit. Arch. 71. Infants must sue by guardian or next friend. Prac. Rules Hil. T. 1853, r. 5; [1 Chitty Pl. 291, and notes.] Idiots must sue in person. [1 Chitty Pl. 21; Hamilton *v.* Colwell, 10 R. I. 39.] Corporations by attorney appointed under their common seal. See Ib. ; Co. Lit. 66 *b.*

(G.) *The Defendant's Name.* — The effect of a misnomer of the defendant, and the mode of taking advantage of it, have been already noticed. See *ante*, (E). As to describing defendant by an initial letter for a Christian name, see Kinnersley *v.* Knott, 7 C. B. 980 ; Nash *v.* Collins, 17 L. J. N. S. C. P. 91 ; 3 & 4 W. 4, c. 42, s. 1 ; such description would be amended under common law procedure act, 1852, s. 222. It would not be demurrable ; *Ib.* s. 51 ; nor be set aside as irregular. Burt *v.* Kennedy, 4 M. & W. 586. There is no material or objectionable misnomer of the right name, if the mistaken name be *idem sonans*. See Rex *v.* Shakespeare, 10 East, 83, where Shakepear for Shakespeare was held a material misnomer ; Webb *v.* Lawrence, 1 Cr. & M. 806, Lawrance for Lawrence held immaterial ; Abithol *v.* Beneditto, instead of Benedetto, 2 Taunt. 401, held immaterial ; Dickenson *v.* Bowes, 16 East, 110, Kay for Key held immaterial. Where the defendant is misnamed in the process, it may be advisable to declare against him thus : "A. B. by, &c. sues C. D. who has been summoned *by the name of E.* D." &c. Hobson *v.* Wadsworth, 8 Dowl. 601. A party who executes a deed by a wrong name should be sued by that name. Gould *v.* Barnes, 3 Taunt. 504 ; Crawford *v.* Stackwell, 2 Stra. 1218 ; Williams *v.* Bryant, 5 M. & W. 447 ; [1 Chitty Pl. 265, 271.] Upon a writ against two persons, the declaration will not be irregular, although one only be declared against, the cause of action being against him only, provided no proceedings be taken against the other party. Evans *v.* Whitehead, 2 M. & R. 367 ; Bowles *v.* Bilton, 2 Cr. & J. 174. There cannot in any case be a writ against two and a declaration against *each* separately upon such writ ; for "every writ of summons shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants in more actions than one ;" Com. Law P. Act, 1852, s. 4 ; Pepper *v.* Whalley, 1 Bing. N. C. 71 ; Carson *v.* Dowling, 4 Dowl. 297 ; Knowles *v.* Johnson, 2 Dowl. 653 ; except in actions on bills under the Sum. Pro. on Bills of Exchange Act ; *post*, tit. "Bills of Exchange." As to the mode of proceeding where the writ is specially indorsed, and one or more only of several defendants appear, see Com. Law P. Act, 1852, s. 33, *post*, 6. Where several defendants are sued in contract, and one suffers judgment by default, and the evidence fails as against some of the others, the judge at *nisi prius* may amend by striking out the names of the latter under common law procedure act, 1854, s. 96 ; Johnson *v.* Goslett, 18 C. B. 728; but *after verdict* finding one only of two defendants to be liable, it is too late to amend by striking out the name of the defendant found not liable. Wickens *v.* Steel, 2 C. B. N. S. 488. [See *ante*, (K).] A declaration by two, commencing "A. B. and C. D. complains," &c. and stating that the defendant was summoned to answer the *plaintiff* (instead of plaintiffs), was not demurrable. Lyng *v.* Sutton, 4 M. & Sc. 417. Sometimes it is stated, in accordance with the form of the *issue*, that the plaintiff sues the defendant, who has been summoned to answer the plaintiff, "by virtue of a writ issued on," &c. But this is unnecessary, though not, it seems, irregular. Dupre *v.* Langridge, 2 Dowl. 584.

(H.) "And the plaintiff claims £——," &c. This is the form of conclusion given by the common law procedure act, 1852, s. 59. As to the conclusion in *mandamus* or *injunction*, *post*. Care must be taken to demand in this part of the declaration a sum equal to the full amount of the debt or damages sought to be recovered. Com. Dig. Pleader, C. 84 ; Vin. Ab. Damages. The jury can-

Obs. not give larger damages than the amount laid in the declaration. Tidd, 9th ed. 896 ; but probably the plaintiff might be allowed, if necessary, to amend as to the amount claimed at the trial. Where interest is claimable as damages, there should be laid at the end of the declaration a sum sufficient to cover the amount of interest. In an action by an informer (or *qui tam* action) damages are not recoverable, and should not regularly be claimed. The common law procedure act, 1852, s. 95, provides that where plaintiff recovers a sum of money, it may be awarded to him by the judgment generally, without any distinction therein as to whether the sum is recovered by way of a debt or damages. See Gowens *v.* Moore, 27 L. J. Ex. 391. As to when a sum mentioned in an agreement is recoverable as liquidated damages or is merely a penalty, see Reynolds *v.* Bridge, 6 El. & Bl. 528 ; Sainter *v.* Ferguson, 7 C. B. 716 ; Cass *v.* Thompson, 5 W. R. 289 ; Betts *v.* Burch, 28 L. J. Ex. 267 ; [4 H. & N. 506 ; Ranger *v.* Great Western Railway Co. 18 Jur. 795 ; 2 Chitty Contr. (11th Am. ed.) 1314 *et seq.* and notes ; Whitefield *v.* Levy, 6 Vroom, 149.]

1. *Declaration after a Writ of Summons.* (A)

In the queen's bench [*or* "common pleas," *or* "exchequer of pleas" (B)].

On the —— day of ——, in the year of our Lord ——. (C)

London [*venue* (D)]. A. B., (E) by ——, his attorney, [*or* "in person," (F)] sues C. D. (G) For that [*here state the subject-matter or cause of action if it have to be specially stated, beginning a second or subsequent count* (*a*) *thus:* "And the plaintiff also sues the defendant, for that," &c. *But if the claim be merely for money under the indebitatus counts, then the statement of the cause of action commences,* "For money payable by the defendant to the plaintiff, for," *stating the subject-matter of the claim, as for goods sold, money lent, &c. as post.*] *Conclude the declaration thus:* And the plaintiff claims £——. (H) [*Or, if the action be brought to recover specific goods or their value,* "And the plaintiff claims a return of the said goods or their value, and £—— for their detention" (see *post*, "Detinue"). *Where the plaintiff claims an* "Injunction," *or* "Mandamus," *see post, those titles.*]

2. *Declaration against two Defendants, where, in a former Action against one of them, he pleaded the Non-joinder of the other in Abatement.* (*b*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., by E. F., his attorney, [*or* "in person,"] sues C. D. and G. H., which said C. D. has heretofore pleaded in abatement the non-

(*a*) Several counts on the same cause of action are not in general allowed. Pl. Rules, Tr. 1853, 1, 2, 3. See the cases on this subject collected, 1 Chit. Arch. Pr. 213; and the decisions will be noticed in their proper places throughout the work. If there be only one contract between the parties, and the plaintiff, in his declaration, insert two special counts, he cannot recover on both. The proper course would be, to insert one count with *two breaches*. Holford *v.* Dunnett, 7 M. & W. 348. Where plaintiff declared on a warranty of soundness of a horse, and in a second count stated a contract respecting a certain "other" horse, it was held he was bound to prove two contracts. Deare *v.* Ivy, 4 Q. B. 379; and see Shires *v.* Burrow, 2 Mood. & Rob. 405; Ward *v.* Bell, 1 Cr. & M. 848; Holford *v.* Dunnett, 7 M. & W. 348.

(*b*) By the common law procedure act, 1852, s. 60, it is provided, that in all cases in which, after a plea in abatement of the non-joinder of another person as defendant, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, or shall amend by adding the omitted defendant or defendants, the commencement of the declaration shall be in the above form, or to the like effect. See, also, ss. 38, 39.

joinder of the said G. H. [*&c.; proceed and conclude as directed in the first form*].

3. *Declaration where there are several Defendants, and the writ has been specially indorsed, and judgment has been signed against one Defendant, who has suffered judgment by default, and the Plaintiff proceeds against the other Defendants.* (*c*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., by ——, his attorney, [*or* "in person,"] sued out a writ of summons against C. D. and E. F., indorsed according to the common law procedure act, 1852, as follows [*copy the indorsement*], and the said C. D., although personally served with the said writ, hath not appeared thereto, and judgment herein has been signed against him, and the plaintiff declares against the said E. F., who has appeared to the said writ. For [*&c. state the cause of action, which must agree with that alleged on the special indorsement, showing the debt to have accrued from both the defendants for goods, &c. as the case may be, sold to them*].

2. DECLARATIONS IN ACTIONS REMOVED FROM INFERIOR COURTS. (*d*)

1. *Commencement of Declaration in an Action after removal from an Inferior Court.* (*e*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. Whereas a plaint having been heretofore levied in the county court of ——, holden at —— [*give the title of the county court*], against C. D., at the suit of A. B., in an action on contract, the said plaint, with all proceedings concerning the same, were, by her majesty's writ of *certiorari*, issued out of the court of queen's bench, ["common pleas," *or* "exchequer of pleas,"] on the —— day of ——, A. D. ——, directed to the judge of the said county court, sent into the said court of queen's bench, ["common pleas," *or* "exchequer of pleas,"] and hereupon the said A. B., by ——, his attorney, [*or* "in person,"] declares against the said C. D. For [*&c.*]

2. *Commencement of a Declaration in Replevin.*

See "Replevin," *post.*

(*c*) This mode of proceding is provided for by the common law procedure act, 1852, s. 33. Plaintiff may, instead of declaring against the defendant who has appeared, issue execution against the defendant who has suffered judgment, and it may be prudent to do so, and drop the action against the defendant who has appeared, if there be any doubt of plaintiff succeeding in proving a *joint* liability against all the defendants. But the name of a defendant may be struck out at the trial, if the evidence does not fix him. *Ante*, 4, (G).

(*d*) See *ante* 1, Obs. (A); and Dodd *v.* Grant, 4 Ad. & E. 485. The cause of action need not be stated to have accrued within the jurisdiction. Powell *v.* Ancell, 3 Scott N. R. 444; S. C. 3 M. & G. 191. It would be irregular to state that plaintiff had been *summoned*, if not the fact Keane *v.* White, 2 D. & L. 525.

(*e*) If the form of action be replevin, see *post*, "Replevin." See form of declaration, after removal of proceedings from the lord mayor's court by habeas, Chitty's Forms, 741.

3. IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

1. *Commencement and Conclusion of a Declaration by an Administrator.*

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., administrator of all and singular the goods, chattels, and credits which were of G. H., deceased, at the time of his death, who died intestate, by E. F. his attorney, [*or* "in person,"] sues C. D. For [*state the cause of action as in the forms hereinafter given, and conclude thus:*] And the plaintiff as administrator as aforesaid claims £——. (*f*)

2. *Declaration by an Administrator with the Will annexed, no Executor being appointed, &c.*

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., administrator of all and singular the goods, chattels, and credits which were of G. H., deceased, with the last will and testament of the said G. H. annexed, by E. F., his the plaintiff's attorney, [*or* "in person,"] sues, [*&c. as before.*]

3. *By an Administrator with the Will annexed, of Goods left unadministered by an Executor deceased.*

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., the plaintiff administrator, with the last will and testament of G. H., deceased, annexed, of all and singular the goods, chattels, and credits which were of the said G. H. at the time of his death left unadministered by O. P., deceased, who in his lifetime, and at the time of his death, was executor of the said will, by ——, his the plaintiff's attorney, [*or* "in his the plaintiff's own person,"] sues C. D. [*&c.; proceed as directed in preceding form*].

4. *By an Administrator during the Minority of an Executor.* (*g*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., administrator of all and singular the goods, chattels, and credits which were of G. H., deceased, at the time of his death, during the minority of L. M., an infant under the age of twenty-one years, who is executor of the last will and testament of the said G. H., by E. F., his the said plaintiff's attorney, [*or* "in person,"] sues C. D. [*&c. as before directed*].

5. *By Husband and Wife, Administratrix.* (*h*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B. and J. his wife, which said J. is administratrix of

(*f*) It is no longer necessary to make profert of a will or letters of administration. Com. Law P. Act, 1852, s. 55.

(*g*) By statute 38 G. 3, c. 88, s. 6, where an infant is sole executor, probate is not to be granted to him until he has attained the age of twenty-one years.

(*h*) It is clear that the husband must, in

all and singular the goods, chattels, and credits which were of G. H., deceased, at the time of his death, who died intestate, by E. F., their attorney, sue C. D. for [*&c. as before. Conclude*] And the said A. B., and J. his wife, as administratrix as aforesaid, claim £——.

6. *Against an Administrator.*

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., by E. F., his attorney, [*or* "in person,"] sues C. D., administrator of all and singular the goods, chattels, and credits which were of G. H., deceased, at the time of his death, who died intestate. For [*&c. See forms of Causes of Action against Administrators, post,* "Executors." *Where the defendant is surviving administrator, he will be described as such, without other change*].

[6*a*. *Another Form.*

The officer is directed to attach the goods and estate which were of A. B., deceased (being the intestate), in the hands and custody of C. D., administrator of the goods and estate of the said A. B., and summon the said C. D., as administrator as aforesaid, to answer, *&c.*]

7. *By the Assignees of a Bankrupt or Insolvent Debtor.* (*i*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B. and G. H., assignees of the debts, estate, and effects of L. M., a bankrupt, according to the statutes in force concerning bankrupts, [*or* "an insolvent debtor, heretofore discharged as such, under and according to the statutes in force for the relief of insolvent debtors in England," (*k*)] by

this case, join as a co-plaintiff. See Vin. Ab. Bar. & F. Q. 22; Com. Dig. Bar. & F. V.; Anon. 1 Salk. 282.

(*i*) See the bankrupt law consolidation act, 12 & 13 Vict. c. 106. By sect. 153, assignees may, by leave of the court of bankruptcy, but not without, commence actions the bankrupt might have commenced; but a defendant cannot set up as a defence the want of such leave; and the consent of the creditors is not essential to the support of the action. Lee *v.* Sangster, 2 C. B. N. S.; Boson *v.* Williams, 2 Y. & J. 475. It is clear that the official assignee must be made a plaintiff. See Ib.; Baker *v.* Neaver, cited *ante*, 3, (E). The non-joinder of an assignee as plaintiff may, in an action *ex contractu*, be objected under a plea traversing that the plaintiffs are assignees. Jones *v.* Smith, 1 Ex. 831. In order to put the plaintiffs upon proof of their character of assignees, the defendant must plead specially. See "Pleas *ex contractu*," *post*, title "Assignees," r. 5, T. T. 1853. [See provision for proving title of assignee in United States bankrupt law. Rev. Sts. U. S. p. 981, § 5049.] When an assignee dies, or a new assignee is chosen, the action will not be thereby abated; but the court may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and the action may be prosecuted in the name of the said surviving or new assignee in the same manner as if he had originally commenced it. Bankrupt Law Consolidation Act, s. 157. See Westall *v.* Sturgess, 4 M. & P. 217; Bates *v.* Sturges, 7 Bing. 585. [See similar provision in United States bankrupt law. Rev. Sts. U. S. p. 981, § 5048.] By the common law procedure act, 1852, s. 142, the bankruptcy or insolvency of a plaintiff in any action which the assignees might maintain for the benefit of the *creditors* (Drake *v.* Beckham, 11 M. & W. 315; Rogers *v.* Spence, 13 M. & W. 571) shall not be pleaded in bar to such action, unless the assignees decline to continue and give security for costs upon judge's order; if they so neglect or refuse, the defendant may, within eight days, plead the bankruptcy. Stanton *v.* Collier, 3 El. & Bl. 274. Assignees can never be declared against "*as* assignees." They are not liable to be sued at law for dividends. Bankrupt Law Con. Act, s. 190.

(*k*) See the insolvent acts, 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116; Ford *v.* Dabbs, 2 Dowl. N. S. 877. The consent of the cred-

——, their attorney, sue C. D. [*&c. as usual. See ante*, 5, Form 1. *Conclude*] And the plaintiffs, as (*l*) assignees as aforesaid, claim £——.

8. *By the Assignees of a Bankrupt Partner and the Solvent Partner.* (*m*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B. and G. H. and K. L., which said G. H. and K. L. are assignees of the estate and effects of O. P., a bankrupt, according to the statutes in force concerning bankrupts, by E. F., their attorney, sue C. D. [*&c. as usual. See* Forms, *ante*, 1 to 7; *and conclude*] And the said A. B., and also the said G. H. and K. L., as assignees as aforesaid, claim £——.

9. *By or against Attorneys.*

The Form will be as ante, Form 1. There is no occasion to describe the party as an attorney in the introductory part of the declaration, although he sues on his bill of costs. Since the 2 W. 4, c. 39, an attorney must sue and be sued in the common form; and if about to leave England, he may be arrested. Flight *v.* Cooke, 1 Dowl. & L. 714. As to the privilege of an attorney to be sued in his own court, 1 Chit. Arch. 65; see *post*, "Pleas in Abatement." An attorney plaintiff, if he sue in person, still has the right to lay and retain the venue in Middlesex, in transitory actions. Grace *v.* Wilmer, 6 El. & Bl. 982, 26 L. J. Q. B. 1, and cases there cited. But where an issue is directed by the court, it is no objection to an application to change the venue from Middlesex to Sussex, that the plaintiff is an attorney. Robertson *v.* Hayne, 16 C. B. 560.

itors need not be obtained before bringing an action. Before assignees are appointed in the stead of provisional assignee, actions must be brought in the name of latter. 1 & 2 Vict. c. 110, s. 42; Miles *v.* Pope, 5 C. B. 294. Where, pending action, a plaintiff or defendant becomes bankrupt or insolvent, the action does not abate, but may be continued by assignees. Com. Law P. Act, 1852, s. 142. [See corresponding provision in United States bankrupt law. Rev. Sts. U. S. p. 981, § 5047.] As to proceedings by assignees under protection act, see 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 8 & 9 Vict. c. 127; 10 & 11 Vict. c. 102. Official assignee may sue immediately, on appointment, for debt due to insolvent. Sayer *v.* Dufaur, 11 Q. B. 325. The fact of the plaintiffs being assignees is admitted, unless specially denied; and an order of adjudication, which recites the date of the vesting order, is evidence of that date, and that the plaintiffs' title accrued from that period. York *v.* Brown, 2 Dowl. N. S. 283.

(*l*) As to the word "as" here, see Ferguson *v.* Mitchell, 2 Cr., M. & R. 687.

(*m*) To recover a debt due to the firm before the bankruptcy, the assignees and solvent partner must be the plaintiffs. Thomason *v.* Frere, 10 East, 418; Eckhardt *v.* Wilson, 8 J. R. 140. The bankrupt law consolidation act, s. 152, enacts, that where one member of a firm becomes bankrupt, the court of bankruptcy may authorize the assignees to commence or prosecute any action or suit, in the name of the assignees and the remaining partner, against any debtors of the firm, and obtain judgment as if the action had been brought by the consent of such partner; and the latter shall not release the debt, but, if he claim no benefit by virtue of the proceedings, shall be indemnified against the payment of costs, and the bankruptcy court may order him to be paid so much of the proceeds of the action as such court may think fit. The solvent partner may use the name of the assignees in bringing actions against the debtors of the firm, but the assignees are entitled to an indemnity against the costs, if they apply for it. Whitehead *v.* Hughes, 2 Cr. & M. 318; and see Laws *v.* Bott, 16 M. & W. 300; [Dean *v.* James, 1 Ad. & E 809.]

10. *By Trustees, or by the Secretary of an Incorporated Railway or other Company empowered by Statute to sue by their Secretary, &c.* (*n*)

In the ——.

On the —— day of ——, A. D. ——

—— [*venue*]. A. B., who before and at the time of the commencement of this suit had been and was duly nominated and appointed, and was then, and still is, secretary [*or* "treasurer," *or* "clerk," *or* "one of the public officers," *as the case may be*] to the ["trustees for carrying into execution and acting by virtue of a certain act of parliament, made and passed in a session of parliament held in the fifth and sixth years of the reign of her majesty Queen Victoria, entitled, (*o*) 'An act,' &c. ("and of a certain other act," &c. "made," &c. *if the fact,*) according to the force, form, and effect of the said statute," (*or* "statutes,") *or, if the company have a corporate name by act of parliament, say* "secretary to the Great Western Railway Company," *giving the correct corporate name* (*p*)] and who, on behalf of the said trustees, [*or* "company,"] by ——, his attorney, sues [*&c.; proceed as ante*, 5, Form 1.]

11. *By or against Trustees of Friendly Societies*, 18 *&* 19 *Vict. c.* 63; 21 *&* 22 *Vict. c.* 101.

[As to industrial and provident societies, see 25 & 26 Vict. c. 87, and the Queenshead Industrial Society *v.* Pickles, 35 L. J. Ex. 1; S. C. *nom.* Queensbury Industrial Society *v.* Pickles, L. R. 1 Ex. 1.]

12. *By the Treasurer of a Loan Society.* (*q*)

Timms *v.* Williams, 3 Q. B. 413; and see Brown *v.* Langley, 4 M. & G. 466, and Albon *v.* Pyke, 4 M. & G. 421.

13. *By or against the Secretary of the Metropolitan Commissioners of Sewers.*

See 18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; Clements *v.* Pollard, 10 Ex. 817; The Metropolitan Board of Works *v.* Vauxhall Bridge Company, 26 L. J. Q. B. 253.

14. *Against a Local Board of Health.*

See a form and law, The Company of the Southampton & Itching Float-

(*n*) See another form, Smith *v.* Goldsworthy, 4 Q. B. 430, note (*b*). It is not sufficient for the clerk to sue in his individual capacity. Guthrie *v.* Fiske, 3 Stark. 151. The form *against* a company may easily be adapted from the above. By the clerk of the trustees of a turnpike road (Wellington *v.* Brown, 15 L. J. Q. B. 23) against clerk to committee of justices of county. Kendall *v.* King, 17 C. B. 483. An action for goods supplied to a society registered under "The Industrial and Provident Societies Act, 1852," 15 & 16 Vict. c. 31, must be brought against the officer of the company if any, otherwise against trustees, and not against an individual member. Burton *v.* Tannahill, 5 El. & Bl. 797.

(*o*) A misrecital of the title of the act would not be bad. Nixon *v.* Nanney, 1 Q. B. 747.

(*p*) The courts will take judicial notice of a corporation created by act of parliament. Church *v.* Imperial Gas Co. 6 Ad. & E. 846.

(*q*) See 3 & 4 Vict. c. 110, continued to 1863 by 21 Vict. c. 19. See 20 & 21 Vict. c. 41.

ing Bridge *v.* The Local Board of Health of Southampton, 8 El. & Bl. 801.

15. *By Churchwardens and Overseers for Land, &c. held of them under* 59 *Geo.* 3, *c.* 12, *s.* 12. (*r*)

Ward *v.* Clarke, 12 M. & W. 747; Churchwardens of St. Nicholas *v.* Sketchley, 17 L. J. M. C. 170.

16. *By the public Officer of a Company authorized to sue by Royal Charter or Letters Patent granted pursuant to* 1 *Vict. c.* 73, *s.* 3.

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., who, at the time of the commencement of this suit, was and still is one of the officers for the time being of the —— Company, duly appointed and acting in that behalf under and by virtue of certain letters patent heretofore, on [*&c.*], granted by her majesty Queen Victoria to the said company, by and under the powers and provisions of an act of parliament, made and passed in a session of parliament held in the first year of the reign of her present majesty, intituled, "An act for better enabling her majesty to confer certain powers and immunities on trading and other companies," to sue and be sued on behalf of the said company, on behalf of the said company, by ——, his attorney, sues, [*&c. as in* Form 11.]

17. *Declaration by Railway and other Companies under the* 8 *&* 9 *Vict. c.* 16. (*s*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. The —— Company, [*describing them by their corporate name*], by ——, their attorney, sues C. D. For [*&c.*]

18. *By a Joint Stock Company, completely registered under the Joint Stock Companies Act,* 1856, 1857, 20 *&* 21 *Vict. c.* 14.

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. The —— Company, being a joint stock company, completely registered (*t*) according to the joint stock companies acts, 1856, 1857, by ——, their attorney, sue C. D. For [*&c.*]

(*r*) Under this statute the churchwardens alone can sue for all lands held in trust for general parish purposes. Rumball *v.* Munt, 8 Q. B. 382. By 5 & 6 W. 4, c. 69, s. 7, *guardians* of the poor are empowered to sue and be sued by virtue of their office. See 11 & 12 Vict. c. 91; Chambres *v.* Jones, 5 Ex. 239; Furnival *v.* Coombes, 5 M. & G. 736.

(*s*) See, generally, 2 Chit. Arch. 1110; and *post.* Sec. 97 points out how contracts by company are to be entered into. Lowe *v.* London & N. W. Railway Co. 18 Q. B. 632; Pauling *v.* London & N. W. Railway Co. 8 Ex. 867; Birkenhead &c. Railway Co. *v.* Watson, 3 Ex. 478, in error; 6 Ex. 127; Birkenhead Railway Co. *v.* Cotesworth, 5 Ex. 226; Moore *v.* Metropolitan Sewage Manure Co. 3 Ex. 333. If the name of the company be changed during the action, this should be suggested. Hebblewhite *v.* The Leeds & Thirsk Railway Co. 21 L. J. Ex. 37; Selby *v.* East Anglian Railway Co. Ib. 27.

(*t*) The company should be described by their registered name. This word "regis-

19. *By or against Companies having Limited Liability, under* 19 & 20 *Vict. c.* 47, *and* 20 & 21 *Vict. c.* 14.

The form will be similar to the last, adding the word "limited" after the corporate name of the company. An alteration in the name of the company does not abate the action. Sect. 12. A limited company may be compelled to give security for costs.

20. *By a Banking Company registered under the Joint Stock Banking Companies Act*, 1857, 20 & 21 *Vict. c.* 49.

The declaration will be in the ordinary form, describing the company as plaintiffs, by their registered corporate name. All banking companies formed under the 7 & 8 Vict. c. 113, were, by the joint stock banking companies act, 1857, required to register themselves as a company under that act, on or before the 1st of January, 1858, or were incapable of suing at law or in equity, but might be sued.

The joint stock companies acts, 1856, 1857, are incorporated with, and form part of the joint stock banking companies act, 1857. Banking companies cannot be registered as limited companies under this act. Sect. 3. Formerly, banking companies carrying on business under the 7 Geo. 4, c. 46, and 7 & 8 Vict. c. 113, sued by their public officer. See Chit. Arch. 1127. See Forms in the last edition of this work, and in Chitty's Forms, 658. See, also, Chit. Arch. 1122.

21. *By an Official Liquidator appointed under the Joint Stock Companies (Winding-up) Acts*, 1856, 1857. (*u*)

The form of declaration will be the same as in ordinary cases. The statute 19 & 20 Vict. c. 47, s. 90, gives power to the official liquidators, with the sanction of the court, to bring or defend actions in the *name and on the behalf of the company.* The official liquidators need not be alluded to in the declaration or pleadings. See, also, sections 102, 103, 104 of the act, as to the proceedings on a voluntary winding-up of a company. See, also, 20 & 21 Vict. c. 14; 21 & 22 Vict. c. 60. The former statutes as to winding-up companies were the 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108. Under those acts the official manager of a company was empowered to sue as the *nominal* plaintiff; but those acts do not apply to companies registered under the joint stock companies acts, 1856, 1857, nor to companies registered under 7 & 8 Vict. c. 110, after registration under the acts of 1856, 1857.

tered" is usually added, but it is not necessary. Woolf *v.* City Steam-Boat Co. 7 C. B. 103, 6 D. & L. 606. See *post*, "Public Companies," "Corporation." The certificate of registration is conclusive evidence that the requisites of the act have been complied with, and the date of the certificate is the date of the incorporation of the company. 19 & 20 Vict. c. 47, s. 13; 20 & 21 Vict. c. 14, s. 4. This latter act is amended by 21 & 22 Vict. c. 60.

(*u*) See 13 & 14 Vict. c. 83, s. 30, as to winding up railway companies. The 11 & 12 Vict. c. 45, 50, only applies to actions against a company, where sued *qua* company, and not to actions against the individual members thereof. Beardshaw *v.* Londesborough, 11 C. B. 408; 2 Pr. Rep. 460.

22. *Declaration by or against a Corporation.*

The form is precisely as in the ordinary case, Form 1, *ante*, p. 5, giving correctly the corporate name. By municipal corporation act the name of all boroughs is "the mayor, aldermen, and burgesses," &c.; 5 & 6 W. 4, c. 76, s. 6; [or, "citizens of a city."] Attorney General *v.* Corporation of Worcester, 15 L. J. Chanc. 398. [According to the practice in New Hampshire, a town corporation is described in legal proceedings as "the town of L.," and not, as in some other of the states, "the inhabitants of the town of L.;" and a description in the latter form would be regarded in New Hampshire as defective. Lebanon *v.* Griffin, 45 N. H. 558; Flanders *v.* Stewartstown, 47 N. H. 549. Corporations should be described by the name given to them in their charters. See Angell & Ames Corp. s. 645 *et seq.* The inhabitants of a city need not sue in the name of the inhabitants of the city, but may sue by its corporate name. Lowell *v.* Morse, 1 Met. 473.] The courts take judicial notice of a corporation created by act of parliament. Church *v.* Imperial Gas Co. 6 Ad. & E. 846; [Bell C. J. in Lebanon *v.* Griffin, 45 N. H. 563.] It is not necessary to state that the company is a corporation, or whether it became so by charter or registration. Woolf *v.* City Steam-Boat Co. 7 C. B. 103. [See Harris *v.* Muskingum &c. Co. 4 Blackf. 267; Hubbard *v.* Chappel, 14 Ind. 601; Heaston *v.* The Cincinnati Railroad Co. 16 Ind. 278.]

23. *By an Executor.* (*x*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., executor of the last will and testament of O. P., deceased, by E. F., his attorney, sues C. D. For [*&c. Conclude*] And the plaintiff, as executor as aforesaid, claims £——.

24. *By a Surviving Executor.*

The form is as before, except that the plaintiff is to be called surviving executor.

[24*a*. *By an Executor of an Executor.*

A. B., executor of the last will and testament of C. D., deceased, who was executor of the last will and testament of E. F., deceased, &c.]

25. *Against an Executor; or Husband and Wife, Executrix.*

Adopt the common form, *ante*, 5, Form 1, ***describing defendant*** executor ***&c. ut supra; or against husband and wife, executrix, state*** C. D., and J. his ***wife,*** executrix of the last will and testament of O. P., deceased.

[25*a*. *Against a Surviving Executor.*

The officer is directed to attach the goods and estate of A. B., deceased, in

(*x*) As to declaring as executor on general process, and *vice versa*, see Obs. *ante*, 3, (**B**).

the hands and possession of C. D., surviving executor of the last will and testament of the aforesaid A. B.

[An executor *de son tort* is sued in the same manner as if he were really executor.

25*b*. *Against Heir and Devisee.*

A. B., son and heir of C. D., late of, &c. deceased, and E. F., devisee of said C. D., &c.]

26. *Declaration against Hundredors.* (*y*)

Use the common form, No. 1, *ante*, 5, *describing the defendants thus:* The men inhabiting within the hundred of ——, in the county of ——.

27. *Declaration by a Husband and Wife.* (*z*)

In the ——.

The —— day of ——, A. D. ——.

—— [*venue*]. A. B., and J. his wife, by E. F., their attorney, [*or* "in their own proper persons,"] sue C. D. [*&c. as usual; concludes*] And the plaintiffs claim £——.

28. *Against Husband and Wife.*

As in the common form, ante, 5, 6, 7, *describing defendants as* C. D., and J. his wife.

29. *Declaration by or against an Infant.* (*a*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., by E. F., who is admitted by the court of our lady the queen here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., sues C. D. [*&c.; proceed and conclude as usual. The declaration against an infant is the same in form as that against an adult.*]

[29*a*. *Another Form.*

To answer to A. B., an infant under the age of twenty-one years, who sues this action by C. D., his father and next friend [*or* his next friend], *&c.*]

(*y*) See 2 Chit. Arch. 1145; 2 Chit. Gen. Pr. 581.

(*z*) The marriage of a woman plaintiff pending action, does not abate the action, but the action may be proceeded with; in such a case the declaration should suggest the marriage; Com. Law P. Act, 1852, s. 141; and allege the debt or cause of action to have accrued to the woman before the marriage of the plaintiffs. *Post*, "Husband and Wife."

(*a*) An infant cannot sue by attorney; *ante*, as to admission of *prochein ami* or guardian. Pr. Ru. Hil. T. 1853, r. 5. The *prochein ami* may sue without authority from the infant. Morgan *v.* Thorne, 9 Dowl. 228. In Wilson *v.* Watson, C. P. sittings after T. T. 1841, Tindal C. J. held that on a record commencing in this way (the only plea being *non assumpsit*), the infancy of plaintiff was admitted on the record, and no proof of it was necessary; the action was for money had and received to the use of the infant and paid by him to the defendant under an agreement which he contended he could rescind. MS. Pearson, counsel for the plaintiff.

30. *Declaration by an Informer.*

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., who sues as well for our lady the queen [*or* "for the poor of the parish of ——, in the county of ——"] as for himself, in this behalf, by E. F., his attorney, [*or* "in his own proper person,"] sues [*&c.; proceed as usual. See ante*, 5, Form 1, *and conclude*] And the plaintiff claims, as well for himself as for our lady the queen, [*or* "for the said parish,"] £——.

31. *Declaration against Peers and Members of Parliament.*

The declaration is in the usual form. See ante, 5, Form 1. The title of the peer should be stated. The M. P. need not be so styled. The uniformity of process act, 2 W. 4, c. 39, s. 1, abolishes the privilege of peers and members of parliament to be sued by original or bill. They are to be sued by writ of summons in the ordinary form. No *ca. sa.* can be issued against peers or members of parliament during their privilege. As to proceedings against an M. P. subject to the bankrupt laws, see Bank. Law Con. Act, 1849, s. 77; Chitty's Forms, 642; Chit. Arch. 1094.

32. *Form of Declaration by or against a Surviving Plaintiff or Defendant, where the Death occurred before Writ issued.*

In this case the commencement and conclusion of the declaration will be in the common form. See ante, 5, Form 1. *As to the body of the declaration, see* "Declarations on Contract," *post*, "Partners."

33. *Commencement of Declaration where one of the Plaintiffs died after the issuing of the Writ.* (*b*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., by E. F., his attorney, sues C. D., who has been summoned to answer the said A. B. and one E. F., who died after the issuing of the writ of summons, at the suit of the said A. B., and the said E. F. in his lifetime, in this cause. For [*proceed as in the forms at the suit of a surviving creditor, &c. post*, tit. "Partners."]

34. *The like, where one of the Defendants died after the issuing of the Writ.* (*c*)

In the ——.

On the —— day of ——, A. D. ——.

—— [*venue*]. A. B., by E. F., his attorney, sues C. D., who has been summoned to answer the said A. B. by virtue of a writ issued in this cause

(*b*) An action does not abate by death of a sole plaintiff or defendant, or of one or more of several plaintiffs or defendants; C. L. P. Act, 1852, ss. 135-6-7-8; but the death being suggested upon the record, the action may proceed at the suit of the legal representative of such sole plaintiff or by the surviving plaintiff or plaintiffs. *Post*, Appendix. If the above suggestion be not made, the subsequent proceedings will be void. Barnewell *v.* Sutherland, 1 L., M. & P. 159; Larchin *v.* Buckle, Ib. 740; Pinkus *v.* Sturch, 5 C. B. 474. As to compelling continuance or abandonment of action, see C. L. P. Act, 1854, s. 92.

(*c*) *Supra*, note (*b*).

on [*&c.*] against the said C. D. and one G. H., who died after the issuing of the said writ. For [*proceed as usual, alleging the debt or cause of action to have accrued against the defendant and the said G. H. deceased, post*, tit. "Partners."]

35. *Declaration by Judgment Creditor against Garnishee, on attachment of Debt, in his Hands.* (*d*)

In the Q. B. [*or* "C. P." *or* "exchequer of pleas."]

The —— day of ——, A. D. ——.

—— [*venue*]. A. B., by ——, his attorney, [*or* "in person,"] sues E. F. by a writ issued forth of this court, in these words: Victoria [*&c. copy the writ.*] And the said E. F. has appeared to the said writ, and the said A. B., by his attorney aforesaid, says that the said debt due from the said E. F. to the said C. D. is for [*&c.; here state the debt as in a declaration in ordinary cases*]; and the said A. B. prays that execution may be adjudged to him accordingly for the said £——, and for costs of suit in this behalf.

II. PLEAS, REPLICATIONS, &c.

1. PLEAS IN ABATEMENT. (*e*)

1. *Commencement and Conclusion of Plea in Abatement.*

In the Q. B. [*or* "C. P." or "exchequer of pleas."]

The —— day of ——, A. D. ——. (*f*)

C. D. ats. A. B. } The said defendant, by ——, his attorney, [*or* "in person," (*g*)] prays judgment of the said writ and declaration, (*h*) and that the same may be quashed, because he says that [*&c. stating the ground of abatement.*

(*d*) See Com. Law P. Act, 1854, s. 64. The rules Mich. 1854, give the above form, and the form of plea as follows: "The said E. F., by ——, his attorney, says, that he never was indebted to the said C. D. as alleged [*or plead such other defence or several defences as in other cases*].

(*e*) See, in general, Steph.; Bac. Ab. Abatement, N.; Com. Dig. Abatement, B.; 1 Chit. Pl. 7th ed. 462; 2 Chit. Arch. 865. Pleas in abatement must be pleaded, that is, delivered in, four days after the delivery, or filing of declaration. The four days are inclusive of the first and exclusive of the last day. Ryland *v.* Wormald, 2 M. & W. 393. The plea must be pleaded (after appearance and declaration) within the above period, although there has been no notice to plead; if pleaded after the proper time without leave of the court or a judge, the plaintiff may sign judgment by default at the expiration of the time for pleading. See, generally, 2 Chit. Arch. 869. By leave, it may be pleaded after the four days. See instances, Sowter *v.* Dunston, 1 M. & Ry. 508; Milner *v.* Milner, 3 T. R. 632. There must be an affidavit of the truth of the plea. 4 Ann. c. 16, s. 11; see forms and notes, *post*. The

(*f*) The day the plea is delivered, see *post*, 19, note (*m*). When to be pleaded, *supra*, note (*e*).

(*g*) A plea in abatement, unless pleaded by a married woman, may be pleaded in person or by attorney. 2 Saund. 209 *a*. Pleas to the jurisdiction are to be pleaded in person. Gil. C. P. 187; Grant *v.* Sondes, 2 Bl. R. 1094; Hunter *v.* Neck, 3 M. & G. 181.

(*h*) This is now the proper form in all the courts; it is not sufficient to pray judgment of the declaration only. Davies *v.* Thompson, 14 M. & W. 161. It is not necessary to say "comes and defends the wrong," &c. as formerly. See *post*, 19, note (*p*).

See forms, post, Index, "Abatement," *and conclude*] And this the defendant is ready to verify: wherefore he prays judgment (*i*) of the said writ and declaration, and that the same may be quashed, [*&c. or if the plea be* "Non-joinder," *or* "Coverture," *see the forms, post. And affidavit of truth, see form, post.* "Abatement."]

2. *Commencement and Conclusion of Replication thereto.* (*k*)

In the ——.

The —— day of ——, A. D. ——.

A. B. v. C. D. } The plaintiff says that his said writ and declaration ought not (*k*) to be quashed, because he says that [*&c. stating the matter; and if it be merely in denial, concluding thus:*] And this the plaintiff prays may inquired of by the country [*&c.; or if the replication be not a mere traverse, and contain new matter, conclude*] And this the plaintiff is ready to verify: wherefore he prays judgment (*l*) and his damages, [*&c.; conclude as in the case of a replication in bar, post,* 24, Form 7; *or perhaps the conclusion might be after the verification, with a prayer of judgment,* whether the said writ and declaration ought to be quashed.]

2. PLEAS IN BAR, AND REPLICATIONS, AND SUBSEQUENT PLEADINGS.

Obs. — When the plaintiff has declared, the defendant, if within the jurisdiction, must plead within eight days, unless the time for pleading be extended by the court or a judge. Com. Law P. Act, 1852, s. 63. No *rule* to plead or *demand* of plea is now necessary, but *notice to plead* in eight days; otherwise judgment may, whether the declaration be delivered or filed, be indorsed on the declaration or delivered separately. Ib. and s. 62. The eight days are

plea in general cannot be amended; 2 Chit. Arch. 871; [but see 1 Chitty Pl. 482, note (*e*);] and a demurrer, even for informality, not constituting a defect in substance, may be general. Lloyd *v.* Williams, 2 M. & S. 484; Eadaile *v.* Lund, 12 M. & W. 607; Ryalls *v.* Bramall, 1 Exch. 734. See Dundalk Western Railway Co. *v.* Tapster, 1 Q. B. 667. Pleas of *misnomer* were abolished by 3 & 4 W. 4, c. 42, s. 11, *ante,* (E) and (G). And by the common law procedure act, 1852, ss. 38, 39, pleas in abatement of *non-joinder* are rendered less obnoxious than formerly to the prosecution of a claim. See form and notes, *post,* "Pleas in Abatement in Actions *ex Contractu.*" As to the pleas to the *jurisdiction* of the court, which are not properly pleas in abatement (Steph. 4th ed. notes, xxvii.), see forms, &c. Ib. 46; 1 Went. 51, 60, 61; 3 Chit. Pl. 7th ed. 8.

(*i*) This prayer of judgment was necessary before the common law procedure act, 1852, s. 66, 69, dispensing with the prayer of judgment in a plea; and this statute seems not to apply to pleas in *abatement*; see *post,* 19, note (*p*); Davies *v.* Thompson, *supra;* Whitling *v.* Desanges, 3 C. B. 910; 4 D. & L. 678; Chitty's Forms, 99, 448; or to pleadings by way of estoppel; Weld *v.* Baxter, 11 Ex. 816; 3 Jur. N. S. 91 Ex.

(*k*) If the plea be defective, the plaintiff may demur (generally) and the defendant cannot amend; see *ante,* 16, note (*e*); and the plaintiff has costs if he succeed on demurrer. 3 & 4 W. 4, c. 42, s. 34. Defendant cannot, upon demurrer to the plea, object to the declaration. Dundalk Western Railway Co. *v.* Tapster, 1 Q. B. 667. But if the objection be not clear, the plaintiff should not demur; especially as the judgment, even if in his favor, is not final, but merely a *respondeas ouster.* 2 Saund. 211, note (3); Tidd, 9th ed. 641, 642. If it be probable that the defendant can establish the truth of his plea in abatement, the plaintiff should enter a *cassetur breve,* except where the plea is of *non-joinder,* where he should amend (C. L. P. Act, 1852, ss. 38, 39, 60, *ante,* 5), and neither party pays costs thereon. 2 Chit. Arch. 1417; Poole *v.* Penbrey, 1 Dowl. 693. As to the replication, &c. upon a plea of *non-joinder,* see form and notes, *post.* The plaintiff recovers final judgment, with damages and costs, if he obtain a verdict upon issue joined on a plea in abatement. Tidd, 9th ed. 641.

(*l*) This and the prayer of judgment seem proper. The rule as to *precludi non* and prayer of judgment applies only to replications to pleas in bar. See *post,* 19, note (*p*).

Obs. reckoned exclusive of the day on which notice to plead is given, but inclusive of the last day — unless the last day be a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also. Rule 174, Hil. T. 1853. By Reg. Gen. East. T. 1856, service of pleadings must be made before 7 o'clock P. M., except on Saturdays, when it shall be made before 2 o'clock P. M. If made after 7 P. M. on any day except Saturday, the service shall be deemed to have been made on the following day, or if made after 2 P. M. on Saturday, the service shall be deemed as made on the following Monday. [Connelly *v.* Bremner, L. R. 1 C. P. 557 ; S. C. 35 L. J. C. P. 319.]

Before judgment can be signed for want of a plea, notice to plead must have been given ; and it must express the time within which the defendant is required to plead. C. L. P. Act, 1852, s. 62–63 ; Ram *v.* Duncombe, 2 D. & L. 88. If it allow a longer time than necessary, defendant is entitled to such prolonged time. Solomonson *v.* Parker, 2 Dowl. P. C. 405.

If the time for pleading or answering any pleadings shall not have expired before the 10th of August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October as if the declaration or preceding pleading had been delivered or filed on the 24th October. Reg. H. T. 1853, note (9).

A plea delivered between the 10th August and 24th October is a nullity, and plaintiff may, after the time for pleading has expired, sign judgment. Mills *v.* Brown, 9 Dowl. 151 ; Severin *v.* Leicester, 12 Q. B. 949. Where a plea was delivered after 2 P. M. on Saturday, the 9th of August, on which the time for pleading expired, judgment signed on the 12th was held regular. Sharp *v.* Fox, 1 H. & N. 49. But by consent, or by the terms imposed by a judge, pleadings may be delivered between those days.

Where the *original*, or the *enlarged* time for pleading expires on the 10th August, judgment for want of plea cannot be signed on the 11th. Morris *v.* Hancock, 1 Dowl. N. S. 320 ; Severin *v.* Leicester, 12 Q. B. 949 ; Wilson *v.* Bradstoche, 2 Dowl. 416. And where a month's time had been given to plead, and twenty-five days of it were unexpired on the 10th August, defendant was held entitled to twenty-five days to plead after the 24th October. Trinder *v.* Smedley, 3 Dowl. 87.

By Rule 175, Hil. T. 1853, the days between Thursday next before and Wednesday next after Easter Day and Christmas Day, and the three following days, shall not be reckoned or included in any rules, notices, or other proceedings, except notices of trial, or notices of inquiry. This rule extends to *pleadings*. Harrison *v.* Tait, 4 Bing. N. C. 443 ; 6 Dowl. 611 ; Wilkes *v.* Perk, 5 M. & G. 376 ; 1 Chit. Arch. 145, 221.

As to the time for pleading after delivery of particulars, see Rule 21, Hil. T. 1853; Aspinwall *v.* Smith, 8 Taunt. 592; Wickens *v.* Cox, 4 M. & W. 67; Maunder *v.* Collett, 3 C. B. 554 ; 1 Chit. Arch. 221; or after order to plead several matters, or order for security for costs, Ib.

By Com. Law Procedure Act, 1852, s. 90, after *amendment* of the declaration, no new notice to plead is necessary ; but the defendant must plead within the time specified in the original notice, or within two days after amendment, which shall last expire, unless otherwise ordered by the court or a judge. If the defendant has already pleaded, and does not plead *de novo* to the amended pleadings within two days, or such further time as is allowed by court or judge, the original pleas pleaded will stand. Ib. But this would seem not to apply to an amendment after *demurrer*. Fagg *v.* Borsley, 1 C. & M. 770 ; 2 Dowl. 107 ; Huckvale *v.* Kendal, 3 B. & Ald. 137. If the original plea pleaded be not applicable to the amended declaration, and the defendant does not alter his plea or plead another, plaintiff may sign judgment. 1 Chit. Arch. 223. When further time is given to plead, it is reckoned exclusive of the day of the date of the order, and inclusive of the last day. R. 174, Hil. T. 1853 ; Pepperell *v.* Burrell, 2 Dowl. 674 ; Liffin *v.* Pitcher, 1 Dowl. N. S. 767. Where defendant has one day's time given him, he has the whole of the day next after the order. If a certain number of *clear* days are given, they are reckoned exclusive of the first and last. An order for time to plead " till Tuesday," includes that day. Dakins *v.* Wagner, 3 Dowl. 535 ; Kerr *v.* Jeston, 1 Dowl. N. S. 538. An order for seven days *from* or

Obs. *after* "Tuesday," excludes that day. Young *v.* Higgon, 6 M. & W. 49 ; 8 Dowl. 211. A month's time to plead is a lunar, not a calendar, month. Tullett *v.* Linfield, 3 Burr. 1455 ; Soper *v.* Curtis, 2 Dowl. 237. See, generally, as to the computation of time, 1 Chit. Arch. 144–146 ; [1 Chitty Contr. (11th Am. ed.) 1062–1066.]

Though the defendant pleads irregularly, or a plea which is a nullity, judgment cannot be signed for want of a plea, until after the time for pleading has expired. 1 Chit. Arch. 268.

"Where a party has obtained time to plead on the terms of 'pleading issuably,' and by his pleading fails to bring the merits of the case, or some question of fact, or some question of law arising on the facts, in issue, he does not comply with the conditions of the order. Per Abbott C. J. Sawtell *v.* Gillard, 5 D. & R. 620 ; and see per Parke B. Mackay *v.* Wood, 7 M. & W. 420. And in such case, although there be other pleas which are issuable, the plaintiff may sign judgment as for want of a plea when the time for pleading has expired, even though the defendant has obtained leave of a judge to plead the pleas. Humphreys *v.* Earl of Waldegrave, 6 M. & W. 622 ; Howen *v.* Carr, 5 Dowl. 305 ; Capner *v.* Minchner, 13 M. & W. 704 ; Roberts *v.* Brett, 17 C. B. 534. As to what are issuable pleas, see 1 Chit. Arch. 228 ; [1 Chitty Pl. 545, 546 ;] a plea in abatement, or a mere dilatory plea, or a demurrer for mere matter of form, formerly only bad on special demurrer is not ; *post*, p. 24, Obs. ; *ante*, 16, note (*e*) ; but a *general* demurrer is an issuable plea. Where the defendant is put under the usual terms to plead issuably, &c. his undertaking has reference to the then existing state of the record, and it ceases to be binding if the plaintiff subsequently amend his declaration. Children *v.* Mannering, 8 Dowl. 120 ; Chapman or Hutt *v.* Giles, 1 D. & L. 389 ; 11 M. & W. 756. An application for time to reply is a waiver of objection to a plea on the ground that it is not issuable ; Trott *v.* Smith, 9 M. & W. 765 ; 2 Dowl. N. S. 278 ; Stead *v.* Carey, 7 M. & G. 646 ; 2 D. & L. 270 ; or service of an order [or *semble*, summons] for particulars of set-off ; Scott *v.* Watson, 1 C. B. 826 ; 3 D. & L. 208. But where defendant pleaded payment into court upon one count, and a non-issuable plea to the rest of the declaration, taking the money out of court was held no waiver to the objection that the plea was non-issuable ; Verbert *v.* De Keyser, 3 D. & L. 392 ; and it is no waiver to obtain leave to reply and demur to a plea. Simian *v.* Miller, 1 C. B. N. S. 686. Terms of *replying* issuably will not in general be imposed on the plaintiff. Crutchley *v.* London & Birmingham Railway Co. 2 D. & L. 102.

1. *Form of Commencement of a Plea in Bar.*

In the Q. B. ["C. P." *or* "exchequer of pleas."] (*m*)

On the —— day of ——, A. D. ——. (*m*)

C. D. (*n*) ats. A. B. } And the defendant, (*n*) by ——, his attorney, (*o*) [*or* "in person,"] says that [*state the matter of defence. See post* (*p*)].

(*m*) The plea must be entitled of the proper court, and of the day when pleaded. Com. Law P. Act, 1852, s. 54. The omission of any title of the court may be immaterial perhaps in a plea, if it be not entitled in the *wrong* court. In the latter case, the plea can hardly be considered a plea in the cause. The omission of a date, or a wrong date, would be ground for a summons to set aside the plea for irregularity ; but the defendant would be allowed to amend on payment of trifling costs — a demurrer would not hold. Neal *v.* Richardson, 2 Dowl. 89 ; Hodson *v.* Pennell, 4 M. & W. 373.

(*n*) Where the defendant is declared against by a wrong name, he cannot plead in abatement (*ante*, 2), but may compel plaintiff to amend. In such case it is usual to commence the plea, "And the said defendant C. D. sued as E. F., by, &c." It has been held that a mistake in stating the defendant's Christian name in the commencement of a plea does not entitle the plaintiff to treat the plea as a nullity, and to sign judgment for want of a plea. Anon. 7 D. & R. 511.

(*o*) The omission to state whether defendant pleads by attorney or in person, was formerly ground of demurrer, but it now appears to be only ground for setting aside the plea for irregularity, or calling upon defendant to amend and pay costs. A plea pleaded in the name of a person who is not an attorney will not entitle plaintiff to treat the plea as a nullity, and sign judgment. Hill *v* Mills, 2 Dowl. 696.

(*p*) The form of commencement of a plea is given by the Com. Law P. Act, 1852, s

Variations in particular Cases of Defendants.

1. *If one defendant only plead, others being sued with him, say,* And the defendant C. D., by G. H., his attorney, [*&c. taking care to entitle the plea,* "C. D. sued with another," *or* "others," "ats. A. B."]

2. *If the defendants be husband and wife, say,* the said C. D. and J. his wife, by G. H., their attorney [*&c.*]

3. *If the defendant be an infant, see the form, post,* "Pleas in Actions on Contracts," "Infancy."

Variations when the Plea is to Part only of the Cause of Action.

4. The defendant, by G. H., his attorney, as to the ["first"] count, [*&c.*]

5. The defendant, by G. H., his attorney, as to the sum of £——, parcel of the money claimed in the ["first," "second," *or* "third count," *as the case may be, see post*] and the said causes of action in respect thereof, (*q*) says, [*&c.*]

6. And the defendant, by G. H., his attorney, as to the said breach first assigned, [*or* "as to so much of the said declaration," *or* "first count," "as charges the defendant with assaulting," *&c. or* "with not keeping the said premises in repair," *or* "with having spoken and published the following words," *&c. as the case may be, following the words of that part of the declaration intended to be answered,*] and the causes of action in respect thereof, (*q*) says, [*&c.*]

2. *Replication. Joinder of Issue.* (*r*)

In the ——.

The —— day of ——, A. D. —— [*The day the replication is delivered.*]

A. B. v. C. D. } The plaintiff joins [*or* "takes"] issue upon the defendant's first [*or* "second"] plea. [*This concludes the pleadings.*]

3. *Replication where the Plea is not a mere Traverse, and the Replication contains New Matter.*

In the ——.

The —— day of ——, A. D. ——.

A. B. v. C. D. } The plaintiff, as to the defendant's first [*or* "second"] plea, [*or* "plea to the sum of £——, parcel, &c." *as the case may be,*] says that [*&c.*] (*s*)

67, which also provides that no formal defence or formal conclusion shall be required or necessary to any plea, avowry, cognizance, or subsequent pleading; nor is it necessary in any plea or subsequent pleading to use any allegation of *actionem non*, or *actionem ulterius non*, or to the like effect, or any prayer of judgment, or in any replication or subsequent pleading, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment. Ib. s. 66. The signature of counsel, is no longer required to any pleading. Ib. s. 85.

(*q*) This is necessary when the plea is to part only of a count, and the body of it answers both that part and the damages accrued in consequence. See Henry *v.* Earl, 8 M. & W. 230, per Parke B. A plea without being confined to any one count, will be taken as pleaded to the whole declaration, and will be informal. Warley *v.* Harrison, 3 Ad. & E. 669. If, however, it clearly appears from the body of the plea to what part of the declaration it intends to be an answer, the plaintiff cannot sign judgment, though the commencement be informal. Vere *v.* Goldsborough, 1 Bing. N. C. 353; 1 Scott, 265.

(*r*) As to the effect of this joinder of issue, see common law procedure act, 1852, ss. 76, 77, 78, 79. And see the form in section 77; differing from form in the schedule. It should seem that the plaintiff "joins" issue where the defendant's plea is a traverse, and does not allege new matter. Where the plea alleges *new* matter, the plaintiff *takes* issue upon it. Glover *v.* Dixon, 9 Ex. 958.

(*s*) Where the plaintiff's pleading is in denial of the pleading of the defendant or some

[*If the plaintiff have obtained leave to reply several matters, commence a second replication thus:* "And the plaintiff, for a further," *or* "second," *or* "third"] replication to the defendant's plea, says [*&c.*]

4. *Commencement of a Second or further Plea.* (*t*)

And for a second [*or* "third," *or* "fourth"] plea in this behalf, the defend-

part of it, the plaintiff may add a joinder of issue for the defendant. Com. Law P. Act, 1852, s. 79; Winterbottom *v.* Lees, 2 Ex. 325. And this joinder need not have any additional date. Edden *v.* Ward, 12 Ad. & E. 428; 8 Dowl. 725; Middleton *v.* Woods, 6 M. & W. 136 *Aliter*, when it is delivered by the other party as an independent pleading. Shackel *v.* Ranger, 3 M. & W. 409. "In all cases where the plaintiff's pleading is in denial of the defendant's, *without joining issue*, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available." Pr. Rules H. T. 1853, r. 40. When the replication contains new matter, there should be a notice to rejoin, which is given on the back of the replication or delivered separately. And where plaintiff added a *similiter* for defendant, and the latter gave notice that he had struck it out, but did not deliver any joinder or demurrer within the four days, it was held the proper course for plaintiff to sign judgment. Twycross *v.* King, 6 Q. B. 663; 2 D. & L. 534; Wrench *v.* James, 6 C. B. 198. Plaintiff may, if defendant do not rejoin, strike out the previous pleadings, and sign judgment for want of a plea, or he may retain the pleadings on the record, and sign judgment for want of a rejoinder. Petri *v.* Fitzroy, 5 T. R. 152; Hitchcock *v.* Walford, 6 Scott N. R. 792; Laws *v.* Shaw, 5 Q. B. 322. A notice to rejoin, however, is not necessary where the defendant is under terms to rejoin *gratis*; but the defendant must rejoin in four days after the delivery of the replication. Adkins *v.* Anderson, 10 M. & W. 12; 1 Dowl. N. S. 877; Winterbottom *v.* Lees, 2 Ex. 325. If the defendant, after notice, omit to rejoin, the plaintiff may sign judgment, although the replication tender issue, and the defendant was under terms to rejoin *gratis*, so that the plaintiff might have added the *similiter* for him; but in case such sharp practice is resorted to, it seems the court will set aside the judgment without costs. Seaton *v.* Scales, 1 Harr. & W. 210, by Williams J. upon the authority of Wye *v.* Fisher, 3 B. & P. 443; but Seaton *v.* Scales is differently reported, by the name of Seaton *v.* Skey, in 3 Dowl. 527. No rule to rejoin or demand of rejoinder is now necessary. Com. Law P. Act, 1852, s. 53. Where a replication concluded to the country with an "&c." although no *similiter* was added in the issue or record, the judge tried the cause, the "&c." being sufficient. Clark *v.* Nicholson, 6 C. & P. 712; Rowlinson *v.* Roantree, Ib. 551.

(*t*) *Pleading several pleas.* At common law a defendant could not plead several distinct pleas to the whole or part of a declaration; Co. Litt. 303 *a*; nor plead and demur to it. Bailey *v.* Baker, 1 Dowl. N. S. 891. But several pleas to *distinct* parts of the declaration, and which, if taken together, formed but one entire defence, might and may still be pleaded without any leave for that purpose, as tender of part, and never indebted to the residue; Archer *v.* Garrard, 5 M. & W. 63, 6 Dowl. 132; or a special plea to part, and another special plea to the residue, without any general issue to the whole. Vere *v.* Goldsborough, 1 Bing. N. C. 353; 5 M. & S. 265. The statute 4 & 5 Anne, c. 16, s. 4, first gave the right to plead several matters of defence. Com. Dig. Pleader, E. 2, Tidd, 9th ed., 654, 657; [1 Chitty Pl. 586, and notes]. And now, by the common law procedure act, 1852, s. 81, the plaintiff in any action may, by leave of the court or a judge, plead in answer to the plea, or the subsequent pleading of the defendant, as many several matters as he shall think necessary to sustain his action; and the defendant in any action may, by leave of the court or a judge, plead in answer to the declaration, or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit of the party making such application, or his attorney, if required by the court or a judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact; provided that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues. As to what pleas will in general be allowed to be pleaded, see Chit. Arch. 255; [1 Chitty Pl. 588, and notes.] Section 82 provides that no *rule of court* for leave to plead several matters shall be necessary where a judge's order has been made for the same purpose; and by section 83 objections to the pleading several pleas, &c. on the ground that they are founded on the same ground of answer or defence are to be heard upon the summons to plead several matters. Section 84 enacts that the following pleas may be pleaded together, as of

ant says, [*&c.; or, if the plea be to part only, (u) say,* "And for a second plea as to the said —— count," *or* "And for a second plea as to the sum of £——, parcel of the plaintiff's claim in the declaration," *or* "first count," "mentioned;" *or, in an action on a covenant,* "And for a second plea as to the said supposed breach of covenant first above assigned." *See ante,* 20, "Variations," 4, 5, 6.]

5. *Plea in Bar showing Matter of Defence arising after the Action was commenced and before Defendant had pleaded.* (x)

In the ——.

The —— day of ——, A. D. ——.

C. D. ats. A. B. } The defendant, by ——, his attorney, [*or* "in his own proper person,"] says that [*&c. showing that the cause of defence arose after writ or declaration and before the day of pleading. See forms, post.*]

6. *Commencement of a Plea setting up an Equitable Defence.* (y)

And the defendant, by [*&c.*] for defence on equitable grounds, says [*&c.*]

course, without leave of the court or a judge: a plea denying any contract or debt alleged in the declaration; tender as to part; statute of limitations; set-off; bankruptcy of defendant; discharge under an insolvent act; plenè administravit; plenè administravit præter; infancy; coverture; payment; accord and satisfaction; release; not guilty; a denial that the property injured is the plaintiff's; leave and license; son assault demesne; if the defendant plead several pleas without leave when necessary, plaintiff may sign judgment (s. 86). By Rule 2, T. T. 1853, several pleas founded on the same ground of answer or defence shall not be allowed; but, if objected to, the judge may allow such pleas as may appear to him proper for determining the real question in controversy on its merits, subject to such terms as to costs or otherwise as the judge may think fit; and see Rule 3, giving the plaintiff costs, where there are several pleas founded on the same ground of defence, and the judge certifies to that effect at the trial. As to demurring and pleading to the same matter, see Com. Law P. Act, 1852, s. 80, *post,* 24. An abstract of the several pleas, &c. intended to be pleaded, must accompany a summons to plead several pleas, &c. This abstract is not meant to be critically exact; if it gives substantial information of the pleas intended, it will suffice. Bedells *v.* Massey, 2 D. & L. 322. But if the pleas do not *substantially agree* with the abstract, the plaintiff may sign judgment. Hills *v.* Hayman, 2 Ex. 323; Flight *v.* Smale, 4 C. B. 766; Holliday *v.* Bohn, 3 Scott N. R. 496; Wills *v.* Robinson, 5 Ex. 302. As if leave be given to plead satisfaction, and defendant plead satisfaction after action. Gabardi *v.* Harmer, 3 Ex. 289. A defendant is not compelled to plead all the pleas he has obtained leave for: thus, he may plead a plea to part under leave to plead a plea to the whole declaration, or he may abandon some of the pleas. Fryer *v.* Andrews. 1 Ex. 471; 1 Chit. Arch. 267. See form of relinquishment of a plea, confessed to be bad after a demurrer to it. M'Intyre *v.* Miller, 2 D. & L. 708; 13 M. & W. 725; Davidson *v.* Bohn, 5 C. B. 170. But defendant cannot waive his plea or enter a *relicta verificatione,* after a demurrer, without leave, unless by consent of plaintiff or his attorney. Rule 8, H. T. 1853; 1 Chit. Arch. 277.

(u) The introductory part of the plea must be confined to the matter answered. *See ante,* 19, note (p). Every second or other plea must be written in a separate paragraph and numbered. Com. Law P. Act, 1852, s. 67.

(x) By the Com. Law Pro. Act, 1852, s. 68, any defence arising after the commencement of any action, shall be pleaded according to the fact without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action. As to pleas *puis darrein continuance,* after defendant *has before* pleaded, see Ib. s. 69, *post.* A plea of a defence arising after action, may be pleaded with pleas of defences arising before action; but the plaintiff may confess such plea, and is entitled to the costs of the cause up to the time of pleading the first mentioned plea. Pl. Rules, Tr. T. 1853, r. 22; Suckling *v.* Wilson, 4 D. & L. 167. Payment into court is not a *defence* within this rule, and cannot be pleaded with a plea in bar to the same part of the plaintiff's claim. Field *v.* Taylor, per Wightman J. at chambers, June 27, 1857; Thompson *v.* Jackson 1 Scott N. R. 157.

(y) This form of commencement is provided by the common law procedure act, 1854, s. 83; any matter of defence on equitable grounds which arises after the lapse of

7. *The Rejoinder.* (z)

The rejoinder is necessary where the replication is a traverse of the defendant's plea and a tender of issue, not a joinder in issue, or contains new matter. In the former case the rejoinder is as follows:

In the ——.

The —— day of ——, A. D. ——. (a)

C. D. ats. A. B. } The defendant joins issue upon the plaintiff's replication to the defendant's plea [*or* "first plea"]. [*If the replication contains new matter requiring a special answer or a traverse of some particular allegation, the rejoinder is thus:*] The defendant, as to the said replication to his said plea [*or* "first plea"], says that [*&c. stating the matter relied upon.*]

8. *Surrejoinder.*

The surrejoinder is entitled in the court, and of the day it is delivered. If the rejoinder tenders issue, say, And the plaintiff joins issue upon the rejoinder to his replication to the said plea [*or* "first plea," *as the case may be*] of the defendant. *If the surrejoinder introduce new matter, the form will be,* And the plaintiff, as to the rejoinder to the replication to the defendant's second plea, says that, *&c.*

9. *Rebutter.*

There will be a rebutter as follows, if the surrejoinder be not a joinder in issue, but traverses some allegation in the previous pleading or alleges new matter. In the former case the rebutter will be, And the defendant joins [*or* "takes"] issue upon the surrejoinder to the rejoinder to the replication to the defendant's said plea [*or* "first plea," *as the case may be. If it be necessary to allege new matter in the rebutter, proceed as follows:*] And the defendant, as to the said surrejoinder, says that, *&c.*

10. *Surrebutter.*

It is rarely the pleadings extend to this length; the surrebutter is necessary if the rebutter do not complete the issue. In ordinary cases, the plaintiff would make up and deliver the issue with notice of trial, adding a joinder of issue. And the plaintiff joins [*or* "takes"] issue upon the defendant's said rebutter. *If necessary to allege new matter, say,* And the plaintiff, as to the said rebutter, says that, *&c.*

the period during which it could be pleaded, may be set up by way of *audita querela*. Ib. s. 84. A replication of matter which on equitable grounds is an answer to a plea, commences, "And the plaintiff, as to the defendant's first or second, &c. plea, for replication on equitable grounds, says," &c. Ib. s. 85.

(z) As to notice to rejoin and when plaintiff may add rejoinder for defendants, *ante*, 20, note (s); as to the form of rejoinder, see Com. Law P. Act, 1852, ss. 78, 79. Defendant may, by leave of the court or a judge, rejoin several matters upon an affidavit if required. Com. Law P. Act, 1852, s. 81. But several rejoinders, founded on the same ground of answer or defence, are not allowed, except under certain circumstances. R. 2, T. T. 1853. As to rejoining and demurring, see *post*, Com. Law P. Act, 1852, s. 80.

(a) As to date and title, *ante*, 1.

III. DEMURRERS.

Obs. — The forms of demurrer and joinder in demurrer are prescribed by the Com. Law Pro. Act, 1852, s. 89. By section 50, either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form; and no judgment shall be arrested, stayed, or reversed, for any such imperfection, omission, defect in, or lack of form.

By section 51, no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.

As to what were grounds of special demurrer, see Com. Dig. Pleader; 2 Bac. Ab. Pleas, N.; Steph. on Pl., and 1 Chit. Pl.; and the last edition of this work.

A demurrer admits the facts, at least such as are pleaded, without involving any informality pointed out by the demurrer; 1 Saund. 337 *b*, note (3); Jones *v.* Stevens, 11 Price, 235; Co. Lit. 716; Wheeler *v.* Haynes, 9 Ad. & E. 286, note; [1 Chitty Pl. 693, and notes.] But the statements in a special plea held bad on demurrer, cannot be used by the plaintiff as evidence for him on the general issue at the trial. Firmin *v.* Crucifix, 5 C. & P. 98; Montgomery *v.* Richardson, Ib. 247. But, by Com. Law P. Act, 1852, s. 80, either party may, by leave of the court or a judge, *plead and demur* to the same pleading at the same time upon an affidavit. Lumley *v.* Gye, 22 L. J. Ex. 9; Price *v.* Hewett, 8 Ex. 146, of the party or his attorney, if required, that there is ground for doing so, and the judge may direct which issue shall be tried first.

But though the required affidavit be produced, it is *discretionary* with the judge to make an order; Thompson *v.* Knowles, 24 L. J. Ex. 43; and if a traverse have been allowed, the court will not rescind the order, and strike out the traverse, though judgment have been given against the party demurring. Sheehy *v.* Professional Life Assurance Co. [2 C. B. N. S. 211.]

If the party demurring have not also traversed the pleading demurred to, and have judgment against him on the demurrer, he is concluded from trying the merits on the defective pleadings in the pending action, and the judgment is in such action final in that respect. Tidd, 9th ed. 741. Where, therefore, the facts are not clearly against the party, and the point of law is doubtful, it is in general advisable not to demur, but to take issue on the facts, and go to trial; that is, assuming the legal objection to be of so substantial a nature that a writ of error, or motion in arrest of judgment, may be supported even after verdict for the opponent. On the other hand, where the cause of demurrer is clear, and the facts are unfavorable, it is proper to demur. The party *demurring* obtains his costs of the issue in law if he succeed, whatever may be the ultimate determination of the cause, and the result of the other issues; 3 & 4 W. 4, c. 42, s. 34; Bentley *v.* Dawes, 10 Ex. 347; Com. Law P. Act, 1852, s. 81; Prac. Rules, H. T. 1853, r. 62; whereas, if he proceed to trial upon the pleadings and be defeated, and move in arrest of judgment, or for judgment *non obstante veredicto*— any material fact omitted from the defective pleadings which would make them good, may be suggested, and an issue raised thereon, and judgment will follow the result. But should the motion in arrest of judgment, or for judgment, *non obstante veredicto*, be successful, the costs of the trial of the issues in fact will be awarded to the party against whom judgment is given; Com. Law P. Act, 1852, ss. 143, 144, 145; and if he bring error, he will have to pay *his own costs*, although he succeeds in reversing the judgment. Bourne *v.* Gatliffe, 8 Scott N. R. 605; Fisher *v.* Bridges, 4 El. & Bl. 666; 24 L. J. Q. B. 165; Rules Hil. T. 1853, r. 69; Pl. Rules T. T. 1853, r. 25; Marshall *v.* Jackson, 4 El. & Bl. 669, note.

It is also to be borne in mind that after verdict many errors are cured, and strong presumptions will be made to support the finding of the jury. See 1 Saund. 228, note (1); Tidd, 9th ed. 919; 1 Chit. Pl. 7th ed. 705–716; Steph. Pl.; Nurse *v.* Wills; 4 B. & Ad. 738; Wilkinson *v.* Malin, 2 Tyr. 544; Delamerer *v.* Reg. 35 L. J. Q. B. 313;] and therefore the point of law is frequently open to more favorable argument upon a demurrer, and the courts now have increased powers of amendment. Com. Law P. Act, 1852, s. 222,

Obs. 1854, s. 96. A demurrer to a declaration or replication, for a defect in substance, is allowable, although the defendant were under terms to plead issuably.

1. *Form of a Demurrer.*

In the ——.

The causes of demurrer are, [*&c. stating one or two of them concisely.* (*b*)]

The —— day of ——, A. D. ——. [*The day the demurrer is delivered, ante*, 1, (c).]

C. D. ats. A. B. } The defendant, by ——, his attorney, [*or* "in person,"] says that the said declaration [*or* "plea," *or* "replication"] is bad in substance.

2. *Demurrer to Part of a Declaration.* (*c*)

In the ——.

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } The said defendant, by ——, his attorney, [*or* "in person,"] as to the said ["first"] count, [*or* "as to the said trespasses, so far as they relate," *&c.*] says that the same is bad in substance [*vide the observations on the last form.*]

(*b*) By the common law procedure act, 1852, s. 89, "in the margin of every demurrer, some substantial matter of law intended to be argued shall be stated; and if any demurrer shall be delivered *without such statement*, or with a *frivolous* statement, it may be set aside by the court or a judge, and leave may be given to sign judgment as for want of a plea; but the want of a marginal note is no ground for objecting to the argument of the demurrer when called on. Lacy *v.* Umbers, 3 Dowl. 732. But only one need be specified. Ross *v.* Robeson, 1 G. & D. 102; 3 Dowl. 779. If several be stated, it need not be shown on which of them the party demurring intends to rely. Whitmore *v.* Nicholls, 5 Dowl. 521. The practice is to state concisely one or two of the strongest points in the margin of the demurrer. In Ross *v.* Robeson, 1 Gale, 102, which was an action for a libel on an attorney, the defendant pleaded that the libel was contained in a report of legal proceedings, published without malice, &c. The plaintiff demurred *generally* to the plea; and the marginal note was, "that the matters disclosed in the plea contain no justification in law of the libel." The court held that this marginal note was not sufficient, observing, that it only repeated the general demurrer. But if several pleas be demurred to on the same grounds, the cause of demurrer to all after the first may be stated by saying that the plea is insufficient for the like causes and grounds of objection which have been taken to the said first plea. Braham *v.* Watkins, 16 M. & W. 77; 4 D. & L. 44. If a party demurring, or joining in demurrer, intends to object to former pleadings of his adversary, on grounds not raised in the demurrer, he must state the points in his demurrer books given to the judges, or he will not be allowed to argue them. Parker *v.* Riley, 2 M. & W. 230; Gatliffe *v.* Bourne, 5 Scott, 674; Arboin *v.* Anderson, 1 Q. B. 498. He need not (though the fairer course) deliver these points to the adversary. Scott *v.* Chappelow, 4 M. & G. 336; 2 Dowl. N. S. 78. The latter can obtain them from the judge's clerk. Garrard *v.* Hardy, 1 D. & L. 51. In applying to set aside a demurrer as frivolous, the question is not whether the objection be *trivial* or insignificant, but whether it be frivolous and *palpably unfounded*. If there be a fair doubt whether the objection stated be good, however trifling the error, if the defendant be not under terms to plead issuably; Nanney *v.* Kenrick, 1 Dowl. 609; the judge or court will not interfere on this rule; Dalton *v.* M'Intyre, 1 Dowl. N. S. 76; Esdaile *v.* M'Clean, Ex. Jan. 23, 1846; and the application to set it aside ought not to be made unless it be palpably frivolous, or be pleaded in direct opposition to some decided case; Papineau *v.* King, 2 Dowl. N. S. 226; Tallis *v.* Tallis, [1 El. & Bl. 391]; but where the latter is the case, the court will not refrain from setting it aside because the party may wish to question the former decision before a court of error; Withers *v.* Maclean, Ex. January 17, 1846. It is necessary to apply to a judge or the court, instead of signing judgment without leave, where the rule is infringed; and where a demurrer is frivolous, and a motion is made to set it aside, the court will grant a "rule for that purpose to be absolute, unless cause is shown on a particular day." Kinnear *v.* Keane, 3 Dowl. 154; Twight *v.* Prescott, 2 Dowl. N. S. 4. The application may be made after obtaining time for joining in demurrer, but not after joinder. Cutts *v.* Surridge, 9 Q. B. 1015; 4 D. & L. 642; Norton *v.* Macintosh, 7 Dowl. 529; Lane *v.* Ridley, 10 Q. B. 479. A demurrer pleaded by the *plaintiff* may be set aside. Cutts *v.* Surridge, *supra*; Tallis *v.* Tallis, [1 El. & Bl. 391.] Plaintiff may have leave to sign judgment on the whole record, though there are other pleas not affected by the demurrer, or the demurrer is to one of several replications. Tucker *v.* Barnesly, 16 M. & W. 54; 4 D. & L. 292.

(*c*) A demurrer commencing "And the defendant says that the said declaration,"

3. *Demurrer to a Plea or Rejoinder.*

In the ——.

The —— day of ——, A. D. ——.

A. B. v. C. D. } The plaintiff saith that the said plea [*or* "rejoinder"] is bad in substance [*stating the ground of demurrer in the margin. If the demurrer be to one plea only, say,* "The plaintiff, as to the said ("first") plea, says that the same is bad in substance."]

4. *Joinder in Demurrer.* (*d*)

In the ——.

On the —— day of ——, A. D. ——. [*Day the joinder is delivered.*]

And the said plaintiff [*or* "defendant"] says that the said declaration [*or* "plea," *&c.*] is good in substance. (*d*)

&c. is to the whole declaration. Parrett Nav. Co. *v.* Stower, 6 M. & W. 564. Care must be taken to confine the demurrer to the defective part of the pleading objected to — such part being capable of separation from the rest — as where one only of several breaches of covenant is badly assigned; or one count only is bad; or the error is in the statement of one only of the debts in the common count, or one only of several divisible trespasses or torts in an action *ex delicto*, or in the allegation of one of several debts in a plea of set-off. 1 Saund. 286, note (9); 2d ed. 379, 380, note (14); Amory *v.* Broderick, 5 B. & Ald. 712; Ring *v.* Roxbrough, 2 Cr. & J. 419; Price *v.* Williams, 1 M. & W. 6; Teague *v.* Morse, 2 M. & W. 599. The consequence of not so confining the demurrer would be, that, though the defendant would obtain judgment on the defective breach, the plaintiff would obtain it on the good one. Slade *v.* Hawley, 13 M. & W. 761. The former practice of giving the whole judgment against the party demurring when the demurrer was too large, seems now overruled. Hinde *v.* Gray, 1 M. & G. 201, note; Briscoe *v.* Hill, 10 M. & W. 740; Yates *v.* Tearle, 6 Q. B. 283. An *entire* plea, if bad in part is bad altogether. Wilkinson *v.* Kirby, 15 C. B. 430; Parr *v.* Jewell, 16 C. B. 684; Com. Law P. Act, 1852, s. 75; [1 Chitty Pl. 572.] But a plea good in part or bad in part, may be construed distributively on *demurrer* as well as on the finding of a jury. Blagrave *v.* Bristol Water Works Company, 1 H. & N. 369; Gubriel *v.* Dresser, 15 C. B. 622. See, also, Lyne *v.* Siesfield, 1 H. & N. 278.

(*d*) This form is prescribed by the common law procedure act, 1852, s. 89. By the practice rules, Hil. Term, 1853, r. 14, the party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or indorsed on the demurrer, otherwise judgment; which notice the court will not shorten. Hall *v.* Popplewell, 5 M. & W. 341. Although a defendant be under terms to *rejoin gratis*, he is not bound to join in demurrer gratis. Jones *v.* Key, 2 Dowl. P. C. 265; 2 Cr. & M. 350. The plaintiff cannot add the joinder for the defendant, Billing *v.* Kightly, 7 Scott, 844; 5 Bing. 629; Mullins *v.* Cox, 7 Dowl. 660, even by leave of a judge, except by consent. Cook *v.* Blake, 4 D. & L. 313. The defendant has four days in which to deliver it. Mullins *v.* Cox, 7 Dowl. 660; Hall *v.* Poplpewell, *supra*. On the other hand, it is irregular to deliver a joinder, and at the same time a notice that it has been set down for argument. Gibbons *v.* Mottram, 7 Scott N. R. 535. A defendant cannot enter a *relicta verificatione* after a demurrer, except by leave of court or judge, or consent of plaintiff or his attorney. Rule 8, Hil. T. 1853. Who to begin on argument. In common pleas the plaintiff begins. Bourne *v.* Seymour, 16 C. B. 337, 342. Where there are cross demurrers, party first demurring to begin. Hill *v.* Cowdery, 1 H. & N. 360. But in Q. B. the plaintiff's counsel begins. Mayor of Blackburn *v.* Parkinson, 28 L. J. M. C. 7. As to making up the demurrer and *paper books*, see Rules Hil. T. 1853, r. 15; 2 Chit. Arch. 886; Arboin *v.* Anderson, 1 Q. B. 502; Hooper *v.* Woolmer, 10 C. B. 370; Sandall *v.* Bennett, 2 Ad. & E. 204; Simmons *v.* Siggers, 1 C. B. N. S. 583.

DECLARATIONS IN ACTIONS ON CONTRACTS.

THE several forms of actions are virtually abolished, though the substance of them remains. In the former editions of this work, declarations on contracts were arranged under the several heads of assumpsit, debt, covenant, and debt and detinue; in the present work they are collected under the above title. Until the passing of the Com. L. P. Act, 1852, s. 3, it was necessary that the form of action should be mentioned in the writ, and the declaration had to agree with the writ as to the form of action; but now no form or cause of action need be mentioned in any writ of summons. And though formerly the misjoinder of forms of actions in the declaration was ground of demurrer, motion in arrest of judgment or writ of error, now by s. 41 of the above act, causes of action of whatever kind, provided they be by and against the same parties and in the same right, may be joined in the same suit, except in replevin or ejectment.

In many cases it was optional on the part of the plaintiff to sue and declare either in form *ex contractu*, or in tort, as in actions against bailees, attorneys, surgeons, carriers, &c.; and, though he may do so now, still, where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of contract; but where there is a *duty* ultra the contract, the declaration may be framed in tort. See Legge *v.* Tucker, 1 H. & N. 500; 26 L. J. Ex. 71, S. C.

I. COMMON COUNTS.

OBS. — The form of these counts is given by the Com. Law Pr. Act, 1852, Sch. B. As to when they may be adapted, see 1 Chit. on Pl. 335–371, 7th ed.; and the law upon them, Chit. on Contr. titles "Sale of Goods," "Services," "Money lent," &c. Whenever the terms of a special agreement have been performed, so as to leave a mere simple debt to be paid by the defendant to the plaintiff, the plaintiff may give the circumstances in evidence, and recover under a general *indebitatus* count. Stone *v.* Rogers, 2 M. & W. 448; Linegar *v.* Hodd, 5 C. B. 347, and see Irving *v.* Veitch, 3 M. & W. 111, per Parke B. 2 Wms. Saund. 269 *b*, note (2); [1 Chitty Pl. 350, and note (*b*), and cases.]

LEADING PRINCIPLES WHEN THE INDEBITATUS COUNTS WILL LIE.

1. *Goods sold and delivered.* — Whether sold at a fixed price or not, and actually or constructively delivered, Smith *v.* Chance, 2 B. & Ald. 755, on the order of the defendant, to him or his agent, or to a third person, Salter *v.* Woodhams, 2 M. & G. 650, not credited by the plaintiff, Storr *v.* Scott, 6 C. & P. 241; at defendant's request. [1 Chitty Pl. 355, 356, and notes; 1 Chitty Contr. (11th Am. ed.) 614, and note (*n*); Spicers *v.* Harvey, 9 R. I. 581; Begole *v.* McKenzie, 26 Mich. 470; Merrill *v.* Parker, 24 Maine, 89, 96; Martin B. in Castle *v.* Sworder, 5 H. & N. 281, 284; Warden *v.* Marshall, 99 Mass. 305, 307.] When delivered on sale or return, and not returned in a reasonable or specified time. Beverley *v.* Lincoln Gas Co. 6 Ad. & E. 836; Bianchi *v.* Nash, 1 M. & W. 545; Moss *v.* Sweet, 16 Q. B. 493; Cannon *v.* Fowler, 14 C. B.

Obs. 181; [1 Chitty Contr. (11th Am. ed.) 618; Schlesinger *v.* Stratton, 9 R. I. 578.] Where the goods have been obtained by a fraudulent sale, provided the credit has expired. Ferguson *v.* Carrington, 9 B. & C. 59; Strut *v.* Smith, 1 Cr., M. & R. 312. Where the goods were to be paid for by bill, and the defendant has refused to give it, and the time during which it was to run has expired; Webb *v.* Fairmaner, 3 M. & W. 473; Helps *v.* Winterbottom, 2 B. & Ad. 434; Paul *v.* Dodd, 2 C. B. 800; [1 Chitty Contr. (11th Am. ed.) 615, and cases in note (*r*); 1 Chitty Pl. 357, notes;] and in such cases the plaintiff is entitled to interest from the time the bill would have become due; Farr *v.* Ward, 3 M. & W. 25; or where, if given, it has been dishonored; Fry *v.* Hill, 7 Taunt. 397. See, further, 1 Chit. on Pl. 7th ed. 355; Roscoe on Evid.; Starkie on Evid. title "Vendor and Vendee;" Chit. on Contr. tit. "Sale of Goods." When to declare specially, *post*, "Sale of Goods."

2. *Goods bargained and sold.* — Where the property in the goods has passed by sale to the defendant, but there has been no actual delivery to him; Simmons *v.* Swift, 5 B. & C. 277; Atkinson *v.* Bell, 8 B. & C. 857; nor any act equivalent to a delivery of them; Boulter *v.* Arnott, 1 Cr. & M. 333; [1 Chitty Pl. 356–358, and notes; 1 Chitty Contr. (11th Am. ed.) 614, and note (*n*);] provided there has been a sufficient constructive acceptance; Norman *v.* Phillips, 14 M. & W. 277; Cunliffe *v.* Harrison, 6 Ex. 903; Acraman *v.* Morrice, 8 C. B. 849; Bushell *v.* Wheeler, 15 Q. B. 442; Edan *v.* Dudfield, 1 Q. B. 302; Lillywhite *v.* Devereux, 15 M. & W. 285, 291; Elliott *v.* Heginbotham, 2 C. & K. 545; Alexander *v.* Gardner, 1 Scott, 630; or written memorandum; Archer *v.* Baynes, 5 Ex. 625; by brokers' bought and sold notes; Sivewright *v.* Archibald, 17 Q. B. 103; or part payment to take the case out of the statute of frauds. Acebal *v.* Levy, 10 Bing. 376; Ashcroft *v.* Morrin, 4 M. & G. 450. See, further, 1 Chit. Pl.; Roscoe & Starkie, *ubi supra;* Chit. on Contr. tit. "Sale of Goods." When to declare specially, *post*, title "Sale of Goods."

3. *Work and materials.* — When done at the request of the defendant, even though there be a special agreement as to its terms, provided the terms have been complied with on plaintiff's part. Prickett *v.* Badger, 1 C. B. N. S. 96; 26 L. J. C. P. 33; 1 Chit. Pl. 358; Cutter *v.* Powell, 2 Smith's L. C. 2 Saund. 350, note (2); Clark *v.* Bulmer, 11 M. & W. 243, 250; [2 Chitty Contr. (11th Am. ed.) 826 *et seq.* and notes.] Attorneys, surgeons, farriers, agents, apothecaries, surveyors, &c. may recover their charges on this general count. Ib. [2 Chitty Contr. (11th Am. ed.) "Services and Works."] Indeed, it will suffice for the value of any mental skill and labor, such as in perfecting an invention. Grafton *v.* Armitage, 2 C. B. 336; Savin *v.* Holyoke Railway Co. 35 L. J. Ex. 52; S. C. L. R. 1 Ex. 9.] See, further, Roscoe on Evid.; Starkie Evid. When to declare specially, see *post*, titles "Work," "Master and Servant," "Agent," "Carriages," "Ship," &c.

4. *Money lent.* — When lent to defendant, or to a third person on defendant's sole credit. 1 Chit. Pl. 360; [2 Chit. Contr. (11th Am. ed.) 876–879.] Provided there be no deed executed. Bristowe *v.* Needham, 9 M. & W. 729. If there be a covenant under seal to pay the money, it should be declared on; but if a mortgage deed contain no covenant for repayment of the sum advanced, it is evidence under the common count for money lent. Yates *v.* Aston, 4 Q. B. 182; Matthew *v.* Blackmore, 1 H. & N. 762; 26 L. J. Ex. 150. An I O U is no evidence under this count, though it is under an account stated. Fesenmayer *v.* Adcock, 16 M. & W. 449; Douglas *v.* Holme, 12 Ad. & E. 641. See, further, Stark. Evid. 3d ed. 79; [2 Chitty Contr. 879.]

5. *Money paid.* — When actual money, Power *v.* Butcher, 10 B. & C. 346; Bleadon *v.* Charles, 7 Bing. 246, the property of the plaintiff, Gossett *v.* Swindon, 1 D. & L. 888, has been paid by the plaintiff for the defendant at his request, express or implied, Alexander *v.* Vane, 1 M. & W. 511; Blythe *v.* Smith, 4 M. & G. 405; [1 Chitty Pl. 361, 362, and notes; 2 Chitty Contr. (11th Am. ed.) 879 *et seq.* and notes;] as, by one partner for a moiety of expense in the nature of capital expended by plaintiff to further the joint object; French *v.* Styring, 2 C. B. N. S. 357; 26 L. J. C. P. 181; or the funeral expenses of the defendant's wife; Ambrose *v.* Kerrison, 20 L. J. C. P. 135; [10 C. B. 776; Cunningham *v.* Reardon, 98 Mass. 538; Bradshaw *v.* Beard, 12 C.

Obs. B. N. S. 344;] or by way of contribution; Davies *v.* Humphrey, 6 M. & W. 153; Pitt *v.* Purssord, 8 M. & W. 538; Prior *v.* Henbrow, 8 M. & W. 873; [2 Chitty Contr. (11th Am. ed.) 891–896, and notes;] or as a surety; Kemp *v.* Finden, 12 M. & W. 421; Jones *v.* Orchard, 16 C. B. 614; [2 Chitty Contr. 14th Am. ed. 889–891, and notes;] or in consequence of any other legal liability; Westropp *v.* Solomon, 8 C. B. 345; Foster *v.* Ley, 2 Bing. N. C. 269; Lubbock *v.* Tribe, 3 M. & W. 607; [2 Chitty Contr. (11th Am. ed.) 882;] as by paying a note which defendant got from plaintiff to secure for himself an illegal advantage under a composition arrangement; Horton *v.* Riley, 11 M. & W. 492; or a promissory note which defendant fraudulently gave in name of plaintiff and defendant's firm for defendant's own debt; Cross *v.* Cheshire, 21 L. J. Ex. 3; [7 Ex. 43;] or by compulsion, as by stock broker in compliance with rules of the stock exchange. Remfrey *v.* Butler, 6 W. R. 761, 230, and cases there cited; Pollock *v.* Stables, 12 Q. B. 765; Bayley *v.* Wilkins, 7 C. B. 886; Taylor *v.* Stray, 2 C. B. N. S. 175; Ib. 197; [Rosewarne *v.* Billing, 33 L. J. C. P. 55; Chapman *v.* Shepherd, 36 L. J. C. P. 113; S. C., L. R. 2 C. P. 228.] But a request to pay will not be implied unless plaintiff be forced to pay. Sleigh *v.* Sleigh, 5 Ex. 514; [2 Chitty Contr. 881 *et seq.*] This count does not lie for moiety of expense of taking up award by plaintiff. Bates *v.* Townley, 2 Ex. 152. And the action may be maintained though the defendant have not been relieved from any legal liability in consequence of the payment. Brittain *v.* Lloyd, 14 M. & W. 762; Lewis *v.* Campbell, 1 C. B. 541; Knight *v.* Cambers, 15 C. B. 562; [Emery *v.* Hobson, 62 Maine, 578, 594.] See, further, Roscoe on Evid. 288; Hunter *v.* Hunt, 1 C. B. 302; Stark. Evid. 3d ed. 74; Chit. on Contr. title, "Money Paid." When to declare specially, *post*, title "Indemnity."

6. *Money had and received.* — This count is proper where the defendant, not being a mere servant of another; Stephens *v.* Badcock, 3 B. & Ad. 30; Barford *v.* Shuttleworth, 11 Ad. & E. 926; [2 Chitty Contr. (11th Am. ed.) 910 *et seq.*;] has received actual money; Marsh *v.* Keating, 1 Bing. N. C. 198; Standish *v.* Ross, 5 Ex. 227; [1 Chitty Pl. 362, and note (*y*); Bullard *v.* Hascall, 25 Mich. 32; 2 Chitty Contr. (11th Am. ed.) 902, and note (*c*);] belonging to the plaintiff; Scarfe *v.* Halifax, 7 M. & W. 288; Vaughan *v.* Matthews, 13 Q. B. 187; [1 Chitty Pl. 364;] but not to a mere trust, in which the plaintiff is interested; Edwards *v.* Bates, 7 M. & G. 590; [Bartlett *v.* Dimond, 14 M. & W. 49; Pardoe *v.* Price, 16 M. & W. 451; Bond *v.* Nurse, 10 Q. B. 244; Roper *v.* Holland, 3 Ad. & E. 99;] or money paid to him or allowed in account; Gingell *v.* Purkins, 4 Ex. 720; Lee *v.* Merrett, 8 Q. B. 820; Lucas *v.* Jones, 5 Q. B. 949; by the plaintiff himself under a mistake or forgetfulness of *facts;* Kelly *v.* Solari, 9 M. & W. 54; Platt *v.* Bromage, 24 L. J. Ex. 63; Aiken *v.* Short, 1 H. & N. 210; Barber *v.* Brown, 1 C. B. N. S. 121; [1 Chitty Pl. 367, and notes; 2 Chitty Contr. (11th Am. ed.) 928 *et seq.* and notes;] or which has been extorted from him by oppression of law; Duke de Cadaval *v.* Collins, 4 Ad. & E. 858; Close *v.* Phillips, 7 M. & G. 586; Valpy *v.* Manby, 1 C. B. 594; [2 Chitty Contr. (11th Am. ed.) 939, 942, 947; Severance *v.* Kimball, 8 N. H. 386; Foshay *v.* Ferguson, 5 Hill, 154;] or by a refusal to do something which it was the defendant's duty to do; Parker *v.* Great Western Railway Co. 7 M. & G. 252; [2 Chitty Contr. (11th Am. ed.) 941;] or by other fraudulent practices; Ashmole *v.* Wainwright, 2 Q. B. 837; Silt *v.* Martindale, 18 C. B. 314; or by duress of goods; Wakefield *v.* Newbon, 6 Q. B. 276; Oates *v.* Hudson, 6 Ex. 346; [2 Chitty Contr. (11th Am. ed.) 941, 947, 948;] but not for money levied on a fraudulent warrant of attorney; De Medina *v.* Grove, 10 Q. B. 152, 157; [1 Chitty Pl. 366, see Roth *v.* Schloss, 6 Barb. 308; Anderson *v.* Gage, Dudley (S. Car.), 319; Hale *v.* Passmere, 4 Dana, 70; 2 Chitty Contr. (11th Am. ed.) 947;] or where the defendant has tortiously taken property of the plaintiff, which may be, and possibly has been, converted into money; Neate *v.* Harding, 6 Ex. 349; [2 Chitty Contr. (11th Am. ed.) 905, 906, and notes; 1 Chitty Pl. 112, and note (*s*), 120, 363;] or has received money on a consideration which has afterwards failed; Young *v.* Cole, 3 Bing. N. C. 724; Remfrey *v.* Butler, 6 W. R. 230, Q. B.; Woodland *v.* Fear, 7 El. & Bl. 519; [Shaw C. J. in Hill *v.* Rewee, 11 Met. 271, 272; Brown *v.* Harris, 2 Gray, 359; Briggs *v.* Vanderbilt, 18 Barb. 222; Parker C. J. in Griggs *v.*

Obs. Austin, 3 Pick. 20; Wheeler *v.* Board, 12 John. 363; Carter *v* Carter, 14 Pick. 424; Harrison *v.* Chilton, 5 Yerger, 293; Lyon *v.* Annable, 4 Conn. 350; Appleton *v.* Chase, 19 Maine, 74;] such as on a deposit for a bargain which has afterwards entirely; Hunt *v.* Silk, 5 East, 449; gone off; Tilt *v.* Casenett, 4 M. & G. 898; or by the sale of a bill which turns out to have been forged; Gurney *v.* Womersley, 4 El. & Bl. 139; [Terry *v.* Bissell, 26 Conn. 23; Merriam *v.* Wolcott, 3 Allen, 258; Cabot Bank *v.* Morton, 4 Gray, 156, 158; Baxter *v.* Duren, 29 Maine, 434; 2 Chitty Contr. (11th Am. ed.) 931 *et seq.* and notes;] or money in the hands of the stakeholder after the event has been determined in the plaintiff's favor; Brown *v.* Overbury, 11 Ex. 715; or to abide the event of a wager repudiated by the plaintiff before the result is ascertained; Martin *v.* Hewson, 10 Ex. 379; or, if the wager is illegal, before the money has been paid over; Gatty *v.* Field, 9 Q. B. 431; [Hastelow *v.* Jackson, 8 B. & C. 221; McKee *v.* Manice, 11 Cush. 358–361; Ball *v.* Gilbert, 12 Met. 397, 402–404; Sampson *v.* Shaw, 101 Mass. 150, 151; Humphreys *v.* Magee, 13 Miss. 435; Stacy *v.* Foss, 19 Maine, 335; Rust *v.* Gott, 9 Cowen, 169; Perkins *v.* Hyde, 6 Yerger, 288; 2 Chitty Contr. (11th Am. ed.) 919; money authorized to be applied to an illegal purpose may be recovered back before such application; Bone *v.* Ekless, 29 L. J. Ex. 438; S. C. 5 H. &. N. 925;] or money paid to a witness with his subpœna for conduct money, where the witness, before he incurs any expense, is informed that the cause is settled. Martin *v.* Andrews, 7 El. & Bl. 1. So money paid as a deposit on shares in an undertaking which has proved abortive, or been abandoned, may be recovered back under this count; as an abortive railway scheme; Walstab *v.* Spottiswoode, 15 M. & W. 501; Chaplin *v.* Clarke, 4 Ex. 403; Ashpitel *v.* Sercombe, 4 Ex. 147; Watson *v.* Earl Charlemont, 12 Q. B. 568; a cost book mine; Johnson *v.* Goslett, 18 C. B. 728; unless the plaintiff have authorized the expenditure of the deposit on the expenses of the undertaking; Mowatt *v.* Lord Londesborough, in error, 4 El. & Bl. 1; 18 Jur. 1094, S. C.; Watts *v.* Salter, 10 C. B. 477; or has derived benefit from, and is not in a situation to *rescind* the contract. Clarke *v.* Dickson, El., Bl. & El. 148; [1 Chitty Pl. 367; 2 Chitty Contr. (11th Am. ed.) 923, 938, 939; Blackburn *v.* Smith, 2 Ex. 783; Clark *v.* Baker, 5 Met. 452; Colville *v.* Besly, 2 Denio, 139; Lyon *v.* Bertram, 20 How. (U. S.) 154; Minturn *v.* Main, 3 Selden, 220; Gilbert *v.* Ross, 1 Strobh. 287. But the count for money had and received lies to recover any money paid by the plaintiff under a contract which has really been rescinded. Payne *v.* Whale, 7 East, 274; Moyer *v.* Shoemaker, 5 Barb. 319; Raymond *v.* Bearnard, 12 John. 275; Gillet *v.* Maynard, 5 John. 85; Feay *v.* Camp, 15 Serg. & R. 227; Danforth *v.* Dewey, 3 N. H. 79; Manahan *v.* Noyes, 52 N. H. 232; 1 Chitty Contr. (11th Am. ed.) 366, and note (*n*); 1 Chitty Pl. 368; Benj. Sales (1st Am. ed.), § 888, note (*a*), and cases. Money paid under an agreement, voidable by the statute of frauds, which the defendant cannot or will not complete, may be recovered back under this count. Lane *v.* Shackford, 5 N. H. 133; Buck *v.* Waddle, 1 Ham. 363; Thompson *v.* Gould, 20 Pick. 134; Cook *v.* Daggett, 2 Allen, 439; Eames *v.* Savage, 14 Mass. 425; Gillet *v.* Maynard, 5 John. 85; Rice *v.* Peet, 15 John. 503; Geer *v.* Geer, 18 Maine, 16; Grant *v.* Craigmiles, 1 Bibb, 206; Lyon *v.* Annable, 4 Conn. 350; Hunt *v.* Sanders, 1 Marsh. 552; Allen *v.* Booker, 2 Stewart, 21; Maddera *v.* Smith, 3 Stewart, 119; Kidder *v.* Hunt, 1 Pick. 328; Cabot *v.* Haskins, 3 Pick. (2d ed.) 95, note; Barnes *v.* Brown, 71 N. Car. 507; Albea *v.* Griffin, 2 Dev. & Bat. Eq. 9; Winton *v.* Fort, 5 Jones Eq. 251; Richards *v.* Allen, 17 Maine, 296. But the money paid under such a contract can be recovered back only on a refusal to perform the contract by the party receiving it; Beaman *v.* Buck, 9 Sm. & M. 207; Cobb *v.* Hall, 29 Vt. 510; Collier *v.* Coates, 17 Barb. 471; Coughlin *v.* Knowles, 7 Met. 57; Abbott *v.* Draper, 4 Denio, 51; or an inability on his part to perform the contract, or a mutual abandonment of it. Sims *v.* Hutchins, 8 Sm. & M. 328; Battle *v.* Rochester City Bank, 5 Barb. 414; Thompson *v.* Gould, 20 Pick. 134; Sweet *v.* Lee, 3 M. & G. 452; 2 Chitty Contr. (11th Am. ed.) 928. This action lies, by a joint tenant or tenant in common, against his co-tenant who receives more than his share of the profits of the estate. 4 Kent, 359, note (*c*), 369; Cochran *v.* Carrington, 25 Wend. 409; Brigham *v.* Eveleth. 9 Mass. 538; Dickinson *v.* Williams, 11 Cush. 258; Shepard *v.* Richards, 2

Obs. Gray, 424, 426; Jones *v.* Harraden, 9 Mass. 540, note; Woolever *v.* Knapp, 18 Barb. 265; Huff *v.* McDonald, 22 Geo. 131, 169; Moses *v.* Ross, 41 Maine, 360; Blanton *v.* Vanzant, 2 Swan, 276. See Thomas *v.* Thomas, 5 Ex. 28; Henderson *v.* Eason, 17 Q. B. 701. There are cases in which money obtained by fraud may be recovered in this action for money had and received. See 2 Chitty Contr. (11th Am. ed.) 936 *et seq.* So to recover money paid on an illegal contract disavowed before completion. 2 Chitty Contr. 944 *et seq.* There appear to be cases in which this action will lie, although no money was ever received by the defendant, but where the defendant has merely admitted that he holds value in money to which the plaintiff is entitled; see 2 Chitty Contr. (11th Am. ed.) 903 *et seq.*; Hennings *v.* Rothschild, 4 Bing. 315; Spratt *v.* Hobhouse, 4 Bing. 173; or has otherwise made himself liable for money, whether he has received it or not. Floyd *v.* Day, 3 Mass. 403; Randall *v.* Rich, 11 Mass, 494; Jackson *v.* Mayo, 11 Mass. 152; Emerson *v.* Baylies, 19 Pick. 55; Appleton *v.* Bancroft, 10 Met. 237. If an agent, intrusted with property to sell for money, dispose of the property, he is liable in this form of action, whether the sale be actually effected for money or not. Thompson *v.* Babcock, Brayt. 24; Miller *v.* Miller, 7 Pick. 136.] But to sustain this count there must in general be some privity between the plaintiff and defendant; the mere fact that the money belongs to the plaintiff is not sufficient if the defendant is accountable for it to some third person. Bluck *v.* Siddaway, 15 L. J. Q. B. 359; Cobb *v.* Becke, 6 Q. B. 930; Moore *v.* Bushell, 27 L. J. Ex. 3. [It is necessary to prove that the defendant or his agent received the money under such circumstances as to create a privity of contract between him and the plaintiff. Barlowe *v.* Brown, 16 M. & W. 128; Vaughan *v.* Matthews, 13 Q. B. 187, 189; Jones *v.* Carter, 8 Q. B. 134; Bloomer *v.* Denman, 12 Ill. 240; Hutchins *v.* Gilman, 9 N. H. 359; Carnegie *v.* Morrison, 2 Met. 396. It has been held, however, that there need be no privity of contract, except that which results from one man's having another's money, which he has not a right conscientiously to retain. Mason *v.* Waite, 17 Mass. 563; Hall *v.* Marston, 17 Mass. 579; Eagle Bank *v.* Smith, 5 Conn. 71; Wiseman *v.* Lyman, 7 Mass. 288; Freeman *v.* Otis, 9 Mass. 271; Carnegie *v.* Morrison, 2 Met. 396; Frost *v.* Gage, 1 Allen, 262; Knapp *v.* Hobbs, 50 N. H. 476, 478; Dickson *v.* Cunningham, Mart. & Yer. 221.] When to declare specially, see *post*, "Sale of Goods;" "Vendors," "Warranty." [1 Chitty Pl. 368.]

1. *Interest.* — Where there has been an express contract or an usage of trade to pay it, this claim may be inserted and the amount recovered as a *debt*. Ashby *v.* Ashby, 3 M. & P. 186; Farr *v.* Ward, 6 Dowl. 163; S. C. 3 M. & W. 25; Calton *v.* Bragg, 15 East, 223; Eaton *v.* Bell, 5 B. & Ald. 34; Iken *v.* Bradley, 2 Moore, 206; [Liotard *v.* Graves, 3 Caines, 226, 234, 235; Koone *v.* Miller, 3 Watts & S. 271; Williams *v.* Craig, 1 Dallas, 313, 315; Reab *v.* M'Allister, 8 Wend. 109.] But without such a contract interest is not *primâ facie* payable on a demand for goods sold, or balance struck on an account for goods; or on a demand for work and materials; or on an attorney's bill; or money lent, money paid or had and received; or on a guaranty; or a foreign judgment. [2 Chitty Contr. (11th Am. ed.) 952, 953, 954. As to interest on judgments, 2 Chitty Contr. 953, note (*h*).] But a surety is entitled to interest on money paid for his principal. Petrie *v.* Duncombe, 20 L. J. Q. B. 242; [Ilsley *v.* Jewett, 2 Met. 168; Gibbs *v.* Bryant, 1 Pick. 118.] And interest is payable on bills, promissory notes, and bankers' checks. [2 Chitty Contr. (11th Am. ed.) 954, 955, note (*a*);] but to obtain it the bill must be produced. Hutton *v.* Ward, 15 Q. B. 26. So interest is recoverable upon overcharges made by a railway company. Edwards *v.* Great Western Railway Co. 11 C. B. 588. When compound interest recoverable. Ferguson *v.* Fyffe, 8 Cl. & F. 121, 140; [Page *v.* Broom, 4 Cl. & Fin. 436, and note (1), and cases cited; 2 Dan. Ch. Pr. (4th Am. ed.) 1259, note (6); 2 Chitty Contr. (11th Am. ed.) 957, note (*h*). A special case must be made for the allowance of compound interest. Armstrong *v.* Campbell, 3 Yerger, 201; Connecticut *v.* Jackson, 1 John. Ch. 13; Darrel *v.* Eden, 3 Desaus. 241; Mowry *v.* Bishop, 5 Paige, 98; Ringgold *v.* Ringgold, 1 H. & Gill, 11; Myers *v.* Myers, 2 McCord Ch. 214.] In other cases it may be recovered on a *liquidated* demand as damages; 3 & 4 W. 4, c. 42, s. 28; Hudson *v.* Fawcett,

Obs. 2 D. & L. 41; 7 M. & G. 348, *per cur.;* Harper *v.* Williams, 4 Q. B. 219, 234; from the time when a written demand of it was made; Frühling *v.* Schroëder, 2 Bing. N. C. 77; Berrington *v.* Phillips, 1 M. & W. 48; and a letter demanding interest from a day prior to the date of the letter, is a sufficient demand under the statute to entitle the jury to give interest from the date of the demand. Londesborough, Lord, *v.* Mowatt, in error, 4 El. & Bl. 1; 2 Com. L. R. 1181; 23 L. J. Q. B. 177. See, further, Stark. Evid.; Chitty on Contr. tit. "Interest;" [1 Chitty Pl. 369. According to the general current of American authorities, interest will be allowed after a demand of payment of an unsettled claim for goods sold and delivered, or services rendered, from the time of the demand; and a presentment of the account or commencement of a suit, is sufficient demand upon which to found, and from which to date, a claim of interest. Barnard *v.* Bartholomew, 22 Pick. 291, 294; McIlvaine *v.* Wilkins, 12 N. H. 481 *et seq.;* Ames *v.* Wilson, 22 Maine, 116; Selleck *v.* French, 1 Conn. 32; Gray *v.* Van Amringe, 2 Watts & S. 128; Moore *v.* Patten, 2 Porter, 451, 454; Houghton *v.* Hagar, Brayt. 133; Bates *v.* Starr, 2 Vt. 536; Cole *v.* Trull, 9 Pick. 325; Goff *v.* Rehoboth, 2 Cush. 475; David *v.* Conard, 1 Iowa (Greene), 336; National Lancers *v.* Lovering, 20 N. H. 511. Accounts for money advanced, lent, or expended, for the use of another, at his request, generally bear interest from the time it is advanced, &c. See Ilsley *v.* Jewett, 2 Met. 168; Gibbs *v.* Bryant, 1 Pick. 118; Liotard *v.* Graves, 3 Caines, 226; Reid *v.* Rensselaer Glass Factory, 3 Cowen, 393; S. C. 5 Cowen, 589; Dilworth *v.* Sinderling, 1 Binney, 488, 494; Weeks *v.* Hasty, 13 Mass. 218; Sims *v.* Willing, 8 Serg. & R. 103, 109; Miles *v.* Bacon, 4 J. J. Marsh. 457; Selleck *v.* French, 1 Conn. 32; Taylor *v.* Knox, 1 Dana, 391, 399; Cheeseborough *v.* Hunter, 1 Hill (S. Car.), 400; Breckenridge *v.* Taylor, 5 Dana, 110, 114; Goodloe *v.* Clay, 6 B. Monr. 236; Fowler *v.* Shearer, 7 Mass. 14; Davenport *v.* Mason, 15 Mass. 85; Campbell *v.* Musier, 6 John. Ch. 24; Barnard *v.* Bartholomew, 22 Pick. 291. Whether interest shall be recoverable in an action for money had and received, seems to depend on the circumstances of each case. A mere stakeholder, agent, trustee, or bailee, in whose hands money has been deposited, and retained without use or default on his part, would not be liable for interest. But where the money of one person has been detained wrongfully, or been used, by another, or where it has been kept by him when it should have been paid over, interest is properly chargeable in an action to recover it. See Dodge *v.* Perkins, 9 Pick. 369; Knight *v.* Reese, 2 Dallas, 182; Bell *v.* Logan, 7 J. J. Marsh. 503; Vance *v.* Vance, 5 Monroe, 521; Selleck *v.* French, 1 Conn. 33; Hudson *v.* Tenney, 6 N. H. 456; Evarts *v.* Nason, 11 Vt. 122; Wood *v.* Robbins, 11 Mass. 504; Marion *v.* McRea, 1 Cheves (Law), 61; Johnson *v.* Eicke, 7 Halst. 316. Except in cases of money advanced, expended, &c. as above stated, interest is not chargeable on open or current accounts between parties, until notice is given in some way by presentment of the account, by demand of payment, or by suit brought. See Crawford *v.* Willing, 4 Dallas, 286; Selleck *v.* French, 1 Conn. 34; Wiltburger *v.* Randolph, Walker (Miss.), 20; Raymond *v.* Isham, 8 Vt. 258; Shewell *v.* Givan, 2 Blackf. 314; Surton *v.* Gilliam, 1 Scam. 579; McKnight *v.* Dunlop, 4 Barb. 36. Where no other demand is made, the commencement of a suit for the money will be regarded as a demand for the purpose of computing interest. Dodge *v.* Perkins, 9 Pick. 369; Hunt *v.* Nevers, 15 Pick. 500; Brewer *v.* Tyringham, 12 Pick. 547; Haven *v.* Foster, 9 Pick. 112; Bryfogle *v.* Beckley, 16 Serg. & R. 264; Nelson *v.* Cartwell, 6 Dana, 7; Walker *v.* Wills, 6 Ark. 167; Schmidt *v.* Limehouse, 2 Bailey, 276; Etheridge *v.* Binney, 9 Pick. 272, 279; Wells *v.* Abernethy, 5 Conn. 228. In an action to recover for money had and received, the plaintiff can only recover interest from the date of the writ, unless in his declaration he alleged a demand before that time. Ordway *v.* Calcord, 14 Allen, 59.]

8. *Account stated.* — This count should generally be added where the plaintiff's claim is for a money demand (except where the action is against an infant or a corporation). It will be supported by evidence of an admission in writing, such as an I O U; Payne *v.* Jenkins, 4 C. & P. 324; Fesenmayer *v.* Adcock, 16 M. & W. 449; Curtis *v.* Richards, 1 Scott N. R. 155; Gould *v.* Coombes, 1 C. B. 543; Bain *v.* Harris, 8 W. R. 79, Ex.; [Buck *v.* Hurst,

Obs. L. R. 1 C. P. 297;] or a bill of exchange is evidence as between the immediate parties; Burmester *v.* Hogarth, 11 M. & W. 97; Wheatley *v.* Williams, 1 M. & W. 533; Perry *v.* Slade, 8 Q. B. 115; or by parol, by the defendant to the plaintiff himself or to his agent; Hughes *v.* Thorpe, 5 M. & W. 656; Newhall *v.* Holt, 6 M. &. W. 662; but not to a stranger; Breckon *v.* Smith, 1 Ad. & E. 488; that a certain fixed sum was due; Lane *v.* Hill, 18 Q. B. 252; Barker *v.* Birt, 10 M. & W. 61; but not if there was a deed releasing the debt; Barker *v.* Heard, 5 Ex. 959. An award is not evidence of an account stated; Bates *v.* Townley, 1 Ex. 152; Porter *v.* Cooper, 1 Cr., M. & R. 387. In general it is not necessary to show the nature of the original debt; but the account stated must have been founded on a debt due and owing. But see Cleave *v.* Moors, 3 Jur. N. S. 48 Ex.; Berry *v.* Storey, C. L. R. C. P. 815; Cocking *v.* Ward, 1 C. B. 858. See, further, Stark Evid.; [2 Chitty Contr. (11th Am. ed.) 961 *et seq.*; 1 Chitty Pl. 371.]

1. *The Common Indebitatus Count, where there is no Special Count in the Declaration.*

In the ——.

On —— day of ——, A. D. ——.

—— [*venue*]. A. B., by ——, his attorney, [*or* "in person,"] sues C. D. for money payable (*a*) by the defendant to the plaintiff, for [*here state any other debt that may be claimed under an indebitatus count, besides the claim for goods, &c. as for use and occupation, as the case may be, and proceed, using only such of the following statements of consideration, as goods, work, &c. as may apply to the case, adding the account stated at all events. They will then form together one count* (McGregor *v.* Graves, 3 Ex. 34; 18 L. J. 109); *and the sum claimed by the plaintiff may be recovered by him upon any one of the considerations stated* (Dawson *v.* Collis, 10 C. B. 523; 20 L. J. C. P. 116); *and on a plea of never indebted, the defendant may have the issue found distributively partly for him, and thus get his costs on those parts on which he succeeds* (Traherne *v.* Gardner, 26 L. J. Q. B. 259):

for goods sold and delivered (*b*) by the plaintiff to the defendant (*c*);

and for goods bargained and sold by the plaintiff to the defendant (*c*);

and for work done and materials (*d*) provided by the plaintiff for the defendant at his request;

(*a*) This form is given by the Common Law P. Act, 1852, s. 91, schedule B, and should be carefully followed. Wilkinson *v.* Sharland, 10 Ex. 724. These words, "for money payable by the defendant to the plaintiff," are in substitution of the old form of indebitatus counts in debt and assumpsit, the latter alleging "That whereas the defendant was indebted to the plaintiff in £—— for [*&c.*], and the defendant, in consideration thereof, promised the plaintiff to pay him the said sum of money on request," *i. e.* immediately, which is the promise the law implies in an executed consideration. Jackson *v.* Hobbin, 8 M. & W. 790; Roscorla *v.* Thomas, 3 Q. B. 234; Kay *v.* Dutton, 7 M & G. 495. A debt *solvendum in futuro*, will not, therefore, support this count. See Obs. *ante*. The omission of the words "money payable by the defendant to the plaintiff," would render the declaration demurrable; Place *v.* Potts, 8 Ex. 705; except, perhaps, so far as relates to the count for money found to be due from defendant to plaintiff on an account stated; Fagg *v.* Nudd, 3 El. & Bl. 650; *sed quære;* but the objection is cured by pleading over. Wilkinson *v.* Sharland, 10 Ex. 724.

(*b*) The Common L. P. Act, 1852, does not give this form. Several sales may be proved on this count. Ferguson *v.* Mitchell, 2 Cr., M. & R. 687. [Under one item of charge, as follows: "To goods sold, materials found, and work done," only one particular subject matter of charge can be proved. Jones *v.* Ilsley, 1 Allen, 273.]

(*c*) It will be observed the words "at his request" are not in these forms, and are no longer necessary; they are implied from the bargain and sale. "Goods sold to defendant by plaintiff at *his* request," was not demurrable. Deriemer *v.* Fenna, 7 M. & W. 439; 9 Dowl. 244. But the words "by the plaintiff" are essential. Fenton *v.* Ellis, 6 Taunt. 192.

(*d*) Materials cannot be recovered on a count for work only. Heath *v.* Freeland, 1 M. & W. 543.

and for money lent by the plaintiff to the defendant (*e*);
and for money paid by the plaintiff for the defendant at his request;
and for money received by the defendant for the use (*f*) of the plaintiff;
and for interest upon and for the forbearance by the plaintiff to the defendant at his request of money due from the defendant to the plaintiff; (*g*)
and for money found to be due from the defendant to the plaintiff on accounts stated between (*h*) them;
And the plaintiff claims £——. (*i*)

[The corresponding forms of declarations in actions of contract under the Massachusetts practice act are similar models of conciseness.

Commencement. — To answer to A. B., of ——, in an action of contract.

A. B. *v.* C. D. } Essex Sup. Ct. Plaintiff's declaration.

In addition to the above English Forms.

Goods sold. — And the plaintiff says the defendant owes him —— dollars for goods sold by the plaintiff to the defendant.

Work. — Also that the defendant owes him —— dollars for work done by the plaintiff for the defendant.

Board. — Also that the defendant owes him —— dollars for board and lodging furnished by the plaintiff for the defendant. See Raymond *v.* Eldridge, 111 Mass. 390, 391.

Freight. — For the carriage of certain goods by the plaintiff for the defendant.

(*e*) "At his request," unnecessary in this count. Victors *v.* Davis, 12 M. & W. 758.

(*f*) "For and on account," instead of "for the use," *semble*, not sufficient. Kelly *v.* Curzon, 4 Ad. & E. 622.

(*g*) This form suffices, and no further statement of a *contract* to pay interest is necessary. Nordenstrom *v.* Pitt, 13 M. & W. 723. It is not given by the Com. L. P. Act, 1852. [If in an action for money had and received, the plaintiff seeks to recover interest, other counts must be inserted accordingly; and he can only recover interest from the date of the writ, unless in his declaration he alleges a demand before that time. Ordway *v.* Colcord, 14 Allen, 59. In this case, Chapman J. said, "A special demand, which entitles the plaintiff to interest as damages for the detention of money, is an important substantive fact to be proved, and should be stated."]

(*h*) This is the form given by the act: The count need not run "by and between them." Debenham *v.* Chambers, 3 M. & W. 128; 6 Dowl. 101; Robinson *v.* May, 6 Dowl. 306. [Under a declaration upon an account stated, the cause of action is the agreement of the parties to pay the amount due upon the accounting, and not any written instrument. This amount may be made up of various items, and may include sums due upon written instruments as well as upon oral agreements. The evidence to support the account may be wholly in writing or wholly by parol, or in part by writing and in part by parol. Hoar J. in Charman *v.* Henshaw, 15 Gray, 294. See, also, Rundlett *v.* Weeber, 3 Gray, 266, 267. Under the Massachusetts practice act, bills of particulars are required under all the common counts; and among the common counts, set forth in the forms annexed to the act, *in simul computassent* is one. "It may be true," Dewey J. said, "that a bill of particulars under this count would not necessarily give the items of the indebtedness, and that the items of the dealings between the parties need not be shown in proof on the trial on such a count. But we see no objection to a bill of particulars stating all the items of the indebtedness, and showing the basis of the alleged indebtedness on the *in simul computassent*, if the plaintiff elects to file such bill of particulars." Rundlett *v.* Weeber, 3 Gray, 266, 267.]

(*i*) The sum mentioned here need not be the precise amount of the plaintiff's claim, nor need the costs be included, but the sum should be sufficient to cover the whole of the plaintiff's claim, including any interest to the time when judgment will be recovered. Watkins *v.* Morgan, 6 C. & P. 661. If not claimed at the trial, it cannot be obtained afterwards. Baker *v.* Brown, 2 M. & W. 199. The sum claimed may be increased by amendment at the trial.

Warehouse room. — For warehouse room furnished by the plaintiff for the storage of certain goods of the defendant.

Horse and carriage hire. — For the use of a certain horse and carriage hired of the plaintiff by the defendant.

Use and occupation. — For the use and occupation of a certain tenement hired of the plaintiff by the defendant. See Warren *v.* Ferdinand, 9 Allen, 357.

In simul computassent. — For the balance found due to the plaintiff by the parties on accounting together. Charman *v.* Henshaw, 15 Gray, 293.

Account annexed. — And the plaintiff says the defendant owes him —— dollars, according to the account hereto annexed. See 1 Chitty Pl. 351, note (s^1), where the cases relating to the practice under this count are cited and stated. Johnson *v.* Trinity Church Society, 11 Allen, 123; Mullett *v.* Bemis, 10 Mass. 92.]

2. *The Common Count when the Declaration contains prior Special Ones.*

And the plaintiff also sues the defendant for money payable by the defendant to the plaintiff for [*&c. as in the last form, concluding*] And the plaintiff claims £——. (*k*)

PARTICULARS OF DEMAND TO BE DELIVERED WITH THE INDEBITATUS COUNTS. (*l*)

Obs. — By the Rules of H. T. 1853, rule 19, with every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th sec-

(*k*) Where the declaration contains special counts on contracts as well as the indebitatus count, or counts in tort, the sum claimed must be sufficient to cover any amount of damages the jury may be likely to give the plaintiff, taking care not to claim a ridiculously excessive sum As to the conclusion in "Detinue," "Mandamus," "Injunction," &c. see those titles.

(*l*) It is not necessary or advisable to give particulars of a count on a bill of exchange or other special count; Brookes *v.* Farlar, 3 Bing. N. C. 291; Day *v.* Davies, 5 C. & P. 340; Gould *v.* Coombes, 1 C. B. 543; but where the plaintiff sues on a bill or note, and has given the *defendant* consideration for it in money or goods, &c. the particulars of the latter items should be inserted as above; so, where the bill or note itself is evidence between the parties of an account stated, or there is any reason to suppose that an admission or promise to pay the amount of the bill or note has been made by the defendant, amounting to an account stated, it would be advisable to add to the foregoing account a statement, thus: "Under the count on the account stated, the plaintiff also seeks to recover the sum of £——" (*the amount of the bill mentioned in the first count*) ["in addition" (*if the fact be so*) "to the balance, *or* "sum," "due on the foregoing account."] See Roberts *v.* Elsworth, 10 M. & W. 653. If the particulars in such case only state that the action is brought to recover "the amount of the note," the plaintiff cannot give evidence of the consideration; and therefore, if the note be not produced or be not admissible in evidence, the whole action will fail; Wade *v.* Beasley, 4 Esp. 7; Brown *v.* Watts, 1 Taunt. 353; and that even although the particulars specify that "for the recovery thereof the plaintiff will avail himself of the whole or any part of the declaration;" Hedley *v.* Bainbridge, 3 Q. B. 316; Roberts *v.* Elsworth, 10 M. & W. 653; but where there is evidence of an admission amounting to an actual account stated between the parties, it may be given in evidence under particulars asserting that the sum was due on the considerations to which the admission related. Simmons *v.* Wood, 5 Q. B. 170. [Under the practice act of Massachusetts, in actions of contract, when either of the common counts is used, the plaintiff shall file a bill of particulars with his writ, when the action is entered. The items in such bill shall be deemed to be numbered consecutively, and it shall be deemed to be part of the record and be answered or replied to as such. Genl. Sts. c. 129, § 10; Rundlett *v.* Weeber, 3 Gray, 266. The want of a bill of particulars under the common counts furnishes ground to move the court to order such a bill to be filed, or to demur to the count; but it cannot be objected to by the defendant after the trial has begun. Preston *v.* Neale, 12 Gray, 222;

ORS. tion of the common law procedure act, 1852) delivered or filed, containing causes of action such as those set forth in schedule B of that act, and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And to secure the delivery or filing of particulars in all such cases, it is ordered that if any such declaration shall be delivered or filed, or any plea of set-off delivered, without such particulars or such statement as aforesaid; and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of the demand and set-off shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer.

By the Pleading Rules of Trin. T. 1853, rule 13, "in any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money."

"But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover *a certain balance*, without giving credit for any particular sum or sums; or to cases of set-off where the plaintiff does not state the particulars of such set-off." And by rule 14, "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar."

The particulars should specify dates, items, and amounts; [see Kellogg *v.* Paine, 8 How. Pr. 329; Wetmore *v.* Jennys, 1 Barb. 53; Seaman *v.* Low, 4 Bosw. 338; Moran *v.* Morrissey, 28 How. Pr. 100; Smith *v.* Hicks, 5 Wend. 48;] and be comprised if possible within three folios. Chit. Arch. 1360. They should be so specific as not to mislead a reasonable man, as by confusing a claim of salary with one for commission. Law *v.* Thompson, 15 M. & W. 545; Richard *v.* Nelson, 16 M. & W. 772; 4 D. & L. 693; Rennie *v.* Beresford, 15 M. & W. 78; Higgins *v.* Ede, Ib. 77. See form of particulars by a surveyor; Irving *v.* Baker, 15 L. J. Q. B. 322; by a broker, for price of scrip bought for the account. Berkley *v.* De Vere, 4 D. & L. 97. As to how far the plaintiff will at the trial be confined to his particulars, see Chit. Arch. Pr. 1389; [Bowman *v.* Earle, 3 Duer, 691; Babcock *v.* Thompson, 3 Pick. 446; Commonwealth *v.* Giles, 1 Gray, 469.] Particulars need not be delivered under special counts, or counts on bills of exchange or promissory notes. [See Ives *v.* Shaw, 31 How. Pr. 54; Tebbetts *v.* Pickering, 5 Cush. 83.]

Crediting Payments. — A plaintiff cannot be *compelled*, in a court of common law, to furnish evidence against himself by admitting *payment*. Randal *v.* Ikey, 4 Dowl. 682. All he *need* state in his particulars are the items of his own de-

Tebbetts *v.* Pickering, 5 Cush. 83. Where the declaration consists of a count on an account annexed, but no bill of particulars is filed upon the entry of the writ, the count may be amended by annexing such a bill. Burgess *v.* Bugbee, 100 Mass. 152. Provision is made by the New York Code, § 158, for the furnishing of bills of particulars. The office of a bill of particulars is to prevent a surprise on the trial and not to furnish evidence. Drake *v.* Thayer, 5 Rob. 694; Brown *v.* Williams, 4 Wend. 368; Waring *v.* Monroe, 4 Wend. 200. It should give as much information as a special declaration, so that the defendant may know the real ground of the action. Babcock *v.* Thompson, 3 Pick. 446. A bill of particulars is regarded as an amplification of the pleading to which it relates, and is to be considered as forming a part of it; Bowman *v.* Earle, 3 Duer, 691; Brown *v.* Williams, 4 Wend. 368; giving to it more certainty. Booth *v.* Howard, 2 Dowl. 438; Farcy *v.* Lee, 10 Abb. Pr. 143. But it is considered sufficient, if it fairly apprise the opposite party of the nature of the claim. Brown *v.* Williams, 4 Wend. 368.]

Obs. mand, the amount by which he admits it to be reduced (without stating *how*), and the *balance* for which he really proceeds; Smith *v.* Eldridge, 4 Ad. & E. 66; and see Penprase *v.* Crease, 1 M. & W. 36; 4 Dowl. 711; and if a gross sum be credited in the particulars as a payment, the court will not compel the plaintiff to give particulars of the *items*. Ib.; and Myatt *v.* Green, 13 M. & W. 377; Fussey *v.* Gordon, 13 C. B. 847; Luck *v.* Handley, 4 Ex. 486; [Williams *v.* Shaw, 4 Abb. Pr. 209; Giles *v.* Betz, 15 Abb. Pr. 285.] If the sums really paid be not credited in the particulars, the defendant may plead payment of them, and get the costs of that issue; when they are credited, the plaintiff will not be entitled to a verdict at all until he has proved a demand greater than the amount of credited payments, and then only for the excess. Kenyon *v.* Wakes, 2 M. & W. 764; Eastwick *v.* Harman, 6 M. & W. 13; Smethurst *v.* Taylor, 12 M. & W. 545; Rowland *v.* Blakesly, 1 Q. B. 403. And a payment generally admitted, as thus, "Cr. by bills 1,500*l.*," is construed as a payment admitted to have been made *by the defendant to the plaintiff*. Smethurst *v.* Taylor, 12 M. & W. 545. The admission, however, in order to be binding, must be in the *particulars themselves;* Hart *v.* Middleton, 2 Car. & K. 9; and therefore, where the particulars referred to a bill already delivered, in which credit was given for certain payments, it was held that this was not a case of admitting payments within the rule, and that payment should have been pleaded. Bosley *v.* Moore, 8 Dowl. 375. The admitted payment is put on the same footing as if there had been a plea of payment; but it cannot be taken as an admission as against the defendant with respect to any of the items in the entire account; Goatley *v.* Herring, 12 L. J. C. P. 32. See, also, Townson *v.* Jackson, 13 M. & W. 374; Turner *v.* Collins, 20 L. J. Q. B. 259. As by the rule it is unnecessary for the defendant to plead payment of any sum or sums of money admitted by the particulars to have been paid, a plea of payment in such cases will be taken to apply to the *balance* demanded; and this will be the case though some of the payments admitted have been made after action brought; Eastwick *v.* Harman, 6 M. & W. 13; 8 Dowl. 399; Alexander *v.* Porter, 1 Dowl. N. S. 832; Kenningham *v.* Alison, 2 Dowl. N. S. 658; Nosotti *v.* Page, 10 C. B. 643; and such a plea will be *primâ facie* supported by evidence in proof of any payments whatsoever; such evidence being liable to be rebutted by proof upon the part of the plaintiff that these payments are no other than those for which he has already given credit. Lamb *v.* Micklethwaite, 1 Q. B. 400; 9 Dowl. 531.

The above rule enables the plaintiff to give credit for a *set-off;* formerly he could not do so; Rowland *v.* Blakesley, 1 Q. B. 403. See, also, Morris *v.* Jones, 1 Q. B. 397; Townson *v.* Jackson, *supra;* Kilner *v.* Bailey, 5 M. & W. 382. See Form of Particulars, where debt paid after action. Nosotti *v.* Page, 10 C. B. 643.

In an action of tort for injury to the person, the court may, if there be reasonable ground for the application, order particulars to be given. Wicks *v.* Macnamara, 3 H. & N. 568. [Under the Massachusetts practice act, the court may in all cases order either party to file a statement of such particulars as may be necessary to give the other party, and the court, reasonable knowledge of the nature and grounds of the action or defence. Genl. Sts. c. 129, § 58. See Commonwealth *v.* Snelling, 15 Pick. 321; Turner *v.* Twing, 9 Cush. 515; Babcock *v.* Thompson, 3 Pick. 446.]

1. *Form of Particulars to be delivered with a Declaration which contains only the Common Money Counts, where the Writ has not been specially indorsed.* (*m*)

In the ——.

Between { A. B., Plaintiff, and C. D., Defendant.

This action is brought to recover the sum of £50 due [*or, if the plaintiff*

(*m*) It is irregular to deliver particulars if the writ has been specially indorsed, but this is waived by the defendant going to trial, and the plaintiff may then avail himself of his particulars. Fremont *v.* Ashley, 22 L. J. Q. B. 237.

gives the defendant credit for any payment or for a set-off, "£70 10s. the balance due"] from the defendant to the plaintiff, upon the following items of account:

1856, June 20.	To 50 sacks of flour, at 60s.	£150	0	0
June 21.	To 1 load meadow hay	5	0	0
		£155	0	0
	By cash paid by defendant to plaintiff [at different times] (*n*)	84	10	0
	Balance	£70	10	0

And the said plaintiff also seeks to recover the said balance upon accounts stated by the defendant. (*o*)

Above are the particulars of the plaintiff's demand in this action.

Dated this —— day of ——, A. D. 1858.

Yours, &c.

To Mr. X. Y., defendant's attorney [*or* "agent."] J. V., plaintiff's attorney.

[*If the full particulars cannot be comprised within three folios, then, instead of copying the debtor side of the account, say*, "for butcher's meat," *or, as the case may be*, "supplied between the —— day of ——, &c. and the —— day of," *&c. crediting as before the actual payments or set-off, and adding*, "Above are such particulars of the plaintiff's dem nd as can be comprised within three folios," *&c. as before.* See Rule 19 Hil. T. 1853.]

2. *Form of Particulars to be delivered with the Declaration which contains Special Counts as well as the common Money Counts.*

The following are the particulars of the plaintiff's demand in this action under the common money counts of the declaration in this cause [*as in preceding form*].

ACCOUNT — ACTION OF.

Obs. — A form of action rarely used. Strictly, it lay only against a bailiff or receiver, and required him to render an account of moneys received by him as such bailiff or receiver. But, being found a most convenient form of action, it was extended to cases where the person called upon to account was neither bailiff nor authorized receiver, if he had in any way received and retained money which it was his duty to hand over to the claimant. See Selw. N. P. Account. Henderson *v.* Eason, 12 Q. B. 987; in error, 17 Q. B. 701; Gorely *v.* Gorely, 1 H. & N. 144; 4 Ann. c. 16, s. 27.

ADMINISTRATORS. See "Executors," *post.*

AGENTS.

1. *By an Agent for Commission, &c.* (*p*)

Commencement, &c. as in Form 1, *ante, and then proceed as follows:*] for

(*n*) Or if plaintiff gives credit for a set-off, say, "And the plaintiff gives the defendant credit for a set-off which he has against him, amounting to £——, in respect of the following items: viz." (*setting them forth*).

(*o*) Effect of omitting this, see Hay *v.* Fisher, 2 M. & W. 722; Fisher *v.* Wainwright, 1 M. & W. 487.

(*p*) See, in general, [2 Chitty Contr. (11th Am. ed.) 803, and note (*c*) and cases cited]

the work, journeys, and attendances of the plaintiff, as the agent of the defendant, and otherwise, on his retainer, and for commission and reward payable to the plaintiff in respect thereof, and for [*money paid, if claimed and account stated, &c. as ante*, 33, 34, Form 1].

2. *Against an Agent for not accounting for Goods, &c. intrusted to him to sell.* (*q*)

Commencement, ante, 5.] For that the plaintiff, at the request of the defendant, delivered (*r*) to the defendant, and he received from the plaintiff, certain goods of the plaintiff, that is to say, [*&c. describing them generally,*] to be sold by the defendant for the plaintiff, for reward to the defendant [" upon the terms that the defendant should, when requested, render to him a true and just account of the sale of the said goods, and of the moneys arising from such sale, and deliver up to the plaintiff such of the goods as should remain unsold by the defendant, after a reasonable time from the sale of the said goods," (*s*)] and the defendant afterwards sold the same for and on account of the plaintiff, (*t*) for divers sums of money; *and although the plaintiff hath performed all conditions precedent on his part, and all things have happened and occurred, and all periods of time have elapsed to entitle the plaintiff to a performance of the defendant's contract, and to enable the plaintiff to maintain this action, (*u*) *yet the defendant hath not rendered to the plaintiff a just and

Story on Agency. The common count for work done, *ante*, 33, Obs. would suffice. See Carruthers *v.* Graham, 14 East, 578; Solly *v.* Weiss, 8 Taunt. 371; as to an *indebitatus* count for a *del credere* agent's commission. See the form of a special declaration in assumpsit, by an agent employed to buy goods and draw a bill on his principal for the amount, against the principal, for not indemnifying him against the bill. Huntley *v.* Sanderson, 1 Cr. & M. 467. [See form of declaration, pleas, and replication, in an action by an agent against his principal for not receiving goods purchased by principal's order. Ireland *v.* Livingstone, L. R. 2 Q. B. 99; S. C. 36 L. J. Q. B. 50. By a factor employed to sell goods according to description, against his employer for delivering goods not equal to the description, whereby the plaintiff was unable to fulfil his contract. Johnson *v.* Usborne, 11 Ad. & E. 549.] Evidence in action for broker's commission; Wilkinson *v.* Martin, 8 C. & P. 1; Burnett *v.* Boach, 9 C. & P. 620; [Rice *v.* Mayo, 107 Mass. 550; Erle C. J. in Green *v.* Bartlett, 14 C. B. N. S. 681, 685;] or ship-broker for commission; Hill *v.* Kitchin, 3 C. B. 299; Smith *v.* Boutcher, 1 Car. & K. 573; duty of insurance broker; Callendar *v.* Oelricks, 4 Bing. N. C. 58; commission recoverable by land agent; Murray *v.* Currie, 7 C. & P. 584. As to agent's right to commission or to sue on a *quantum meruit* where his authority has been revoked, or his principal has prevented him from earning his commission, see Prickett *v.* Badger, 1 C. B. N. S. 96; 26 L. J. C. P. 33; [Glen *v.* Davidson, 37 Md. 365, 367.] London brokers may sue for advances, although not licensed pursuant to 6 Ann. c. 16, but not for commission. Jessop *v.* Lutwyche, 10 Ex. 614; Smith *v.* Lindo, 4 C. B. N. S. 395. An unlicensed appraiser cannot recover commission. Palk *v.* Force, 12 Q. B. 666. [An agent was shareholder in a company, and was employed to sell land; he sold it to the company. Held not entitled to commission from the vendor. Salomons *v.* Pender, 3 H. & C. 639; S. C. 34 L. J. Ex. 95.]

(*q*) See form; Crosskey *v.* Mills, 1 Cr., M. & R. 298; and see *post*, Declarations in Case, title, "Agents." [Washington *v.* Eames, 6 Allen, 417, 419.]

(*r*) Or, if the goods were not *delivered* to the defendant, or in his power, allege that plaintiff *employed* defendant to sell, &c.

(*s*) These are the terms implied by law, as "whenever one acts as bailiff he promises to render an account;" Bull. N. P. 148; and the law will also imply a promise to account for such goods as are not sold, and to return them to plaintiff. Topham *v.* Braddick, 1 Taunt. 572. The words in brackets may be omitted, as it is not now necessary to allege promises which need not be proved. Com. Law Pro. Act, 1852, s. 49.

(*t*) This, *if traversed*, would require evidence of a sale by defendant; Elbourn *v.* Upjohn, 1 C. & P. 572; but after a reasonable time a sale will be presumed; Hunter *v.* Welsh, 1 Stark. 224; [Burnap *v.* Partridge, 3 Vt. 144.] If the sale by defendant cannot be proved, the breach should be for not accounting for the goods on being requested.

(*u*) This averment is framed under the provisions of the C. L. P. Act, 1852, s. 57. If the defendant denies the performance of any condition precedent, he must plead it

true or any account of the sale of the said goods, or of the moneys (*x*) arising from such sale, nor hath the defendant delivered up to the plaintiff any goods unsold as aforesaid [*add the common count for money had and received, if provable, and the account stated*].

3. *Against an Agent for not using due Care in selling Goods.*

Commencement, ante, 5.] For that the plaintiff, at the defendant's request, employed the defendant, for reward, to sell and dispose of certain goods, that is to say, sugar, for the plaintiff, and delivered the goods to the defendant, who received the same for that purpose; yet the defendant did not use due care or diligence in endeavoring to sell or selling and disposing of the said sugar for the plaintiff, (*y*) but sold and disposed of the same for less than could and might have been gotten and received for the same, and thereby also the said sugar became wasted and deteriorated in value, and the plaintiff incurred expenses, in warehousing and keeping the same, and is otherwise damnified. [*Conclude as before.*]

[3*a*. *Against an Agent employed to purchase Goods, for Negligence in accepting Goods not agreeing with the Description in the Contract.*

Zwilchenbart *v.* Alexander, 1 B. & S. 234.]

4. *Against an Agent employed to sell Goods, for not obeying the Orders of his Principal.*

Commencement, ante, 5.] For that the plaintiff, at the defendant's request, employed him, for commission and reward, to sell goods, that is to say, sugar, for the plaintiff, upon the terms that the defendant should use due care and diligence in obeying the lawful and reasonable orders of the plaintiff to be given by him to the defendant in regard to the sale of the said sugar; and the defendant received, and had such sugars in his possession and charge upon the terms and for the purpose aforesaid; and the plaintiff afterwards ordered and directed the defendant, as such agent, to sell the said sugar for the plaintiff, at a certain price, and not less, in case the same could be obtained by using due

specifically; see Rust *v.* Nottidge, 1 El. & Bl. 99, where an allegation or an averment of readiness and willingness of performance was sufficient without. This general averment is sufficient, if the condition has been dispensed with by the other party. See Cort *v.* The Ambergate &c. Ry. Co. 17 Q. B. 127; Manby *v.* Cremonini, 6 Ex. 808. See Grey *v.* Quin, 15 Q. B. 901. If a request is put in issue it must be proved. Topham *v.* Braddick, 1 Taunt. 572.

(*x*) It will be observed that this count does not charge the receipt or *non-payment* of the proceeds. The common count will be proper in order to recover the moneys *received* by defendant. Although no money may have been received so as to charge the agent with the *proceeds*, he may be liable for refusing to render an account of the sale; therefore the special count should be inserted when it can be maintained. An auctioneer who delivered goods without receiving the price from the purchaser, was held liable in the above form for the full produce of the goods: Brown *v.* Staton, 2 Chit. Rep. 353; but if the goods are sold on credit, with the consent of the seller, an action will not lie against the agent for not paying over the produce, unless the delay in the payment has been occasioned by the agent's neglect, or the transaction been closed. Varden *v.* Parker, 2 Esp. 710. The remittance of the proceeds is at defendant's risk, as it is his duty to pay over. Lucas *v.* Groning, 1 Stark. 392.

(*y*) If the defendant carelessly sold to an insolvent person, the form should be: "and then carelessly and improperly sold the said sugar for the plaintiff to a person in bad and embarrassed circumstances, without receiving the price of the said sugar, or taking security for the payment thereof; and the plaintiff, by reason of the premises, is likely to lose the price of the said sugar."

and reasonable care and diligence in that behalf, the same being a lawful and reasonable order and direction in that behalf, as the defendant well knew; and although the defendant could, by using due care and diligence, have obtained, and ought to have obtained, for the said sugar, the said price, yet the defendant did not use due care or diligence in obeying the said order and direction of the plaintiff, and disobeyed the same, and neglected to sell the said sugar according to such order and direction; and by reason thereof the plaintiff was forced to suffer the said sugar to be sold for a less price, and thereby the plaintiff sustained a great loss upon and in respect of the price and value of the said sugar, and the said sugar was also wasted and deteriorated in value, and the plaintiff incurred expenses in warehousing and keeping the same, and was otherwise injured.

5. *Against an Agent for disobeying Plaintiff's Directions in effecting a different Insurance on Goods shipped than the one required, and not giving Plaintiff Notice of the Failure to effect the latter Insurance.*

Callendar *v.* Oelricks, 4 Bing. N. C. 58. See a form in "case," Turpin *v.* Bilton, 5 M. & G. 455.

6. *Against an Agent for Negligence in effecting a Policy on Goods.*

Cahill *v.* Dawson, 3 C. B. N. S. 106; 26 L. J. C. P. 252.

7. *Against an Agent appointed to sell Goods at stated prices, for selling part at less prices; for not accounting for those sold; and not delivering up the remainder of the Goods.*

Commencement, ante, 5.] For that the plaintiff, at the defendant's request, employed him, for commission and reward, to sell certain chaises, gigs, and other carriages of the plaintiff, at and for certain prices respectively to be stated to the defendant by the plaintiff, and upon the terms that the defendant should render to him a just and true account of the sale thereof, and deliver to the plaintiff such of the chaises, gigs, and other carriages as should remain unsold by the defendant when requested; and although the defendant received divers chaises, gigs, and other carriages of and from the plaintiff upon the terms aforesaid, and the plaintiff stated the prices of the same respectively to the defendant, yet the defendant, without the consent of the plaintiff, sold some of the said chaises, gigs, and other carriages at much smaller prices than the prices so stated to him by the plaintiff, and the defendant hath not, although requested by the plaintiff so to do, rendered to the plaintiff a just and true or other account of the said sales, or delivered up to him the said plaintiff the residue of the said chaises, gigs, and other carriages which remained unsold, although a reasonable time from the delivery of the said goods to the defendant and the time of the said sales hath elapsed. [*Add money had and received, if defendant has not paid over what he has received, and also account stated and breach, ante,* 35, Form 2.]

8. *Against a Factor for selling contrary to Orders.*

Smart *v.* Sanders, 3 C. B. 380; 5 C. B. 895.

9. *Against an Auctioneer for selling on Credit.* (z)

Commencement, ante, 5.] For that the plaintiff delivered certain goods of the plaintiff to the defendant, and, at the defendant's request, retained the defendant as an auctioneer, to sell and dispose of the same for the plaintiff, for reward to the defendant, upon the terms that the defendant should not sell or dispose of the said goods otherwise than for ready money. And although the defendant accepted the said retainer, and received the said goods on the terms and for the purpose aforesaid, yet the defendant sold and disposed of the said goods on credit and otherwise than for ready money, without the plaintiff's consent, whereby the plaintiff hath hitherto lost and is likely wholly to lose the price and value of the said goods.

10. *Against a Commission Agent, who undertook to sell a Library for Plaintiff, and to be responsible for the proceeds of the sale in conjunction with the Auctioneer.*

Cholmondeley *v.* Payne, 8 C. & P. 482.

11. *Against the Captain of a Ship or an Agent at the suit of the Owner for not procuring a sufficient Cargo.*

Commencement, ante, 5.] For that the plaintiff was the owner of a vessel lying in the river Thames waiting for a cargo, to be conveyed therein for and upon freight and reward to be paid to the plaintiff, and bound from thence upon a certain voyage; and the plaintiff, at the request of the defendant, retained and employed him to obtain and procure a cargo on freight for the said vessel for reward to the defendant in that behalf, (a) and although the defendant accepted the said retainer, yet the defendant did not use due diligence, care, nor attention in and about the endeavoring to procure such cargo on freight for the said ship or vessel; but then so carelessly, negligently, and improperly behaved and conducted himself in and about the premises that by

(z) See form in Earl of Ferrers *v.* Robins, 2 Cr., M. & R. 152; and see a form in case against a broker. Boorman *v.* Brown, 3 Q. B. 510. An auctioneer cannot without express authority sell goods by auction on credit. Brown *v.* Staton, 2 Chit. R. 353. [Nor can he take a bill of exchange. Williams *v.* Evans, 35 L. J. Q. B. 112; S. C. 1 Q. B. 352. It is not usual to sell stock on credit. Henderson *v.* Barnewall, 1 Y. & J. 387; Wiltshire *v.* Sims, 1 Camp. 258. And accordingly a stock-broker, or auctioneer, has no authority to act in opposition to the custom in this respect without the express order of his principal. See Delafield *v.* Illinois, 26 Wend. 192; S C. 2 Hill, 159; Ives *v.* Davenport, 3 Hill, 374. If an agent or factor, authorized to sell only for cash, sells on credit, he becomes immediately responsible to his principal for the entire amount of the debt. Parsons *v.* Martin, 11 Gray, 115; Walker *v.* Smith, 4 Dallas, 389.] When customary to sell on credit, an agent has implied authority to sell on such terms. Scott *v.* Surman, Willes R. 406; Houghton *v.* Mathews, 3 B. & P 489; [De Lazard *v.* Hewitt, 7 B. Mon. 697; Brigham *v.* Bache, and Randolph *v.* Hollingsworth, cited 1 Yeates, 487; Lausatt *v.* Lippencott, 6 Serg. & R. 392; Delafield *v.* Illinois, 26 Wend. 192; S. C. 8 Paige, 527; 2 Hill, 159; Byrne *v.* Schwing, 6 B. Mon. 199. A factor, without special instructions to sell for cash alone and not on credit, may sell on credit for the period usual in the market. Forrestier *v.* Bordman, 1 Story, 43; Russell *v.* Phillips, 1 Gall. 360; Goodenow *v.* Tyler, 7 Mass. 36; Clark *v.* Van Northwick, 1 Pick. 343; Hapgood *v.* Batcheller, 4 Met. 573, 576; Greely *v.* Bartlett, 1 Greenl. 172; Van Alden *v.* Vanderpool, 6 John. 69; M'Kinstry *v.* Pearsall, 3 John. 319; Robertson *v.* Livingston, 5 Cowen, 473; Leverick *v.* Meigs, 1 Cowen, 645; Symington *v.* McLin, 1 Dev. & B. 291; M'Connico *v.* Curzen, 2 Call, 358; Hamilton *v.* Cunningham, 2 Brock. 331; Barksdale *v.* Brown, 1 Nott & McC. 517; Pourie *v.* Fraser, 2 Bay, 269.]

(a) See *ante*, 39, note (s).

reason thereof the plaintiff was obliged to dispatch the said vessel on her said intended voyage with a much less cargo or quantity of goods than the said vessel was capable of receiving and containing, and the defendant might and ought to have procured for the same on freight as aforesaid, before the said vessel sailed; and thereby the plaintiff lost freight and gains and profits which would otherwise have accrued to him.

12. *Second Count for not properly Stowing the Cargo.* (*b*)

And also, for that the plaintiff retained and employed the defendant at his request to superintend and direct the loading and stowing of the cargo of a certain ship of the said plaintiff, bound on a certain voyage, in and on board the said ship, for reward to the defendant; and although the defendant accepted and acted upon the said retainer, yet the defendant did not use due care or attention, skill or diligence in and about the loading and stowing the cargo of the said ship in and on board the same, but caused the same to be loaded and stowed on board the same in so careless, unskilful, and improper a manner, that by reason thereof the said ship could not hold as much freight or cargo as the same would otherwise have reasonably held; and the said plaintiff was compelled to dispatch the said ship on her said voyage with a smaller cargo than he otherwise would have had on board thereof, and was obliged to decline to receive on board goods which he otherwise would have taken on freight; and thereby lost gains and profits which would have arisen to him from having a full cargo in and on board of the said ship.

13. *Against a Shipping Broker, the Proprietor of a Shipping Office, for not forwarding Plaintiff's Goods by a Vessel proceeding abroad.*

Commencement, ante, 5.] For that the defendant was a shipping broker and agent, and the proprietor of an office for the reception of goods to be forwarded and sent by a vessel proceeding from the port of London to France, and for keeping such goods until the same should be delivered by the defendant, within a reasonable time, to the master or crew of such vessel, to be shipped on board for the purpose aforesaid, for reward to the defendant in that behalf; and thereupon the plaintiff, at the defendant's request, delivered to the defendant, at his office, certain goods, upon the terms that the same should be by the said defendant kept in the said office until the same should be delivered by him, within a reasonable time, to the master or crew of a vessel about to proceed from the port of London to France, for the purpose aforesaid, for reward to the defendant in that behalf; and although the defendant then received the said goods upon the terms aforesaid, and such vessel did, within a reasonable time, proceed from the port of London to France, and the defendant could and might and ought to have delivered the said goods to the master or crew of such vessel for the purpose aforesaid, and such reasonable time hath elapsed, yet the defendant did not, within such reasonable time, deliver or cause to be delivered the said goods to the master or crew of such vessel

(*b*) As to liability of captain for bad stowage where stevedore employed; Blakie *v.* Stembridge, 6 C. B. N. S. 894; [Swanston *v.* Garrick, 2 L. J. N. S. Ex. 255; as to the liability of the captain in other respects, on contracts relating to the employment, &c. of the ship, see 1 Chitty Pl. 41, note (*u*), and cases.]

for the purpose aforesaid, and wrongfully and carelessly kept and detained the same in his office for an unreasonable time; and the said goods were not carried in or by the said vessel, and perished, and became and were of no use or value, and the plaintiff thereby lost divers gains and profits from the sale thereof, and was and is otherwise damnified. [*If the defendant has been guilty of a conversion of the goods, a count for such conversion may be added.*] And the plaintiff claims £——.

14. *Against the Payee of a Bill of Exchange for not taking it up with Money furnished to him by the Plaintiff, whereby the Plaintiff was sued on the Bill.*

Commencement, ante, 5.] For that the plaintiff, at the defendant's request, delivered to him a certain sum of money, for the purpose of taking up and discharging, and upon the terms that the defendant would therewith take up and discharge when due, a certain bill of exchange, dated [*&c.*], and made and drawn by the plaintiff upon and accepted by one J. W., whereby the plaintiff required the said J. W. to pay, two months after the date thereof, to the said defendant or order, the sum of £——, value received, and which bill of exchange was indorsed by the defendant; and although the said bill of exchange afterwards became due and payable, whereof the defendant had notice, yet the defendant did not nor would take up or discharge the said bill of exchange when the same became due and payable, or at any time afterwards, but wholly refused and neglected so to do, and by reason thereof one X. Y., being the holder of the said bill, brought an action at law against the plaintiff here upon the said bill for the recovery of the amount thereof, and the plaintiff necessarily paid the amount of the said bill to the said X. Y., together with the costs of the said action, and thereby also the plaintiff incurred expenses in defending the said action. [*When a count for money had and received is maintainable, it should be added* (Ehrensperger *v.* Anderson, 3 Ex. 148; 18 L. J. Ex. 132; Buchanan *v.* Findlay, 9 B. & C. 738; Fletcher *v.* Marshall, 15 M. & W. 755) *and a count on an account stated.*]

[15. *Against an Agent for not using Due Care and Diligence in collecting Moneys.*

That in consideration that the plaintiff would employ the defendant as his agent to collect certain moneys owing from divers persons to the plaintiff, for reward to the defendant, the defendant promised the plaintiff to use due care and diligence in endeavoring to collect the same for the plaintiff; and the plaintiff employed the defendant accordingly for the purpose and on the terms aforesaid, and a reasonable time for the performance of the said promise by the defendant elapsed; yet the defendant did not use due care or diligence in endeavoring to collect the said moneys for the plaintiff, whereby the plaintiff has hitherto been deprived of the use of the said moneys, and is likely to lose the same.

Against an Agent employed to get Bills discounted, for not discounting or returning them; Mullett *v.* Hutchinson, 7 B. & C. 639; Alder *v.* Keighley, 15 M. & W. 116; *for not applying the proceeds according to his Instructions:* Hart *v.* Miles, 4 C. B. N. S. 371.

Against an Agent employed as Manager of a Bank, for negligently advancing Money on Bad Security. Ward *v.* Greenland, 19 C. B. N. S. 527.]

16. *Against an Agent on his Implied Promise that he had Authority from his Principal to sell Goods to the Plaintiff.* (*c*)

Commencement, ante, 5.] For that the defendant, by representing and warranting to the plaintiff that he, the defendant, was the agent of E. F. for the sale of certain goods, as such pretended agent of the said E. F. bargained and agreed with the plaintiff to sell to him on behalf of the said E. F. and sold to the plaintiff certain goods to be delivered to the plaintiff by the said E. F. on [*&c.*], at a certain price [*&c. stating the terms of the contract*]. And the plaintiff [*here aver performance of conditions precedent as ante,* 39, *between the* * *], yet the defendant was not the agent of the said E. F., and had no power or authority from the said E. F. to sell the said goods to the plaintiff, whereby the said agreement was void; and by reason thereof, and of the refusal of the said E. F. to deliver the said goods to the plaintiff on the terms aforesaid, the plaintiff was deprived of the benefit and advantages he would have derived and acquired from the completion of the said agreement, and incurred expenses in endeavoring to enforce the said agreement and in prosecuting an action against the said E. F. for the non-delivery of the said goods [*or* "in prosecuting a suit in equity against the said E. F. for the specific performance of the said agreement" (*d*)]. And the plaintiff claims £——.

(*c*) A person who contracts *as agent* cannot in general be sued as a principal *on the contract.* [Jenkins *v.* Hutchinson, 13 Q. B. 744, 752; Carr *v.* Jackson, 7 Ex. 382; Jefts *v.* York, 4 Cush. 371; S. C. 10 Cush. 392; Long *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 Mass. 461; Sherman *v.* Fitch, 98 Mass. 63; Kingman *v.* Kelsie, 3 Cush. 339; Harper *v.* Little, 2 Greenl. 14; Stetson *v.* Patten, 2 Greenl. 358; Ogden *v.* Raymond, 22 Conn. 385; McHenry *v.* Duffield, 7 Blackf. 41; Hopkins *v.* Mehaffy, 11 Serg. & R. 126; Abbey *v.* Chase, 6 Cush. 56, 57; Moor *v.* Wilson, 26 N. H. 432; Draper *v.* Massachusetts Steam Heating Co. 5 Allen, 338; Taylor *v.* Shelton, 30 Conn. 122; Sheffield *v.* Ladue, 16 Minn. 388; Duncan *v.* Niles, 32 Ill. 532.] But a person so contracting impliedly warrants that he has the authority of his pretended principal to enter into the contract; and if he has not such authority, is liable in damages to third parties who innocently contract with him — although he acted, *bonâ fide,* under a mistaken belief that he had such authority. Lewis *v.* Nicholson, 18 Q. B. 503; Collen *v.* Wright, 7 El. & Bl. 301; affirmed in error, 27 L. J. Q. B. 215; Randell *v.* Trimen, 18 C. B. 786; Simons *v.* Patchett, 7 El. & Bl. 568; [Godwin *v.* Francis, L. R. 5 C. P. 295; Richardson *v.* Williamson, L. R. 6 Q. B. 276; Smout *v.* Ilbery, 10 M. & W. 10; Polhill *v.* Walter, 3 B. & Ad. 114; Pow *v.* Davis, 1 B. & S. 220; Spedding *v.* Nevell, L. R. 4 C. P. 212; Taylor *v.* Shelton, 30 Conn. 128; Shaw C. J. in Jefts *v.* York, 10 Cush. 393, 395; Baltzen *v.* Nicolay, 53 N. Y. 469; Kingman *v.* Kelsie, 3 Cush. 341; Long *v.* Colburn, 11 Mass. 97; Webster *v.* Larned, 6 Met. 528; Feeter *v.* Heath, 11 Wend. 477; Meech *v.* Smith, 7 Wend. 315; White *v.* Madison, 26 N. Y. 117, 124; Layng *v.* Stewart, 1 Watts & S. 222; Beattie *v.* Lord Ebury, L. R. 7 Ch. Ap. 777; Royce *v.* Allen, 28 Vt. 234; Dusenbury *v.* Ellis, 3 John. Cas. 70; Clark *v.* Foster, 8 Vt. 98; Sinclair *v.* Jackson, 8 Cowen, 543; Bank of Hamburg *v.* Wray, 4 Strobh. 87; Johnson *v.* Smith, 21 Conn. 627; Keener *v.* Harrod, 2 Md. 63. The agent, in this event, would be liable in a special action on the case. Jefts *v.* York, *supra;* Bartlett *v.* Tucker, 104 Mass. 336; Noyes *v.* Loring, 55 Maine, 408; McCurdy *v.* Rogers, 21 Wisc. 197, 202.] And if he *fraudulently* misrepresent the existence or extent of his authority, he is liable to an action in tort for the deceit. [Jervis C. J. in Randell *v.* Trimen, 18 C. B. 786, 794; Cherry *v.* Colonial Bank of Australasia, L. R. 3 P. C. 24.]

(*d*) As to these damages, see Collen *v.* Wright, *ubi supra.* [The measure of damages in this action is the loss which the plaintiff has sustained, by reason of the supposed contract not being binding; thus, where the contract was for the sale of a ship at a certain price, which the plaintiff afterwards resold at a less price, the measure of damages was the difference in price. Simons *v.* Patchett, 7 El. & Bl. 568. And where the contract was for the purchase of goods, the measure of damages was the difference between the contract price and the value of the goods, under the same circumstances. Hughes *v.* Graeme, 33 L. J. Q. B. 335. The

17. *Against a del credere Agent, on his Guaranty.* (*e*)

Commencement, ante, 5.] For that the plaintiff, at the defendant's request, retained and employed him, for commission and reward to him in that behalf, to sell and dispose of certain goods for the plaintiff, upon the terms that the defendant should be responsible to him for the price of the said goods, if sold, when the same should become due on such sale; and the plaintiff delivered the said goods to the defendant, and the defendant accepted the said retainer, upon the said terms, and sold and disposed of the said goods for the plaintiff to one E. F. for a large sum of money; and although the credit and time of payment for the price of the said goods by the said E. F. hath elapsed, and the plaintiff [*here aver performance of conditions precedent, as ante*, 39, *between the* * *], yet the said E. F. did not pay, nor hath the defendant paid to the plaintiff, the price of the said goods or any part thereof. [*If defendant has received the price, add a count for money had and received, and on accounts stated, and conclude:*] And the plaintiff claims £——.

[*Like counts.* Randell *v.* Trimen, 18 C. B. 786; Simons *v.* Patchett, 7 El. & Bl. 568.

Count against a broker on an implied warranty of authority to sell goods to the plaintiff. Hughes *v.* Graeme, 33 L. J. Q. B. 335.

Count against an agent on a warranty that he had authority to let certain premises to the plaintiff, who was afterwards ejected therefrom by the owner Pow *v.* Davis, 1 B. & S. 220.]

AGISTMENT. (*f*)

1. *Commencement, &c. as in* Form 1, *ante*, 33, *and then proceed as follows:*] for the agistment, feeding, and taking care of horses and cattle by the

plaintiff is entitled to recover as special damages the costs of an unsuccessful action against the alleged principal on the contract; Randell *v.* Trimen, 18 C. B. 786; and see Richardson *v.* Dunn, 8 C. B. N. S. 655; or of an unsuccessful suit for specific performance; Collen *v.* Wright, 7 El. & Bl. 391; if such action or suit would have been a valid and appropriate remedy against the principal but for the want of authority in the agent to bind him. Hughes *v.* Graeme, 33 L. J. Q. B. 335; Pow *v.* Davis, 1 B. & S. 220. The *liability* to pay such costs is sufficient to sustain the claim for special damage; Randall *v.* Roper, 1 El., Bl. & El. 84; Spark *v.* Heslop, 1 El. & El. 563; Josling *v.* Irvine, 6 H. & N. 512, if properly charged in the declaration as a liability to pay and not as a payment made; Pritchet *v.* Boevey, 1 Cr. & M. 775; the allegation that the plaintiff had been "put to expenses," &c. was held sufficient to charge a liability though not paid. Richardson *v.* Chasen, 10 Q. B. 756. Where the contract made with the alleged principal is defective in form, the plaintiff cannot recover the costs of suing upon it; as where the plaintiff was let into possession of premises by the defendant under a supposed authority to let them, but upon a mere verbal agreement for a seven years' lease, and was afterwards sued in ejectment by the owner, he could not recover against the supposed agent the costs of defending the ejectment. Pow *v.* Davis, 1 B. & S. 220; Spedding *v.* Nevell, L. R. 4 C. P. 212; Godwin *v.* Francis, L. R. 6 C. P. 295.]

(*e*) See 1 Chitty Contr. (11th Am. ed.) 275, and notes; Story on Agency; Smith's Mercantile Law, 416; Morris *v.* Cleasby, 4 M. & Sel. 566. It is not necessary that his engagement should be in writing. Couturier *v.* Hastie, 8 Ex. 40; 9 Ex. 102; 5 H. L. Cas. 673; Wickham *v.* Wickham, 2 K. & J. 478; [Tanvaco *v.* Lucas, 1 El. & Bl. 581; Swan *v.* Nesmith, 7 Pick. 220; Wolff *v.* Koppel, 5 Hill, 458; S. C. 2 Denio, 368; Bradley *v.* Richardson, 23 Vt. 721; Sherwood *v.* Stone, 4 N. Y. 265; Lewis *v.* Brehme, 33 Md. 412; Cartwright *v.* Greene, 47 Barb. 9, 16; Bramble *v.* Spiller, 18 W. R. 316; S. C. *nom.* Bramwell *v.* Spiller, 21 L. T. N. S. 672; Ex parte White, L. R. 6 Ch. Ap. 397, 403; Titcomb *v.* Seaver, 4 Greenl. 542; Hosmer C. J. in Redfield *v.* Davis, 6 Conn 448; Holbrook *v.* Wight, 24 Wend. 169.]

(*f*) If the defendant had *possession* of the *land*, the count should be for the use of land, &c. See a form for horse meat and stabling, *post*. The duty of an agister of cattle is merely to take care of them, not "to

plaintiff, for the defendant, at his request, on land of the plaintiff [*account stated, and conclusion, as ante*, 33, 34.]

[2. *Indebitatus Count for the use of Pasture.*

Money payable by the defendant to the plaintiff, for the defendant's use, by the plaintiff's permission, of pasture land of the plaintiff, and the eatage of the grass growing thereon for the depasturing of cattle.

A like count. Sutton *v.* Temple, 12 M. & W. 52.

3. *Against an Agister of Cattle for losing a Horse.*

That in consideration that the plaintiff delivered to the defendant a horse of the plaintiff, to be agisted, kept, and taken care of by the defendant for the plaintiff, for reward to the defendant, the defendant promised the plaintiff to agist, keep, and take care of the said horse for the plaintiff; yet the defendant did not keep and take care of the said horse for the plaintiff, whereby the same was and is lost to the plaintiff.]

ANNUITY.

[*On an Annuity Deed for Arrears.* (*g*)

That the defendant, by deed (*h*) dated the —— day of ——, A. D. ——, granted to the plaintiff an annuity or yearly sum of $——, payable half-yearly on the —— day of ——, and the —— day of ——, in every year, from the —— day of ——, A. D. ——, for and during the life of the plaintiff, and thereby covenanted with the plaintiff to pay the same to the plaintiff at the times and in the manner aforesaid; of which said annuity $——, being the amount of ——, half-yearly payments thereof, is due and unpaid.

Like counts. Randall *v.* Rigby, 4 M. & W. 130; Humphreys *v.* Jenkinson, 8 Ex. 684; Howkins *v.* Bennet, 7 C. B. N. S. 507.

On a covenant in a deed of separation between husband and wife, to pay an annuity to the wife's trustee. Baynon *v.* Batley, 8 Bing. 256; Goslin *v.* Clark, 12 C. B. N. S. 681; Kendall *v.* Webster, 1 H. & C. 440.]

APOTHECARIES.

Obs. — The right to recover the charges of apothecaries and other medical practitioners has been materially altered by the medical act, 21 & 22 Vict. c. 90; s. 15 provides for the registration of physicians, surgeons, and apothecaries; s. 31 enacts that "every person registered under this act shall be entitled,

redeliver them." Corbett *v.* Packington, 6 B. & C. 268. If he leave the gate of his field open, and the cattle stray out and are stolen, he must make good the loss. Broadwater *v.* Blot, Holt N. P. C. 541; [1 Chitty Pl. 70, 169; so, in any case, where the cattle are injured or lost by the negligence or carelessness of the agister. Rey *v.* Toney, 24 Miss. (3 Jones) 600; McCarthy *v.* Wolfe, 40 Misso. 520. See Sinclair *v.* Pearson, 7 N. H. 219]

(*g*) Where there is an annuity *bond* it may be as well to proceed thereon in order to get a judgment for the penalty, and issue a *scire facias* for subsequent arrears as they from time to time accrue due. *See post*, "Bond." But where the plaintiff wishes to proceed expeditiously, an action on the *deed* is preferable, as the execution of a writ of inquiry is thus avoided.

(*h*) It would seem that this description of the deed is sufficient without alleging it to have been made *inter partes*; or that it was sealed with the defendant's seal. No profert or excuse for profert need now be made. Com. Law P. Act, 1852 s. 55.

Obs. according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of her majesty's dominions, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicines or other medical or surgical appliances rendered or supplied by him to his patients. Provided always that it shall be lawful for any college of physicians to pass a by-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any court of law; and thereupon such by-law may be pleaded in bar to any action for the purpose aforesaid commenced by any fellow or member of such college." By s. 32, "After the 1st day of January, A. D. 1859 (extended to 1st July, 1859, by 22 Vict. c. 21), no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, *unless he shall prove upon the trial* that he is registered under this act." The mode of proof of registration is pointed out by s. 27, which provides that a book to be called the "Medical Register" is to be printed and published by the registrar every year; and a copy of the Medical Register for the time being, purporting to be printed and published as aforesaid, shall be evidence in all courts, and before all justices of the peace, and others, that the persons therein specified are registered according to the act; and the absence of the name of any person from the register is evidence, until the contrary be made to appear, that such person is not registered. The act does not affect chemists, druggists, or dentists, and duly licensed apothecaries in Ireland, so far as the same extends to selling, compounding, or dispensing medicines.

It would seem that the act is not retrospective; and that in an action to recover an apothecary's charges incurred before the act came into operation, proof of *registration* under the act is not necessary; but an apothecary, when suing for a claim which accrued to him prior to the late act, must *prove at the trial* that he was in practice as such on 1st August, 1815, or produce a certificate granted to him by the Apothecaries' Company, or he cannot recover any charges, not even for the phials in which medicines were supplied; Steed *v.* Henley, 1 C. & P. 574; though there be no plea denying that he is an apothecary. 55 Geo. 3, c. 194, s. 21, & 6 Geo. 4, c. 133, s. 5. The certificate purporting to be sealed with the seal of the society, proves itself; 14 & 15 Vict. c. 99, s. 8; and if granted to a person of the same name as plaintiff, is *primâ facie* proof of plaintiff's right to practise. Simpson *v.* Dismore, 9 M. & W. 47.

An apothecary may recover for both medicines and attendances if the united charges are reasonable; Morgan *v.* Hallen, 8 Ad. & E. 489; and although supplied to a patient in London, although he has only a country certificate; Young *v.* Geiger, 6 D. & L. 337; 6 C. B. 541; unless such defence be specially pleaded. Ib. But if an apothecary assume the character of a physician, and induce his patients to believe that he has a diploma, he cannot recover. Lipscombe *v.* Holmes, 2 Camp. 441. A physician cannot recover except upon an express contract; Veitch *v.* Russell, 1 Car. & M. 362; unless being also a surgeon, he attend his patients and contract in that character, and not as a physician, but as a surgeon; Little *v.* Oldacre, 1 Car. & M. 370; but, a physician may now, if registered under the late act, recover his fees, unless the college which has granted him his diploma has passed a by-law under the 15th section of the act, debarring him from suing. A surgeon, unless licensed by the College of Surgeons, could not practise or recover for work done as such, within London or seven miles thereof; 3 Hen. 8, c. 11, s. 1; Cundall *v.* Dawson, 4 C. B. 376; D'Allax *v.* Jones, 26 L. J. Ex. 79; 2 Jur. N. S. 979; and, if not also an apothecary, cannot recover for medicines supplied unless they were ancillary to a *surgical* case, and therefore not for medicines in a case within the province of an apothecary, as typhus fever. Allison *v.* Haydon 4 Bing. 616; Wagstaff *v.* Sharpe, 3 M. & W. 522; Proud *v.* Mayall, 3 D. & L. 531; Apothecaries Company *v.* Lotinga, 2 Moo. & Rob. 495; Simpson *v.* Rolfe, 4 Tyr. 325. As to the rights of *pharmaceutical chemists*, see 15 & 16 Vict. c. 56; Reg. *v.* Pharmaceutical Society, 5 El. & Bl. 138. [Where no restraint is imposed by statute, physicians and surgeons, in the

Obs. American states, have the same right as others to the benefit of the principle of the common law, that when services are performed on request, and no special agreement is made in reference to them, the law raises an implied promise to pay so much as the person performing them deserves to have, and an action lies upon such implied promise. Hewitt *v.* Wilcox, 1 Met. 154; Towle *v.* Marrett, 3 Greenl. 22; Bailey *v.* Mogg, 4 Denio, 60; Warren *v.* Saxby, 12 Vt. 146; Judah *v.* McNamee, 3 Blackf. 269; M'Pherson *v.* Cheadell, 24 Wend. 15; M'Clallen *v.* Adams, 19 Pick 333; Mooney *v.* Lloyd, 5 Serg. & R. 416. In some states a license from some designated body or society has been made necessary to the right of a physician to recover for his fees and services, and in such cases it has been held that an unlicensed physician cannot recover for medical attendance, though he administers medicines for which he has obtained a patent; Smith *v.* Tracy, 2 Hall, 465; Jordan *v.* Dayton, 4 Ohio, 294; Thompson *v.* Staats, 15 Wend. 395; or uses only vegetable remedies of domestic origin. Bailey *v.* Mogg, 4 Denio, 60. See Alcott *v.* Barber, 1 Wend. 526.]

By a Surgeon and Apothecary for his Bill. (*i*)

Commencement as in Form 1, *ante*, 5, *and then proceed:*] for the work, care, and attendance of the plaintiff, by him done and bestowed as *a surgeon* (*k*) and apothecary, for the defendant, at his request; and also for medicines and other necessary things provided and applied by the plaintiff for the defendant, at his request. [*Add account stated and conclusion, as ante*, 5, Form 1.]

[See form of declaration against a surgeon for negligence, *post*, "Declarations in Tort."]

APPRAISERS, *post*, "Auctioneers."

APPRENTICES.

Obs. — See forms of declarations in covenant upon indentures of apprenticeship, 2 Chit. Pl. 7th ed. 370; Hughes *v.* Humphreys, 6 B. & C. 680. As to the law upon this subject, see Burn's J.; Harr. Ind. and Fisher's Ind. tit. "Apprentices." The apprentice, if under age, cannot be sued upon the deed. Gilbert *v.* Fletcher, Cro. Car. 179. See Chit. jr. Cont. Index *in voc.* The common form of the indenture is not *inter partes*. It begins: "This indenture witnesseth, that, &c. binds himself," &c. and ends with a clause that "for the true performance of the indenture, each party binds himself to the other," &c. This clause constitutes a covenant, and binds the parties executing the deed according to their relative positions; and if the father of the apprentice execute the deed, he is liable thereon for any misconduct of the apprentice in violation of its provisions, although it be not expressed in terms in the prior part of the instrument that the father thereby covenants with the master, &c. Branch *v.* Ewington, 2 Dougl. 518; Cumming *v.* Hill, 3 B. & Ald. 59; [Whitley *v.* Loftus, 8 Mod. 190.] The common indenture often runs, that the master covenants (not stating *with whom*) to instruct the apprentice, &c.; and it seems that in such case the latter alone (if a party to the deed) should be the plaintiff in an action against the master for a breach of his covenant, although the father be also a covenanting party. See a form by an apprentice against his master, to whom he had been assigned, for not instructing him, &c. Morris *v.* Cox, 2 M. & G. 659. A contract between master and servant is not necessarily a contract of apprenticeship because it

(*i*) See the form, Ring *v.* Roxbrough, 2 B. & J. 8 41; 2 Tyr. 468, and Obs. on the general issue, *post*, "Apothecaries." The common count for work and materials would be sufficient. *Ante*, Obs. "Work," &c. p. 33.

(*k*) Omit this, if the plaintiff be not a surgeon, or if he attended merely as an apothecary.

Obs. contains a stipulation about being "taught" or "instructed" in his work. Reg. *v.* Northowram, 2 New Sess. Cas. 437; 10 Jur. 1003. If the master abandon part of the trade he covenanted to teach, he cannot maintain an action for desertion by the apprentice against the father on his covenant, even though the father consented by parol to the discontinuance of the abandoned trade. Ellen *v.* Topp, 6 Ex. 424. The covenants in a deed of apprenticeship are independent covenants, and misconduct of *the apprentice* does not justify the master in putting an end to the contract. Phillips *v.* Clift, 4 H. & N. 168; 28 L. J. Ex. 153; [Winstone *v.* Linn, 1 B. & C. 460. It is a good defence to an action for not teaching and providing for the apprentice, that he quitted the service without leave; Hughes *v.* Humphreys, 6 B. & C. 680; or that he refused to be taught; Raymond *v.* Minton, L. R. 1 Ex. 244. As to the right to a return of the premium on the death of the master or apprentice, see Therman *v.* Abell, 2 Vern. 64; Ex parte Prankerd, 3 B. & Ald. 257; In re Thompson, 1 Ex. 864; Hirst *v.* Tolson, 2 Mac. & G. 134; Craven *v.* Stubbins, 24 L. J. C. 126.]

[1. *By an Apprentice against the Master, on the Indenture of Apprenticeship.*

That by an indenture of apprenticeship, dated the —— day of ——, A. D. ——, (*l*) the plaintiff put himself apprentice to the defendant, to learn the defendant's trade and business of a ——, and with him, after the manner of an apprentice, to serve from the —— day of ——, A. D. ——, for the term of —— years thence next following; and the defendant thereby covenanted with the plaintiff to instruct the plaintiff in his the defendant's said trade and business, by the best means that he could, and to provide for the plaintiff sufficient meat, drink, lodging, and all other necessaries, during the said term; and after the making of said indenture, the plaintiff entered into the said service of the defendant, with him after the manner of an apprentice, to serve for the term aforesaid, and has always performed all things in the said indenture contained on his part to be performed; yet the defendant, after the making of the said indenture, and during the said term, did not nor would instruct the plaintiff in his the defendant's said trade and business, nor did nor would provide for the plaintiff sufficient meat, drink, lodging, (*m*) and other necessaries.

Like counts by the father of the apprentice. Winstone *v.* Linn, 1 B. & C. 460; Hughes *v.* Humphreys, 6 B. & C. 680; Dunn *v.* Sayles, 5 Q. B. 685; Phillips *v.* Clift, 4 H. & N. 168; Raymond *v.* Minton, L. R. 1 Ex. 244.

2. *By the Master against the Father of the Apprentice on the Indenture of Apprenticeship.*

That by an indenture of apprenticeship, dated the —— day of ——, A. D. ——, and made between G. B., therein described as the son of the defendant of the first part, the defendant of the second part, and the plaintiff of the third part, the said G. B., with the consent of the defendant, put himself apprentice to the plaintiff to learn his trade and business of a ——, and with him after the manner of an apprentice, to serve from the —— day of ——, A. D. ——, for the term of —— years thence next following; and the defendant thereby

(*l*) No profert or excuse for it is necessary; C. L. P. Act, 1852, s. 55; describing the agreement between the parties to be by *indenture*, sufficiently shows it was by *deed*. Phillips *v.* Clift, 4 H. & N. 168.

(*m*) As to when a master can recover for board and lodging for a *pupil* before he is actually apprenticed, see Attwaters *v.* Courtney, 1 Car. & M. 51. See, also, as to washing, Blackburne *v.* Davis, 1 C. & K. 167.

covenanted with the plaintiff, amongst other things, that the said G. B. the plaintiff faithfully should serve, his secrets keep, his lawful commands obey and do, and that he should not absent himself from the plaintiff's service day or night unlawfully, but in all things as a faithful apprentice should behave himself towards the plaintiff and all his during the same term; and after the making of the said indenture, the plaintiff received the said G. B. into the plaintiff's said service as such apprentice for the term aforesaid, and has always performed and been ready and willing to perform all things in the said indenture on his part to be performed; yet the said G. B., after the making of the said indenture and during the said term unlawfully absented himself from the service of the plaintiff. [*State the breach according to the fact in the terms of the covenant broken.*]

Like counts. Cuming *v.* Hill, 3 B. & Ald. 59; Ellen *v.* Topp, 6 Ex. 424; Millership *v.* Brookes, 5 H. & N. 797; Cox *v.* Muncey, 6 C. B. N. S. 375.

Count against a surety, a party to the indenture of apprenticeship, for non-payment of the premium. Popham *v.* Jones, 13 C. B. 225.]

ARBITRATORS.

By an Arbitrator for his Fees, &c. for making an Award.

Obs.—The common counts for work and materials and for money paid for the stamps, &c. would be sufficient. *Ante*, 33, 34. In general an arbitrator does not part with the award until he has been paid. [See Butman *v.* Abbot, 2 Greenl. 363.] If there be a prior or subsequent express promise to pay an arbitrator, he may maintain an action to recover his fees. Hoggins *v.* Gordon, 3 Q. B. 466–474; Hardres *v.* Prowd, Styles, 465. But in the absence of such promise, *semble*, he cannot do so. Viranny *v.* Warne, 4 Esp. 47; Swinford *v.* Burn, 1 Gow, 7. If the arbitrator be a barrister it is clear he cannot recover in the absence of an *express contract* to pay him if he be employed in his professional character. The arbitrator should not fix his own fees by the award, Re Coombes, 4 Ex. 839, unless power be given him by the submission. Roberts *v.* Eberhardt, 3 C. B. N. S. 482; [Threlfall *v.* Fanshawe, 19 L. J. Q. B. 334; Parkinson *v.* Smith, 30 L. J. Q. B. 178.] The reasonableness of the fee fixed by him may be referred to the decision of an officer of the court. Miller *v.* Robe, 2 Taunt. 461; Fitzgerald *v.* Graves, 5 Taunt. 342. If he compel payment of an excessive sum for taking up his award, the excess may be recovered back from him as money had and received. Barnes *v.* Braithwaite, 2 H. & N. 569. As to the right of a lay arbitrator to charge for professional assistance in preparing his award, see Galloway *v.* Keyworth, 15 C. B. 288. [In the American states, arbitrators and referees have the same right to recover payment for their services as other persons. Hinman *v.* Hapgood, 1 Denio, 188; Hassinger *v.* Diver, 2 Miles, 411; Butman *v.* Abbot, 2 Greenl. 361. If there are several referees, a separate action lies for each. Butman *v.* Abbot, 2 Greenl. 361; Hinman *v.* Hapgood, 1 Denio, 188. In Butman *v.* Abbot, *supra*, it is held that the action must not be brought against both parties to the suit jointly, but only against the party making the demand.]

[1. *Count on arbitration bond conditioned to perform the award.* Welch *v.* Ireland, 6 East, 613; Ferrer *v.* Oven, 7 B. & C. 427.

2. *Count for breach of an agreement contained in a contract to refer to arbitration all disputes which might arise as to the contract.* Livingston *v.* Ralli, 5 El. & Bl. 132; Beckh *v.* Page, 5 C. B. N. S. 708. *For refusing to choose an arbitrator.* Marsack *v.* Webber, 6 H. & N. 1. *For refusing to appoint a*

valuer to ascertain damages in pursuance of an agreement. Thomas *v.* Frederics, 10 Q. B. 775. *For revoking the arbitrator's authority.* Warburton *v.* Storr, 4 B. & C. 103.]

ARREST.

1. *Declaration against a Sheriff for carrying Plaintiff to Prison within Twenty-four Hours after Arrest upon Mesne Process.*

See 32 G. 2, c. 28, ss. 1–12. See the forms Silk *v.* Humfrey, 7 C. & P. 14; and see Dewhurst *v.* Pearson, 1 Dowl. 664; and Barsham *v.* Bullock, 10 Ad. & E. 23; Gordon *v.* Laurie, 9 Q. B. 60.

2. *See Form against a Bailiff for Extortion,*

Plevin *v.* Prince, 10 Ad. & E. 594, which may easily be adapted to the present mode of pleading. The 7 W. 4 and 1 Vict. c. 55, gives the court the power of punishing summarily; and see Curlewis *v.* Bird, 1 Dowl. N. S. 752.

3. *Form against a Sheriff for refusing to accept Bail.*

Evans *v.* Moseley, 2 Cr. & M. 496; 2 Saund. 61 *b*, *c*; Matson *v.* Booth, 5 M. & S. 223.

ASSIGNEES OF A BANKRUPT.

Obs. — By the bankrupt law consolidation act, 12 & 13 Vict. c. 106, s. 153, assignees, with the leave of the court, may institute or defend actions or suits which the bankrupt might have commenced, prosecuted, or defended. *Ante*, 8, note (*i*). They may also compound for debts, and submit disputes to arbitration. Assignees cannot be sued *as such*. If they enter into contracts or engagements, they become personally liable, and must be sued accordingly. They cannot be sued at law for dividends. Bank. Law Consol. Act, s. 190. [See bankruptcy act, 1861, §§ 116 and 117, as to choice and appointment of creditors' assignee. To what time title of assignees relates back. Stevenson *v.* Newnham, 13 C. B. 285. Vesting of cause of action in assignees. Hodgson *v.* Sidney, L. R. 1 Ex. 313. Proof of title. Kelly *v.* Morray, L. R. 1 C. P. 667. Under the United States bankrupt law it is provided that the assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. And the assignee may be admitted to prosecute or defend suits, by or against the bankrupt, pending at the time of the adjudication of bankruptcy. Rev. Sts. U. S. p. 981, § 5047. Leave of the court is not required. So the assignee may, under the direction of the court, compound and settle controversies respecting demands against the estate of the bankrupt, or of debts due to it; and may submit any such controversy to arbitration. Rev. Sts. U. S. p. 983, § 5061. A copy, duly certified by the clerk of the court, under the seal thereof, of the assignment, is made conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt. Rev. Sts. U. S. p. 981, § 5049.]

1. *For Goods sold, &c. by the Bankrupt, alleging the Debt to have accrued to him before Bankruptcy, and Account stated with the Assignees.* (*n*)

Commencement as ante, 8, Form 7, *and see notes there.*] For money pay-

(*n*) This, and the two following counts, will be allowed together. Williams *v.* Vines, 14 L. J. Q. B. 50; Lackington *v.* Vines, 1 D. & L. 710, *semble*, 1 Chit. Arch. 213.

able by the defendant to the said E. F. before he became a bankrupt, for goods sold and delivered by the said E. F. before he became a bankrupt to the defendant, and for [*state any other debts in the same way, see ante*, 33, Form 1, *taking care to write throughout the name of the bankrupt*, E. F., *for* "the plaintiff." (*o*) *If it is probable that a promise to the assignees can be proved, here insert the next form as a second count;* (*p*) *if not proceed thus:*] And also for money payable by the defendant to the plaintiffs, as assignees as aforesaid, for money found to be due from the defendant to the plaintiffs as assignees as aforesaid, on accounts stated between the defendant and the plaintiffs, as assignees as aforesaid. And the plaintiffs, as assignees as aforesaid, claim £——.

2. *Second Count, alleging the Debt to be payable to the Assignees for a consideration moving from the Bankrupt.* (*q*)

And the plaintiffs also sue the defendant for money payable by the defendant to the plaintiffs, as assignees as aforesaid, for goods sold and delivered by the said E. F. before his bankruptcy to the defendant [*stating any other debts in the same way*], and for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, upon accounts stated between the plaintiffs, as assignees as aforesaid, and the defendant. And the plaintiffs, as assignees as aforesaid, claim £——.

3. *By Assignees on Causes of Action arising after the Bankruptcy.* (*r*)

Commencement as before.] For money payable by the defendant to the plaintiffs, as assignees as aforesaid, for goods sold and delivered by the plaintiffs, as assignees as aforesaid, to the defendant; and for money paid by the plaintiffs, as assignees as aforesaid, for the defendant at his request; and for money received by the defendant for the use of the plaintiffs, as assignees as aforesaid; *and for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, upon accounts stated between the defendant and the plaintiffs, as assignees as aforesaid. And the plaintiffs, as assignees as aforesaid, claim £——.

4. *By the Assignees of a Bankrupt and the Solvent Partner of the Bankrupt.*

Commencement as ante, 9, Form 8, *and see the notes thereon*, and Lewis *v.*

(*o*) The above count may be joined with both or either of the forms, 2, 3. An assignee cannot join with the above a count for a debt due to him in his individual or private capacity. Richardson *v.* Griffin, 5 M. & Sel. 297.

(*p*) It is a rule in actions by executors, administrators, assignees of bankrupts, &c. that a promise after the death of the testator or intestate, or after the bankruptcy, cannot be received in evidence unless there be a count charging such a promise to have been made to the plaintiff in his representative capacity; Sarell *v.* Wine, 3 East, 409; Powley *v.* Newton, 6 Taunt. 453; Hickman *v.* Walker, Willes R. 27; Pittam *v.* Forster, 1 B. & C. 248; and as the words "money payable" are in substitution of the old form laying the debt as the consideration for the promise, the form 2 would seem proper. It would also be applicable where the goods were sold on a credit, which had not expired at the time of the bankruptcy. It is often highly important to prove a promise or admission, or part payment to the plaintiff in such capacity, to obviate the effect of the statute of limitations, &c.

(*q*) When proper to insert this count, *supra*, note (*p*).

(*r*) This count may be joined with both or either of the two preceding forms. Richardson *v.* Griffin, 5 M. & Sel. 297. When assignees can sue for rent due after bankruptcy, see Graham *v.* Allsop, 3 Ex. 186.

Edwards, 7 M. & W. 300]. For money payable by the defendant before the said O. P. became a bankrupt, to the said A. B. and the said O. P. for goods sold and delivered by the said A. B. and the said O. P. to the defendant, and for [*proceed in the same manner with other causes of action. See ante*, 33, Form 1, *taking care to write* "the said A. B. and the said O. P." *for* "the plaintiff." *If necessary, add a count claiming money payable by the defendant to A. B. and the other plaintiffs as assignees for goods sold, &c. by A. B. and O. P. before the bankruptcy, and an account stated by the defendant with A. B. and the other plaintiff as assignees. Conclude as ante*, 10, Form 8.]

5. *By the Assignees of a Bankrupt for not giving an Acceptance for Goods sold by the Bankrupt before the Bankruptcy.*

Groom *v.* West, 8 Ad. & E. 758.

6. *By Assignees on a Contract partly executed by the Bankrupt to deliver Linseed at Odessa on Special Terms.*

Gibson *v.* Carruthers, 8 M. & W. 321.

7. *For not delivering Railway Shares to Assignees, the Defendant having contracted to sell them to the Bankrupt.*

Lawrence *v.* Knowles, 5 Bing. N. C. 400.

8. *Against Assignees on a Contract made by the Bankrupt and adopted by them after the Bankruptcy.*

Twemlow *v.* Askey, 6 Dowl. 597.

BY THE ASSIGNEES OF AN INSOLVENT DEBTOR.

As to the rights of Assignees of Insolvent Debtors, see in general Chit. Contracts; 1 & 2 Vict. c. 110, ss. 37, 45; 5 & 6 Vict. c. 116, s. 7; 7 & 8 Vict. c. 96, ss. 4, 5, 10, 11, 63.

Obs. — Under the insolvent act, 1 & 2 Vict. c. 110, by the vesting order, all the real and personal estate, and effects of the prisoner (except the wearing apparel, bedding, and necessaries of himself and family, and his working tools and implements, not exceeding in the whole the value of 20*l.*), and all his future estate which shall accrue to him before his final discharge, and all debts due, or growing due (*i. e.* debts ascertained but payable in future. Skelton *v.* Mott, 5 Ex. 231) to such prisoner, or to be due to him before such discharge (as a debt which accrues to insolvent between the vesting order and final discharge, Williams *v.* Chambers, 10 Q. B. 337; Ford *v.* Dabbs, 5 M. & G. 309), vest in the provisional assignee without other conveyance being made: but a debt accruing to the insolvent for his personal labor during that period, does not pass. Williams *v.* Chambers, *ubi supra*. The assignees must sue in their own names as assignees for cause of action which so vest in them. Wetherell *v.* Julius, 10 C. B. 267; Rochfort *v.* Battersby, 2 H. L. Cas. 388; Stanton *v.* Collier, 3 El. & Bl. 274; Breary *v.* Kemp, 26 L. J. Q. B. 64; Sprye *v.* Porter, 7 El. & Bl. 58; but the insolvent may sue for debts which accrue to him between the vesting order and final discharge unless the assignees have interfered and claimed such debts. Jackson *v.* Burnham, 8 Ex. 173.

Where the insolvent was discharged from prison *without adjudication*, but the

Obs. petition was not dismissed, it was held the insolvent could not sue. Wearing *v.* Ellis, 26 L. J. Ex. 15; Tudway *v.* Jones, 24 L. J. Chan. 507.

1. *On Causes of Action which accrued to the Insolvent, and Account stated with the Assignees.*

Commencement as ante, 8, Form 7, *and see notes thereon.*] For money payable by the defendant to the said L. M. before the estate and effects of the said L. M. became or were vested (*s*) in the plaintiffs, as such assignees as aforesaid, by order in that behalf made by the court for the relief of insolvent debtors in England, according to the form of the statutes in that case made and provided, for goods sold and delivered by the said E. F. to the defendant, and for [*&c.; here state any other debts in the same way as ante*, 33, Form 1, *taking care to write the name of the insolvent*, L. M., *for* "the plaintiff." *If it is probable that a promise to the assignees can be proved, or in cases where the assignees are suing for a debt due to the insolvent before, but not payable until after the vesting order* (Skelton *v.* Mott, 5 Ex. 231), *here insert as a second count a form upon the principle of* Form 2, *ante*, 53, *and proceed thus:*] And also for money payable by the defendant to the plaintiffs, as assignees as aforesaid, for money found to be due [*&c. as in* Form 3, p. 53, *from the* *].

2. *By the Assignees of an Insolvent Debtor, on a Cause of Action accruing after the Vesting Order.* (*t*)

Commencement as in last form.] For money payable by the defendant to the plaintiffs, as assignees as aforesaid, after the estate and effects of the said L. M. vested in the plaintiffs, as assignees, by order of the court for the relief of insolvent debtors in England, for goods sold and delivered by the plaintiffs, as assignees as aforesaid, to the defendant, and for money received by the defendant for the use of the plaintiffs, as assignees as aforesaid, [*inserting such other debts as may be due and can be included,*] and for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, upon accounts stated between the defendant and the plaintiffs, as assignees as aforesaid. And the plaintiffs, as assignees as aforesaid, claim £——.

BY AND AGAINST ATTORNEYS.

Obs. — 1. *By Attorneys.* — The common count for work, as *ante*, 33, would suffice for the recovery of an attorney's bill of costs. But it is usual to state the plaintiff's capacity of attorney, and that he did the work in that character. See the law on this subject, [2 Chitty Contr. (11th Am. ed.) 810 *et seq.*,] and the notes to the pleas in actions by and against attorneys, *post*. An attorney, if he sue as such in person, may lay and retain the venue in Middlesex. Grace *v.* Wilmer, 6 El. & Bl. 982; *ante*, 9. The old doctrine that an attorney is bound to continue a suit which he has been retained to prosecute or defend until its termination, although his client refuse to supply the necessary pecuniary means, is overruled; and upon reasonable notice, and demand and refusal of the necessary funds, the attorney may decline further proceedings, and recover his bill to the extent to which he has, at the time of abandonment, conducted or defended the action, although such action be unfinished. Vansandau *v.* Brown, 9 Bing. 402; 2 M. & Sc. 543; Wadsworth *v.* Marshall, 2 Cr. & J. 665; Rowson *v.* Earle, Mood. & Mal. 538; Hoby *v.* Built, 3 B. & Ad. 350;

(*s*) See 1 & 2 Vict. c. 110, ss. 37, and 45; 5 & 6 Vict. c. 116, s. 7; Williams *v.* Chambers, 10 Q. B. 337; Ford *v.* Dabbs, 5 M. & G. 309; 7 & 8 Vict. c. 96, s. 4.

(*t*) See Observations, *ante*, 54.

Obs. Hawkes *v.* Cotterell, 3 H. & N. 243; [Gleason *v.* Clark, 9 Cowen, 578; Castro *v.* Bennett, 2 John. 296; Bohannon *v.* Paterson, 9 Wend. 503.] But in such case it lies on the attorney to show satisfactorily why he has abandoned the cause; Nichols *v.* Wilson, 11 M. & W. 106; and if he has done so wrongfully, he will be liable to an action, and disabled for suing for costs already incurred. Hoby *v.* Built, Nichols *v.* Wilson, *supra*. [It has been held that if an attorney had reasonable ground for commencing an action, and it appears that he desisted only because he afterwards found that the cause could not be sustained, he will be entitled to recover for his work and labor. Tindal C. J. in Lawrence *v.* Potts, 6 C. & P. 428. See Pennington *v.* Yell, 6 Eng. 212. A lawyer who, with his client's consent, withdraws from a case, after having rendered beneficial services, may still recover for his services, unless at the time of withdrawing, he waives his claim to compensation. Coopwood *v.* Wallace, 12 Ala. 790.] In general, however, an attorney's contract, on being employed in a suit, is that he will complete it; and the statute of limitations runs against his bill of costs only from the time the suit is ended; Harris *v.* Osbourn, 2 Cr. & M. 629; Rothery *v.* Munnings, 1 B. & Ad. 17, unless he has, at an earlier period, given up the business in consequence of the client's refusal to supply him with funds. Whitehead *v.* Lord, 7 Ex. 691; Phillips *v.* Broadley, 9 Q. B. 744; Martindale *v.* Falkner, 2 C. B. 706. An attorney cannot recover, if his clerk alone conducted the business, and his clerk resided and carried on business at a distance from the attorney, and the clerk had the entire superintendence of the business, and the attorney had not the means of exercising his judgment in the matter. Hopkinson *v.* Smith, 1 Bing. 13. An attorney is bound by his agreement to charge only money out of pocket, although he was misled by his client's statement as to his right of action; Thwaites *v.* Mackerson, 3 C. & P. 341; Mood. & M. 199; and he cannot recover even for money paid, if he has agreed to do the work on the terms of no cure no pay. Turner *v.* Tennant, 10 Jur. 429; Re Stretton, 14 M. & W. 806; Lewis *v.* Samuel, 8 Q. B. 685; Collins *v.* Brook, 28 L. J. Ex. 143. The master may tax his charges, though it was agreed he should be paid at a fixed rate. Drax *v.* Scroope, 2 B. & Ad. 581; Re Masters, 4 Dowl. 18; but see In re Vann, 15 C. B. 341; [2 Chitty Contr. (11th Am. ed.) 810, note (*o*).] He may recover his bill for issuing a fiat in bankruptcy, against a person who employed him to do so, but was not petitioning creditor, although no assets are received, &c. Pocock *v.* Russen, Mood. & Mal. 357. If his client sue in *formâ pauperis*, he can only recover money out of pocket. Philips *v.* Baker, 1 C. & P. 533; Pr. Rules Hil. T. 1853, 121; Dooly *v.* Great Northern Railway Company, 24 L. J. Q. B. 25; Holmes *v.* Penney, 23 L. J. Ex. 132. When he may sue two persons jointly, if employed by them, though they were separately interested, see Hellings *v.* Gregory, 1 C. & P. 627. When a firm of attorneys may sue, although only one of the partners was admitted in the court in which the business was performed, see Arden *v.* Tucker, 4 B. & Ad. 815; Hill *v.* Sidney, 7 Ad. & E. 956. Employment by a corporation. Arnold *v.* Mayor of Poole, 4 M. & G. 860. Employment by and against guardians of poor and district boards of management, 22 & 23 Vict. c. 49, s. 5. [An attorney, in the American states, who has been regularly admitted to practise in the courts, is presumed to have authority to institute a suit in the manner in which he prosecutes; his want of authority must be shown; Norris *v.* Douglass, 2 South. 817; even when he appears and defends a suit in behalf of a corporation. Osborn *v.* Bank of United States, 9 Wheat. 738; Proprietors *v.* Bishop, 2 Vt. 231. He is not bound to show his authority until it is disputed. See Osborn *v.* Bank of United States, 9 Wheat. 938; Jackson *v.* Stewart, 6 John. 34; Murray *v.* House, 11 John. 464; Denton *v.* Noyes, 6 John. 296; Woodbury J. in Eastman *v.* Coos Bank, 1 N. H. 23; Harding *v.* Hull, 5 Harr. & J. 478; Henck *v.* Todhunter, 7 Harr. & J. 275; Noble *v.* Bank of Kentucky, 3 Marsh. 263; Huston J. in Lynch *v.* Commonwealth, 16 Serg. & R. 369.] As to remedy for business done in county court, see Leverson *v.* Shaw, 15 C. B. 282. As to attorney's lien on the judgment recovered for his client, and when client may compromise and release debt and costs, see Brunsdon *v.* Allard, 28 L. J. Q. B. 306; [Potter *v.* Mayo, 3 Greenl. 34; Hobson *v.* Watson, 34 Maine, 20; Wright *v.* Cobleigh, 21 N. H. 339; Shapley *v.* Bellows, 4 N. H. 347; Currier *v.* Boston

Ore. & Maine R. R. 37 N. H. 223; Heart *v.* Chipman, 2 Aiken, 162 ; Ocean Ins. Co. *v.* Rider, 22 Pick. 210; Benjamin *v.* Benjamin, 17 Conn. 110. As to the mode of enforcing an attorney's lien on a judgment, see Woods *v.* Berry, 4 Gray, 357; or on a bond, see Hobson *v.* Watson, 34 Maine, 20. As to an attorney's lien on the papers, &c. of his client, see 2 Kent, 640, 641; Dennett *v.* Cutts, 11 N. H. 163; Walker *v.* Sargeant, 14 Vt. 247; Walton *v.* Dickerson, 7 Barr, 376; Hobson *v.* Watson, 34 Maine, 20.] An attorney cannot recover any portion of his bill of costs for business done or money paid, if the proceedings taken by him have become *wholly* useless in consequence of his gross negligence, inadvertence, or want of skill. Lewis *v.* Samuel, *supra;* Cox *v.* Leech, 1 C. B. N. S. 617 ; Long *v.* Orsi, 18 C. B. 610; Stokes *v.* Trumper, 2 Kay & J. 232; Bracey *v.* Carter, 12 Ad. & E. 373; Dax *v.* Ward, 1 Stark. 409 ; Lewis *v.* Collard, 14 C. B. 208 ; [Hopping *v.* Quin, 12 Wend. 517; Bredin *v.* Ringland, 4 Watts, 420. But it is otherwise if the failure occurred partly from accident, and not wholly from the negligence of the attorney. See Dax *v.* Ward, 1 Stark. 409; and see Lewis *v.* Collard, 14 C. B. 208; Bowman *v.* Tallman, 40 How. Pr. 1. The retainer of an attorney does not imply an engagement for success. See Gallagher *v.* Thompson, Wright, 466.] Where the business is not *wholly* useless, but some benefit has or may accrue to the client, this shall go merely to reduce the amount; 2 Smith L. C. 15; [Cox *v.* Leech, and Long *v.* Orsi, *supra;*] an *entire item* for work *partly* useful cannot be reduced by the jury; Shaw *v.* Arden, 9 Bing. 287; but the client must resort to a cross action. [All lawyers in the American states have generally the same right to recover for their services as attorneys have in England. Wilson *v.* Burr, 25 Wend. 386; Stevens *v.* Adams, 23 Wend. 57; Brady *v.* Mayor &c. 1 Sandf. 569; Vilas *v.* Downer, 21 Vt. 419; Newman *v.* Washington, Martin & Yerg. 79. An attorney is entitled to recover for his professional services what he reasonably deserves, taking into view the nature of the business performed by him, and his own standing in the profession for learning and skill, whereby the value of his services is enhanced to his client. For the purpose of aiding in the determination of this, evidence may be admitted to show the prices usually charged for similar services by other persons of the same profession, in the same vicinity and practising in the same court. Vilas *v.* Downer, 21 Vt. 419; Christy *v.* Douglas, Wright, 485. He cannot recover more than he has agreed to receive by proof that his services were worth more. Coopwood *v.* Wallace, 12 Ala. 790. Nor can he recover on the mere proof of services performed; he must also prove his retainer. Burghart *v.* Gardner, 3 Barb. 64; Brigham *v.* Foster, 7 Allen, 420; Cooper *v.* Hamilton, 52 Ill. 119; Briggs *v.* Georgia, 15 Vt. 61.]

1. *Against Attorneys.*—The law *implies* a promise on the part of an attorney, that he will use a reasonable degree of care, skill, and dispatch in the execution of business intrusted to his management; [O'Barr *v.* Alexander, 37 Geo. 195;] if he is guilty of *gross* default, negligence, or ignorance, whereby his client is injured, he is liable to an action ; but if he acts to the best of his skill, and with a *bonâ fide* and ordinary degree of attention, he is not responsible. [1 Chitty Contr. (11th Am. ed.) 815, 816, and note (p^1), 817–820; Purves *v.* Landell, 12 Cl. & Fin. 91; Swinfen *v.* Lord Chelmsford, 5 H. & N. 890; Chown *v.* Parrot, 14 C. B. N. S. 74; Stimpson *v.* Sprague, 6 Greenl. 470; Dearborn *v.* Dearborn, 15 Mass. 316; Crooker *v.* Hutchinson, 1 Vt. 73; Pennington *v.* Yell, 6 Eng. 212; Gilbert *v.* Williams, 8 Mass. 51; Grayson *v.* Wilkinson, 5 Sm. & M. 268; Dorrance *v.* Hutchinson, 22 Maine, 357; Cox *v.* Sullivan, 7 Geo. 144; Wilson *v.* Coffin, 2 Cush. 316 ; Varnum *v.* Martin, 15 Pick. 440 ; Reilly *v.* Cavenaugh, 29 Ind. 435; Hart *v.* Frame, 6 Cl. & Fin. (Am. ed.) 193, note (1); Chapman *v.* Chapman, L. R. 9 Ex. 276; Evans *v.* Watrous, 2 Porter, 205; Percy *v.* Millaudon, 20 Martin, 68, 75; Holman *v.* King, 7 Met. 384; Nesbit *v.* Lawson, 1 Kelly, 275; Parker *v.* Rolls, 14 C. B. 691; Hosmer C. J. in Brackett *v.* Norton, 4 Conn. 524; Fray *v.* Voules, 1 El. & El. 839; O'Barr *v.* Alexander, 37 Geo. 195; Wilson *v.* Russ, 20 Maine, 421 ; Goodman *v.* Walker, 30 Ala. (N. S.) 482.]

Upon the retainer of an attorney there arises also a *legal obligation* or *implied duty* on his part, independently of any contract to perform the business in a proper, skilful, and diligent manner.

Obs. It was the practice to sue and declare against an attorney either in *assumpsit* for breach of the implied promise (or an express one if it existed), or in *case* for the neglect of duty (see per Littledale J. Burnett *v.* Lynch, 5 B. & C. 609) and it seems a plaintiff may still do so; and in some instances it may be an advantage to sue in tort rather than on contract, as, where it may be doubtful whether the plaintiff may recover £20, and therefore might be deprived of costs under the county court acts, if the declaration were in contract. See Legge *v.* Tucker, 1 H. & N. 500; *ante*, 27.

The question of negligence is for the jury. Reece *v.* Righy, 4 B. & Ald. 202. If diligence would have been ineffectual the defendant must prove it. Green *v.* Jackson, 2 Chit. R. 311; Godefroy *v.* Jay, 7 Bing. 413.

An attorney is liable if ignorant or not observant of the rules of practice of the courts; Ravenga *v.* Mackintosh, 2 B. & C. 693; but not for an error of judgment on a point of new occurrence or on the construction of the doubtful meaning of a rule of court. Ib.; Godefroy *v.* Dalton, 6 Bing. 461: [Laidler *v.* Elliott, 3 B. & C. 738; Lord Tenterden C. J. in Montriou *v.* Jeffreys, R. & M. 320;] or on a doubtful point of law; Kemp *v.* Burt, 4 B. & Ad. 424; Elkington *v.* Holland, 9 M. & W. 659; Crosbie *v.* Murphy, 8 Ir. C. L. Rep. 301: [Bowman *v.* Tallman, 40 How. Pr. 1; Watson *v.* Muirhead, 57 Penn. St. 161; or for a mistake in a nice point of practice, arising on the meaning of an act of parliament. Chapman *v.* Van Toll, 8 El. & Bl. 896.]

The having acted upon counsel's opinion is not *conclusive* that there was no negligence. Ravenga *v.* Mackintosh, Kemp *v.* Burt, Godefroy *v.* Dalton, ubi *supra*.

It is an act of negligence on the part of an attorney to sue out a writ in a court of a peculiar construction without first ascertaining that the court has machinery to carry out the object of the action. Cox *v.* Leech, 1 C. B. N. S. 617.

Or, to bring an action in his client's name, as holder of a foreign bill, without ascertaining that his title was complete by special indorsement as required by the foreign law. Long *v.* Orsi, 18 C. B. 610; or, if an attorney omit to instruct counsel to appear in the cause or to give him full instructions. Ireson *v.* Pearman, 2 B. & C. 799; or, if having delivered a brief to counsel he neglect to attend in court to give him necessary information. Hawkins *v.* Harwood, 4 Ex. 503. But he is not responsible for the absence, neglect, or want of attention of the counsel engaged. Lowry *v.* Guilford, 5 C. & P. 234.

He is liable if he allow a cause to be called on without ascertaining if a material witness be present whereby the plaintiff was nonsuited; Reece *v.* Righy, 4 B. & Ald. 202; if he omit to declare in time; Russell *v.* Palmer, 2 Wils. 325; Pitt *v.* Yalden, 4 Burr. 2061; if he suffer judgment by default when instructed to defend an action, even though the plaintiff did not prove that he had a defence to the action, or *semble*, that he had sustained special damage; Godefroy *v.* Jay, 7 Bing. 413; [see Grayson *v.* Wilkinson, 5 Sm. & M. 268; Salisbury *v.* Gourgas, 10 Met. 442;] but not for omitting to plead a plea in *abatement*, which he was instructed to plead *for the purpose of delay*: Johnson *v.* Alston, 1 Camp. 176; or for negligence and delay in bringing an action which is not sustainable. Aitcheson *v.* Padock, Peake, 162; Lee *v.* Ayrton, Ib. 119; Cates *v.* Indermaur, 1 F. & F. 259.

He is liable for delay in issuing execution; Russell *v.* Palmer, 2 Wils. 325; Pitt *v.* Yalden, 4 Burr. 2060; or not exercising a proper discretion in doing so. Shaw *v.* Arden, 9 Bing. 287; 2 M. & Sc. 341.

He is also liable for negligence in taking an insufficient or invalid instrument as security upon an advance of money by his client; but it is not his duty to ascertain the *value* of the proposed security unless that duty be specially cast upon him. Brumbridge *v.* Massey, 28 L. J. Ex. 59.

An attorney employed generally has no power to sue, only to defend. Wright *v.* Castle, 3 Mer. 12. And though he may in general have power to enter into a reasonable and *bonâ fide* compromise of an action in which he is retained, he cannot do so *contrary* to the express wish and instructions of his client, who is *dominus litis*. Fray *v.* Voules, 1 El. & El. 839; Swinfen *v.* Swinfen, 1 C. B. N. S. 364; Churchyard *v.* Watkins, 27 L. J. Ex. 13; Chambers *v.* Mason, 5 C. B. N. S. 59; 28 L. J. C. P. 10. [According to the American authorities, an attorney employed in the usual way to conduct a suit is not in general invested with authority to enter into a compromise without the

Obs. sanction of his client. Holker *v.* Parker, 7 Cranch, 436; Vail *v.* Jackson, 15 Vt. 314; Mayer *v.* Foulkrod, 4 Wash. C. C. 511; Huston *v.* Mitchell, 14 Serg. & R. 307; Dodds *v.* Dodds, 9 Penn. St. 315; Davidson *v.* Rozier, 23 Missou, 287; Lockhart *v.* Wyatt, 10 Ala. 231; Derwort *v.* Loomer, 21 Conn. 245; Lewis *v.* Gamage, 1 Pick. 347; Abbe *v.* Rood, 6 McLean, 106; Langdon *v.* Potter, 13 Mass. 320; Nolan *v.* Jackson, 16 Ill. 272; Doub *v.* Barnes, 1 Md. Ch. 127; Stackhouse *v.* O'Hara, 14 Penn. St. 88; Filby *v.* Miller, 25 Penn. St. 264; Smock *v.* Dude, 5 Rand. (Va.) 639; Shaw *v.* Kidder, 2 How. Pr. 244; Bates *v.* Seabury, 1 Sprague, 433; Jones *v.* Ransom, 3 Ind. 327. But in Strauss *v.* Francis, L. R. 1 Q. B. 379, it was held that it is within the general authority of counsel, retained to conduct a cause, to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority, is binding on the client, notwithstanding he may have dissented, unless the dissent was brought to the knowledge of the opposite party at the time. See, also, Prestwich *v.* Poley, 18 C. B. N. S. 806; Swinfen *v.* Lord Chelmsford, 5 H. & N. 590; Swinfen *v.* Swinfen, 2 De G. & J. 381; Potter *v.* Parsons, 14 Iowa, 286. See declaration against an attorney for compromising after judgment. Butler *v.* Knight, L. R. 2 Ex. 109; S. C. 36 L. J. 66.]

An attorney is also liable, if guilty of a breach of professional confidence, for any damage thereby occasioned to his client. Taylor *v.* Blacklow, 3 Sc. 614; 3 Bing. 235.

As to his duty to endeavor to refer cause under common law procedure act, 1854, see Chapman *v.* Van Toll, 8 El. & Bl. 396; 3 Jur. N. S. 1126.

As to the liability of attorney employed without reward, see Elsee *v.* Gatward, 5 T. R. 143; 7 Ib. 171; 1 H. Bl. 158.

An attorney is bound to deliver up his client's papers to him when required, in a *reasonable state of order*. North Western Railway Co. *v.* Sharp, 10 Ex. 451. And if he negligently lose a client's deed, he cannot set up the loss as an answer to an action of detinue. Reeve *v.* Palmer, 5 C. B. N. S. 91.

1. *By an Attorney for his Bill of Costs for prosecuting or defending Suits, or for Conveyancing, or otherwise.*

Commencement, &c. as in Form *ante*, 33, *and then proceed:*] For the work and labor, care, diligence, journeys, and attendances of the plaintiff by him done, performed, and bestowed,* as the attorney and solicitor of and for the defendant (*u*) and at his request, and for fees due and of right payable to the

(*u*) The common counts for work and materials, and for money paid, are sufficient to enable an attorney to recover the amount of his bill of costs. *Ante*, 28. If the business were done on defendant's *credit* for a third person, as to which see Hayward *v.* Flott, 8 C. & P. 59; Grissell *v.* Robinson, 3 Bing. N. C. 10; state at the asterisk, "as an attorney and solicitor in and about divers businesses, at the request of the defendant, and for fees," &c. See Scrace *v.* Whittington, 2 B. & C. 11. If the *third* party were to be responsible in the first instance, the defendant can only be charged upon a special count upon a written guaranty, under the statute of frauds. Noel *v.* Hart, 8 C. & P. 200. The question of *credit* is one for the jury, and it is not a question of *usage*. Hayward *v.* Flott, *ubi supra*. A person may be liable to the attorney if he has given him grounds for regarding him as his employer, although he has no legal or equitable interest in the subject-matter of the suit. Southall *v.* Keddy, 1 F. & F. 177. [And in Brigham *v.* Foster, 7 Allen, 419, it was held that a party to a suit, in which the employment of senior counsel is necessary, is liable for the reasonable value of the services of a counsellor at law, who acts as senior counsel at the trial, in his presence, in consultation with him and without objection from him, under a retainer for that purpose by the attorney of record, although there was a secret agreement between him and the attorney of record that such services should be paid for by the latter.] When *next friend* liable to attorney. Hawkes *v.* Cottrell, 3 H. & N. 243. As to when an attorney for a mortgagee or lessor may sue the mortgagor or the lessee for the costs of preparing the mortgage or lease, see Smith *v.* Clegg, 28 L. J. Ex. 300; Grissell *v.* Robinson, 3 Bing. N. C. 10. When the mortgage goes off through the default of the mortgagor, the mortgagee's attorney cannot recover his costs from the mortgagor in the absence of an express contract to pay them. Wilkinson *v.* Grant, 18 C. B. 819. The attorney for a defendant in one of several actions which have been consolidated to abide the event of the one trial, and in which the attorney was engaged, has a remedy against the defendants in the other actions,

plaintiff in respect thereof, and for materials (*x*) and necessary things by the plaintiff provided in and about the said work and labor for the defendant and at his request, and for money paid [*&c.; add claims for money paid, and account stated, and conclude, as ante*, 33, Form 1].

2. *General Count against an Attorney for Negligence in conducting an Action at the Plaintiff's Suit against a Third Person.*

[That in consideration that the plaintiff retained the defendant, as and being an attorney (*y*) of the court of ——, to conduct an action in that court at the suit of the plaintiff against G. H. for the recovery of money claimed (*z*) to be due to the plaintiff from the said G. H., for reward to the defendant, the defendant accepted such retainer, and promised the plaintiff to conduct the said action with due and proper care, skill, and diligence; (*a*) yet the defendant did not conduct the said action with due and proper care, skill, and diligence, (*b*) whereby the plaintiff was obliged to suffer himself to be nonsuited therein, and lost the costs and expenses incurred by him in prosecuting the said action, and was obliged [*or* "became liable"] to pay the *costs* incurred by the said G. H. in defending the same, and the plaintiff has been delayed in recovering the said money, and is likely to lose the same.

A like count for not instructing counsel to appear at the trial, whereby the plaintiff was compelled to withdraw the record. Hawkins *v.* Harwood, 4 Ex. 503.

A like count for negligently conducting a chancery suit. Frankland *v.* Cole, 2 Cr. & J. 590.

A like count for neglect in recovering the amount of a bill delivered to him for the purpose of suing the parties liable. Langdon *v.* Wilson, 7 B. & C. 640, note (*b*).

as on a joint retainer from the time of consolidation. Anderson *v.* Boynton, 18 Q. B 308. In general it must be shown in order to charge a corporation that there was a retainer under the corporate seal. Arnold *v.* Mayor of Poole, 4 M. & G. 860; Reg. *v.* Lichfield, 10 Q. B. 534. *Aliter*, in case of *quasi* corporations, as joint stock commercial companies incorporated by act of parliament. R. *v.* Justices of Cumberland, 17 L. J. Q. B. 102. [But in the American states it is not necessary to prove a retainer under the corporate seal, or even by vote of the corporation. Angell & Ames Corp. §§ 282, 283; Union Manuf. Co. *v.* Pitkin, 14 Conn. 174; State Bank *v.* Bell, 5 Blackf. 127; Bridgton *v.* Bennett, 23 Maine, 422; 1 Chitty Contr. (11th Am. ed.) 378, note (*r*), 379, note (*t*).] If the action be by an attorney against his agent, the form may be: "as an attorney, and as the defendant's agent for him and at his request, and for fees," &c.

(*x*) This is correct. Fisher *v.* Snow, 3 Dowl. 27.

(*y*) It need not be alleged that the defendant was an attorney of the court in which action was pending. Peake's Rep. 237; 2 Chit. Rep. 311.

(*z*) It is not necessary to charge an actual debt, and it seems better not to do so. See Lee *v.* Ayrton, Peake's R. 115; Brown *v.* Jacobs, 2 Esp. R. 726.

(*a*) This is the promise *implied* by law; and as it need not be proved, it would seem not necessary to allege it. Com. L. Pract. 1852, s. 49. But if there be any special contract entered into between the plaintiff and defendant by which the defendant has contracted to perform any work or do any act not necessarily arising out of a simple retainer, as to do work in some special manner, or at a special time, or upon the terms of "no cure no pay," or "for costs out of pocket," then the contract should be declared upon in terms.

(*b*) The Pl. Rules T. T. 1853, l. 1, provide that several counts on the same cause of action shall not be allowed; and it is therefore expedient to lay the cause of action in a general form. But in cases where there is no difficulty in proving a particular neglect, &c. it may be stated in a more specific shape. This may be effected by alleging that defendant did not use due care, &c. in and about the bringing, &c. the said action, "in this, that he proceeded to trial in the said action without taking due care to provide and addnce proper evidence on the plaintiff's behalf in support thereof," &c. ac-

3. *Against an Attorney for Negligence in defending an Action.* (*c*)

That in consideration that the plaintiff retained the defendant, as and being an attorney of the court of ——, to conduct the defence of the now plaintiff in an action depending in that court at the suit of G. H. against the now plaintiff, for reward to the defendant, the defendant accepted such retainer, and promised the plaintiff to conduct the said defence with due and proper care, skill, and diligence; (*d*) yet the defendant did not conduct the said defence with due and proper care, skill, and diligence, whereby the said G. H. recovered in the said action a judgment against the now plaintiff for a large sum of money as for the damages and costs of the said G. H. therein, and the plaintiff became liable to pay other costs and expenses.]

4. *Against an Attorney (employed to conduct an Action against another Attorney for Negligence) for carelessly omitting to adduce Proper Evidence, whereby Plaintiff was nonsuited.*

Godefroy *v.* Dalton, 6 Bing. 460; Hoby *v.* Built, 3 B. & Ad. 350.

5. *Against an Attorney for Carelessness in investing Plaintiff's Money upon an Insufficient Annuity Security.*

See form, &c. Whitehead *v.* Greetham, 2 Bing. 464; and form and cases, Ireson *v.* Pearman, 3 B. & C. 799; Wilson *v.* Tucker, 3 Stark. R. 154; Kemp *v.* Burt, 4 B. & Ad. 424; [Dartnall *v.* Howard, 4 B. & C. 345; Hayne *v.* Rhodes, 8 Q. B. 342; Watts *v.* Porter, 3 El. & Bl. 743. See Harman *v.* Johnson, 2 El. & Bl. 61.]

6. *Against an Attorney for suffering his Client to execute an unusual Covenant on assigning a Term.*

Stannard *v.* Ullithorne, 10 Bing. 491. [See Parker *v.* Rolls, 14 C. B. 691.]

[7. *Against an Attorney for not taking care of his Client's Papers.*

North Western Railway Co. *v.* Sharp, 10 Ex. 451. *And so for disclosing a defect in his client's title.* Taylor *v.* Blacklow, 3 Bing. N. C. 235.]

8. *Against an Attorney by Trustees for not investigating Security upon which they were about to advance Trust Funds, and for not preparing Sufficient Securities.*

Brumbridge *v.* Massey, 28 L. J. Ex. 59; [Wigens *v.* Cooke, 6 C. B. N. S. 784.]

9. *Against an Attorney for not taking Proper Measures to obtain a Prisoner's Discharge from Custody.*

Shilcock *v.* Pasman, 7 C. & P. 289.

cording to the fact, "and by reason thereof," &c. as above. See specific allegations of negligence in the cases referred to in the Observations, *ante*, 55–58.

(*c*) Hoby *v.* Built, 3 B. & Ad. 350; Reece *v.* Righy, 4 B. & Ald. 202; Godefroy *v.* Jay, 7 Bing. 413. See next form.

(*d*) *Ante*, 60, note (*b*).

10. *By an Executor against the Executor of an Attorney for the Carelessness of the latter in the Investigation of the Sufficiency of the Security for an Annuity purchased by the Plaintiff's Testator.*

See form in the last edition of this work, which may be readily altered to the present system of pleading.

11. *Against Attorney for not paying over to his Client Money levied under a Judgment.*

Bevins *v.* Hulme, 15 M. & W. 188; 3 D. & L. 309.

[12. *Against an Attorney of Plaintiff for misrepresenting to the Sheriff the Address of the Debtor.*

Childers *v.* Wooler, 2 El. & El. 287.

13. *Against Attorney for neglecting to enforce a Judgment and accepting a smaller Sum in satisfaction, contrary to the Plaintiff's Directions.*

Butler *v.* Knight, L. R. 2 Ex. 109.

14. *Against an Attorney for compromising an Action contrary to the Directions of the Client.*

Fray *v.* Voules, 1 El. & El. 839; and see Chown *v.* Parrott, 14 C. B. N. S. 74.]

AUCTIONEER AND APPRAISER.

1. *By an Auctioneer and Appraiser for his Bill.* (*e*)

Commencement as ante, 5.] For money payable by the defendant to the plaintiff for the work, journeys, and attendances of the plaintiff by him done, performed, and given as an auctioneer and appraiser, and otherwise, in endeavoring to sell, and in and about appraising, valuing, and selling, by auction and otherwise, goods and chattels for the defendant at his request, and in other business of the defendant at his request, and for [*add for materials provided or money paid, if applicable, and account stated, and conclude as ante*, 33, Form 1].

(*e*) The common count for work and labor would suffice. *Ante*, 33. An auctioneer may bring an action in his own name for the price of goods sold by him as auctioneer, although the purchaser had paid the principal for whom the goods were sold. Robinson *v.* Rutter, 4 El. & Bl. 954. [An auctioneer, employed to sell, may ordinarily maintain an action for the price or for the property itself. Thompson *v.* Kelly, 101 Mass. 296; 2 Kent, 536; Beller *v.* Block, 19 Ark. 566; Tyler *v.* Freeman, 3 Cush. 261.] The 8 & 9 Vict. c. 76, s. 1, requires appraisers to take out annual licenses chargeable with a duty, which is a condition precedent to recovering for commission. Palk *v.* Force, 12 Q. B. 666. A vendee may maintain an action against the auctioneer to recover the deposit; Duncan *v.* Cafe, 2 M. & W. 244; for he is a stakeholder between the parties. Harrington *v.* Hoggart, 1 B. & Ad. 577. [As to sales by auction of land, and puffing, see 30 & 31 Vict. c. 48. An auctioneer has no authority to take a bill of exchange. Williams *v.* Evans, L. R. 1 Q. B. 352.]

2. *Against an Auctioneer at a Sale, advertised as without reserve, by the Plaintiff, the Highest bonâ fide Bidder, for not completing the Sale to the Plaintiff, but knocking the Property down to the next Bidder, the Owner.*

See the law and form, and a form suggested per Willes J. Warlow *v.* Harrison, [1 El. & El. 295, 309; Mainprice *v.* Westley, 6 B. & S. 420.]

3. *Against a Bookseller, who undertook to manage a Sale for the Plaintiff, and to be responsible for the Proceeds, together with the Auctioneer.*

Cholmondeley *v.* Payne, 8 C. & P. 482.

[4. *Against the Purchaser, on the Conditions of Sale at an Auction, for not clearing away the Lots purchased.*]

Green *v.* Baverstack, 14 C. B. N. S. 204.

AWARDS.

Obs. — See, in general, 1 Saund. 28; Watson on Awards; Russell on Awards; 2 Chit. on Pleading, in notes; 2 Chit. Arch. Index, *in roc.* The remedy by action, for non-performance of an award, is either on the submission or on the award. Where there is an arbitration bond the declaration may be framed on the bond as a common money bond; see *post;* Ferrer *v.* Oven, 7 B. & C. 427; assigning a breach in the replication; or suggesting a breach upon the roll, if the defendant suffer judgment by default; or the breach may be assigned in the declaration. See a form, Ferrer *v.* Oven, 7 B. & C. 427. Where the action is brought to recover money awarded to be paid, the indebitatus count, *post*, 67, will suffice. Crump *v.* Adney, 1 Cr. & M. 362; Sutcliffe *v.* Brooke, 3 D. & L. 302. But it may often be prudent to declare especially on the award in order to narrow the case in evidence at the trial; as *never indebted* to the common count would put more in issue than if the defendant pleaded merely a denial of the submission, or some other allegation in the special count. An action also lies on the submission for revoking the arbitrator's power. See the stat. 3 & 4 W. 4, c. 42, s. 39, prohibiting such revocation where the submission is by judge's order, or rule of court, &c. 2 Chit. Arch. 1544. [Count on an award made under an arbitration in conformity with conditions of sale. Boss *v.* Helsham, 36 L. J. Ex. 20; S. C. L. R. 2 Ex. 72.]

1. *Upon an Award made in pursuance of a Submission between the Parties, where the Time for making the Award was enlarged.* (*f*)

For that by a certain agreement in writing, (*g*) [*or* "articles of agreement under seal," *or* "by an indenture sealed with the seals of the plaintiff and defendant,"] made by and between the plaintiff and the defendant, it was, amongst other things, agreed by and between the plaintiff and the defendant that [*set out the material parts of the agreement*] certain matters in difference (*h*) between them should be and the same were thereby referred to the final award and determination of J. R. and T. B., arbitrators chosen by and

(*f*) As to the effect of such an enlargement on the original promise to perform the award, see Armitage *v.* Coates, 4 Ex. 641.

(*g*) State "in writing," if the fact; but a verbal submission suffices.

(*h*) It is not essential to show the cause of dispute; 2 Saund. 61 *h*, note (1); and

Harrison *v.* Creswick, 13 C. B. 399; Armitage *v.* Coates, 4 Ex. 641; Hatton *v.* Royle, 3 H. & N. 500; Lievesley *v.* Gilmore, L. R. 1 C. P. 570.]

5. *On an Award for the Costs, &c. where the Arbitrator decided in Favor of the Defendant.*

Duckworth *v.* Harrison, 4 M. & W. 432. See Rich *v.* Unwin, 6 Ex. 908; [Law *v.* Blackburrow, 14 C. B. 77; Holdsworth *v.* Barsham, 31 L. J. Q. B. 145.]

6. *Indebitatus Count on an Award.* (*q*)

Commencement as ante, 33, Form 1.] For money payable by the defendant to the plaintiff upon and by virtue of an award made by one E. F. on a submission made by the plaintiff and defendant to the award of the said E. F. concerning certain matters in difference depending between them, and upon which reference the said E. F. awarded that the defendant should pay to the plaintiff the sum of £——, at a day now past [*if there be any doubt about the regularity of the award, insert counts on the original cause of action; and on accounts stated, as ante*, p. 34. *But the award itself is no evidence under the count on an account stated.* Bates *v.* Townley, 2 Ex. 152.]

[*Like counts.* Sim *v.* Edmands, 15 C. B. 240; Everest *v.* Ritchie, 7 H. & N. 698.]

7. *Indebitatus Count on an Umpirage.*

For money payable by the defendant to the plaintiff, upon and by virtue of an umpirage made by one E. F. by virtue of a submission made by the plaintiff and defendant to the award, order, and determination of G. H. and I. K. concerning certain matters in difference then depending between the plaintiff and defendant, and thereby empowering the said G. H. and I. K., in case they should not agree in making such award, to appoint a third person to determine finally the said matters in difference; and whereupon the said G. H. and I. K., having taken upon themselves the burden of the said arbitration, and not agreeing in making the said award, by virtue of the aforesaid power, appointed the said E. F. as an umpire (*r*) to award and finally determine the said matters in difference between the plaintiff and defendant, upon which said reference the said E. F., having taken upon himself the burden of the said umpirage, awarded that the defendant should pay to the plaintiff the sum of £——, at a day now past; and for [*&c.; conclude as in the last form*].

[*Count on a reference to a single arbitrator.* Roberts *v.* Eberhardt, 3 C. B. N. S. 482; Smith *v.* Trowsdale, 3 El. & Bl. 83; Hatton *v.* Royle, 3 H. & N. 500. *On a reference to three arbitrators.* Duckworth *v.* Harrison, 4 M. & W. 432. *On a reference by agreement to two arbitrators and a third appointed by them.* Bates *v.* Townley, 1 Ex. 572; Wade *v.* Dowling, 4 El. & Bl. 44; Williams *v.* Wilson, 9 Ex. 90. *Against executors.* Dowse *v.* Coxe, 3 Bing. 20; Riddle *v.* Sutton, 5 Bing. 200; Williams *v.* Wilson, 9 Ex. 90.]

(*q*) See Observation, *ante*, 63.

(*r*) As to the mode in which an umpire must be appointed, see Lord *v.* Lord, 5 El. & Bl. 404; and see *ante*, 64, note (*k*).

BAIL BOND. (s)

Obs. — An action on a bail bond occurs so seldom that it has been thought sufficient to refer to the last edition of this work, where a form is given which may be easily adapted to the present rules of pleading and practice. See, also, Chitty's Forms. See a form of declaration where a judge had made an order for a *capias*, Barnes *v.* Keane, 15 Q. B. 75; also a form on a bond given by the defendant, a trader, and two sureties, under 1 & 2 Vict. c. 110, s. 8, to pay the debt and costs in an action, or to render, Hinton *v.* Acraman, 2 C. B. 367.

BAILEES.

Obs. — There are several descriptions of bailment which have been arranged by Sir William Jones in his treatise on bailments, under five heads, viz.:

1. Depositum, which is a naked bailment, *without reward*, of goods to be kept for the bailee;
2. Mandatum, or commission, when the mandatory undertakes, *without recompense*, to do some act about the thing bailed or simply to carry it;
3. Commodatum, or loan for use, when goods are bailed, *without pay*, to be used for a certain time by the bailee;
4. Pignori acceptum, when a thing is bailed by a debtor to his creditor, in pledge, or as a security for his debt;
5. Locatum, or hiring, which is always for a reward; and this bailment is either, 1. Locatio operis faciendi, when work and labor, or care and pains are to be performed or bestowed on the goods delivered; and, under this head, may be considered the duties of innkeepers and warehousemen, with respect to goods intrusted to their care; 2. Locatio rei, by which the hirer gains the temporary use of the thing; 3. Locatio operis mercium vehendarum; where goods are delivered to a public carrier or private person to be carried. See Jones on Bailments, 35, 36; Coggs *v.* Bernard, 2 Lord Raym. 912; [1 Chitty Contr. (11th Am. ed.) 661 *et seq.*;] Chitty & Temp. on Carriers.

In general it is optional on the part of the plaintiff to declare against a bailee in form *ex contractu*, for the breach of the *express* contract entered into by him, or the promise *implied* from the act of bailment; or *in tort* for the breach of the *duty* which is by law impliedly cast on the bailee; but it seems that in whatever shape he may frame his declaration the action is still one of *contract*, wherever the liability of the defendant in fact arises out of a contract. Legge *v.* Tucker, 1 H. & N. 500; [1 Chitty Pl. 114, 150.] See the forms following these observations, also the titles "Carriers," "Farriers," "Hire of Goods," and the forms in tort against Bailees. As to criminal proceedings against Bailees, see 20 & 21 Vict. c. 54, s. 4.

1. *Against a Bailee for Reward (viz. a Watchmaker), for not using due care in repairing the Goods; for not taking care of them; and for not returning them on request (in one count).*

For that the plaintiff, at the request of the defendant, retained and employed the defendant and delivered to him a certain watch of the plaintiff, to

(s) See the law and practice; Chit. Arch. 753; Pr. R. H. T. 1853, r. 82 *et seq.* The plaintiff suing as assignee must necessarily set out the condition, to show his title under the statute 4 & 5 Ann. c. 16, s. 20, which enables him to sue. Where the sheriff sues, which he may now do in any court, Pr. R. H. T. 1853, r. 83, he may declare as on a common money bond. In an action on a bail bond, the debt and costs need not be indorsed on the writ. Smart *v.* Lovick, 3 Dowl. 34. As to the extent of liability of bail, see Jonas *v.* Tepper, 28 L. J. Q. B. 85; Pr. R. Hill. T. 1853, r. 109, *post*, Appendix. Common bail having made default, and then rendered their principal, are liable to an action on the bond for debt and costs, unless proceedings are stayed by a judge's order; and if the judge's order is not taken advantage of until judgment is signed, the bail can have no relief. Jallicks *v.* Costar, 28 L J. Ex. 209.

be repaired by the defendant in the way of his said trade or business of a watchmaker, for reward to the said defendant upon certain terms agreed upon between the plaintiff and defendant, that is to say, that the defendant should use due care, diligence, and skill in repairing the said watch, and take due and proper care thereof whilst the same should be in his the said defendant's possession for the purpose aforesaid, and redeliver the same to the plaintiff on request; yet the defendant did not use due care, diligence, or skill in repairing the said watch, [but performed certain work under color of repairing the said watch in so careless, unworkmanlike, and unskilful a manner, that no benefit was derived therefrom by the plaintiff in that behalf, and the said watch was not improved,] and did not take due and proper care (*t*) of the said watch whilst the same was in his possession for the purpose aforesaid, and in consequence of the carelessness, negligence, and improper conduct of the said defendant the said watch became and was broken, injured, and deteriorated in value. And although the plaintiff requested the defendant to redeliver the said watch to him the plaintiff, and a reasonable time for the defendant so doing hath long elapsed, yet the defendant neglected and refused so to do, whereby the plaintiff was deprived of the use and value thereof. And the plaintiff claims £——. [*A count may be added for the conversion of the watch; or for the detention of it, if the plaintiff seek to recover the watch itself.*]

2. *Against a Bleacher for not bleaching Cloths properly, and for injuring them.*

See the form in the last edition of this work, which may be adapted to the present system of pleading.

3. *Against a Pawnbroker for losing a Pledge.* (*u*)

For that the plaintiff, at the defendant's request, pawned with and delivered to the defendant, as and being a pawnbroker, goods of the plaintiff [that is to say, a gold watch], as and by way of pledge to the defendant for money advanced thereon by the defendant to the plaintiff, and upon the terms that the defendant should take due and proper care of the said goods until the same should have been redeemed by the plaintiff and redelivered to him or sold by the defendant according to the statutes relating to pawnbrokers. Yet the defendant, whilst he had the custody of the said goods as such pawnbroker, and before the time had expired for redeeming the same, negligently lost the said goods [*or* "damaged and spoiled the said goods."]

(*t*) In all cases of bailment the duty of the bailee may be alleged in the declaration to be "safely and securely" to keep the goods. Ross *v.* Hill, 2 C. B. 877. [See 1 Chitty Contr. (11th Am. ed.) 672, 673, and notes.]

(*u*) See per Parke B. Cheeseman *v.* Exall, 6 Ex. 341–344. The pawnee in this case is liable for ordinary neglect, and for a loss arising from anything except unavoidable force; Jones, 5–79; Coggs *v.* Bernard, 2 Ld. Raym. 917; or accidental fire. Rex *v.* Cording, 1 N. & M. 35; [1 Chitty Contr. (11 Am. ed.) 669, 670.] A pawnbroker is not excused from liability though his premises are burglariously entered into and the goods stolen, if he has left his premises in a very insecure state, and without protection at night. See Shackell *v.* West, 8 W. R. 22, Q. B. The statutes, relating to pawnbrokers are 30 Geo. 2, c. 24; and 39 & 40 Geo. 3, c. 99.

[4. *Against a Bailee for not redelivering Goods bailed.*

That in consideration that the plaintiff delivered to the defendant certain goods to be safely kept and taken care of by the defendant, and to be redelivered by the defendant to the plaintiff on request, for reward to the defendant, the defendant promised the plaintiff to safely keep and take care of the said goods and to redeliver the same to the plaintiff on request; and afterwards the plaintiff requested the defendant to redeliver to him the said goods, and a reasonable time for the redelivery thereof elapsed after such request, yet the defendant did not redeliver the said goods to the plaintiff, whereby [the plaintiff was prevented from letting the said goods to hire to G. H., and] the same are lost to the plaintiff.

Like counts. Moss *v.* Smith, 1 M. & G. 228; Crossfield *v.* Inch, 8 Ex. 159; Corbett *v.* Packington, 6 B. & C. 268; Van Toll *v.* South Eastern Railway Co. 12 C. B. N. S. 75.

Count on a bailment of a ship for not redelivering it according to the contract. European & Australian Royal Mail Co. *v.* Royal Mail Steam Packet Co. 30 L. J. C. P. 247.

Against a bailee for not redelivering goods pledged with him as security for advances of money. Stanton *v.* Collier, 3 El. & Bl. 274.]

5. *Against a Bailee of a Horse, for not training, feeding, and returning same, according to Terms specially agreed upon.*

For that it was agreed by and between the plaintiff and defendant that the defendant should have the use of a horse of the plaintiff for a period which has now elapsed, and take care of and properly feed and keep the said horse during that time, and train the same for the plaintiff, for reward to be paid by the plaintiff to the defendant, and return the horse to the plaintiff at the expiration of the said time, and the defendant received the said horse from the plaintiff, and had the possession and use thereof for the purpose and on the terms aforesaid, and for the period of time aforesaid, [*here aver performance of all conditions precedent, as ante*, 39, between the**] yet the defendant did not during that time take care of the said horse, or train or properly feed the same; but the defendant so improperly fed and kept the said horse that the same became out of condition, and the defendant took so little care thereof that the same was through the neglect of the defendant injured, and the defendant hath not yet returned the same to the plaintiff. And the plaintiff claims £——.

6. *General Count against a Bailee for not taking care of Goods, and for losing same.*

For that the plaintiff, at the defendant's request, delivered to the defendant, and the defendant had the care and custody of goods of the plaintiff, that is to say, ["household furniture,"] upon the terms that the defendant should take due and proper care thereof whilst they were in his custody; yet the defendant, whilst he had the care and custody of the said goods, took so little and such bad care thereof that the same became damaged and injured and lost to the plaintiff. And the plaintiff claims £——.

BANKERS.

1. *By a Customer against his Bankers for not paying the Customer's Check.* (*x*)

[That the defendant was a banker, and carried on the business of a banker at a banking-house in ——; and thereupon the plaintiff retained and employed the defendant as his banker, and the defendant accepted the said retainer and employment, upon the terms (amongst other things) that the defendant would from time to time, out of any moneys of the plaintiff in his hands applicable to that purpose, pay on presentment any check which might be drawn by the plaintiff upon the defendant, and duly presented at the said banking-house of the defendant on payment by any person lawfully entitled to receive the amount of such check, not exceeding the amount of the moneys of the plaintiff in the hands of the defendant applicable to the payment thereof at the time of the presentment thereof; and thereafterwards the plaintiff drew a check directed to the defendant, and thereby required the defendant to pay to G. H. or bearer $——, and delivered the said check to the said G. H. [in payment of a debt due to the said G. H. from the plaintiff], and the said G. H., being the lawful holder of the said check and entitled to receive the amount thereof, duly presented the said check at the said banking-house of the defendant for payment, and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to have the said check paid by the defendant when so presented as aforesaid; yet the defendant did not pay the said check when so presented as aforesaid, whereby the plaintiff was injured in his credit and reputation, [and the said G. H. refused to deal with the plaintiff, and deliver goods to the plaintiff on credit as he otherwise would have done.]

Against a banker for not presenting within a reasonable time a check on a third party paid in by a customer. Hare *v.* Harty, 10 C. B. N. S. 65.

Against a banker for not complying with instructions as to the disposal of money deposited with him. Clerk *v.* Laurie, 1 H. & N. 452.]

2. *Against Bankers by the Bearer of a Bank-note issued by them.*

Post, tit. "Promissory Note."

(*x*) See a form for not honoring the plaintiff's acceptance made payable at his banker's, Rolin *v.* Steward, 14 C. B. 595; also a form in tort for not paying a check, Tassell *v.* Cooper, 9 C. B. 510; and other forms, *post*, "Tort." [Liability of banker to refund money paid for unused circular notes. The Conflans Stone Quarry Co. *v.* Parker, L. R. 3 C. P. 1.] Bankers may be sued either in contract for the breach of their express or implied *contract*, or in tort for the breach of *duty*, which results from their employment; but in whichever form the declaration is framed, the action is one of *contract*. The jury may give more than nominal damages, though no special damage be proved. Marzetti *v.* Williams, 1 B. & Ad. 415; Rolin *v.* Steward, 14 C. B. 595. As to the payment of crossed checks, see 21 & 22 Vict. c. 79; Simmons *v.* Taylor, 2 C. B. N. S. 528, decided before that statute, and not now law. [The relation between a banker and his customer who pays money into the bank, is the ordinary relation of debtor and creditor with a superadded obligation arising out of the custom of bankers to honor the customer's checks. See Pott *v.* Clegg, 16 M. & W. 321, 328; Hill *v.* Foley, 2 H. L. Cas. 28; Ex parte Waring, 36 L. J. C. 151. Where the usual dealing of a banker was to credit a customer in his book against bills, &c. paid in, and to honor the checks of the customer, he was held liable for refusing to pay a check without having given notice that he discontinued such dealing. Cumming *v.* Shand, 5 H. & N. 95. A banker, paying a forged or altered check, cannot charge the customer with the amount. Hull *v.* Fuller, 5 B. & C. 750. A banker having paid a check in ignorance that he then had no assets of the customer, cannot recover back the amount from the payee. Chambers *v.* Miller, 13 C. B. N. S. 125.]

BILLS OF EXCHANGE.

Obs. — Pleadings in actions on bills of exchange and promissory notes are not of such frequent occurrence as they formerly were; the remedies upon these instruments having been greatly facilitated by the prevention of frivolous or fictitious defences by "The Summary Procedure on Bills of Exchange Act, 1855," 18 & 19 Vict. c. 67. But still in all cases where there is a *primâ facie* defence to the action, or where there are counts applicable to the original consideration for the bill or note (R. H. T. 1858), there should be pleadings as in ordinary actions.

An action under the act can only be brought by a *bonâ fide* holder; and it has been made a question whether an executor of a party to a bill can sue or be sued under this act. Leigh *v.* Baker, 2 C. B. N. S. 367; In re Skiggs, 28 L. J. Chanc. 433. The action must be commenced within six months after the bill or note became due and payable; s. 1; Leigh *v.* Baker, 2 C. B. N. S. 367; and an action cannot be maintained under this act upon a bill or note payable on demand, after the lapse of six months from its date, a promissory note payable on demand being due immediately upon the day of its date. Norton *v.* Ellan, 2 M. & W. 461; Thorpe *v.* Coombe, R. & M. 388; Waters *v.* Earl of Thanet, 2 Q. B. 757–769. The plaintiff may proceed under this act, or by the ordinary action; but he can only adopt the former course if the plaintiff is within the jurisdiction. No other claim but that on the bill, and the original consideration for the bill, can be included in the writ. R. H. T. 1858, see R. M. T. 1858.

An action under the act must be commenced by writ of summons in the form given in the schedule to the act, with the various indorsements and notices specified in that form, see *post*, 75. Robinson *v.* Cotterell, 11 Ex. 476; Hall *v.* Coates, Ib. Reg. Gen. M. T. 1855. As to what amendments may be made in the indorsements without vitiating the service of the writ, see Knight *v.* Pocock, 17 C. B. 177.

The holder of any bill or note may issue one writ against all or any number of the parties to such bill or note; and such writ shall be the commencement of an action or actions against the parties named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs had been issued (s. 6), so that if leave be given to appear and defend, the pleadings must be against each defendant separately. [1 Chitty Pl. 50, note (*b*).]

The service of the writ must be personal (s. 1), unless dispensed with under s. 17 of the C. L. P. Act, 1852.

The defendant may, within twelve days from the service of the writ, apply to a judge at chambers (whose decision may be reviewed by the court, Pollock *v.* Turnock, 1 H. & N. 741), for leave to appear and defend. S. 2. Upon payment into court of the sum indorsed upon the writ, *or* upon affidavits satisfactory to the judge disclosing a legal or equitable defence, *or* such facts as would make it incumbent on the holder to prove consideration, *or* such other facts as the judge may deem sufficient, the judge shall grant such leave to appear and defend. S. 2. This application is made *ex parte;* but the judge may grant only a rule *nisi*. 2 Chit. Arch. 1059.

Sunday is not included in days for appearance, if it is the last day, as R. 174, H. T. 1853, applies. Lewis *v.* Calor, 1 F. & F. 306. Leave will be given to appear and defend, although the defence disclosed be strictly technical, or even doubtful. Matthews *v.* Marsland, 27 L. J. Ex. 148. The affidavit need not show a defence with the same certainty as is required in a plea. It is sufficient to disclose reasonable and plausible grounds for supposing there is a defence. Clay *v.* Turley, 27 L. J. Ex. 2. This order to appear and defend will be set aside if obtained fraudulently. Pollock *v.* Turnock, 1 H. & N. 741. The plaintiff may sign judgment if the defendant has not appeared, upon filing an affidavit of personal service of the writ, or an order to proceed under s. 17 of the C. L. P. Act, 1852. The judgment may be set aside, or execution stayed or set aside, or leave may be given to appear and defend after judgment upon term. S. 3. The judgment may be signed for any sum not exceeding that indorsed on the writ, together with interest, if any, at the rate specified, to the date of the judgment, and a sum for costs

Obs. fixed by the masters; see R. G. M. T. 1855; unless the plaintiff claim more than such fixed costs, in which case the costs are to be taxed in the usual way. S. 1. Error does not lie upon the judgment (s. 1), and execution thereon may be issued forthwith. S. 1. The plaintiff may be ordered to deposit the bill, and give security for costs. S. 4. The expenses incurred in noting for non-payment or non-acceptance, or otherwise by reason of the dishonor of the bill or note, may be recovered under the act in the same way as the amount of the bill or note. S. 5. The C. L. P. Acts, 1852 and 1854, and all rules made pursuant thereto, shall extend so far as applicable to proceedings under the act, s. 7; and see Leigh *v.* Baker, 2 C. B. N. S. 367; Knight *v.* Pocock, 17 C. B. 177. A writ which has been sued out under the act in a case not within the act may be amended under s. 222 of the C. L. P. Act, 1852, to make it a good writ under that act. Leigh *v.* Baker, *supra*. By s. 8, the act applies to the C. P. of Lancaster and Durham, and by s. 9 can be made applicable to the county courts, which has been done. In an action in the county court under this act, the defendant may avail himself of any defence of which the facts admit, and is not confined to that disclosed on the affidavit on which he is let in to defend. Saul *v.* Jones, 1 El. & El. 59. As to the operation of the City of London Small Debts Act, 15 Vict. c. 77, on bills for less than 20*l.* see Healey *v.* Jones, 27 L. J. Q. B. 183.

1. *Form of Writ of Summons.*

Victoria by the grace of God [*&c.*]

To C. D., (*y*) of ——, in the county of ——.

We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear in our court of ——, in an action at the suit of A. B., the said A. B. may proceed to judgment and execution. Witness [*&c.*]

Memorandum to be subscribed on Writ.

N. B. This writ is to be served within six calendar months from the date hereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before service thereof.

This writ was issued by E. F., of ——, attorney for the plaintiff [*or* "this writ was issued in person by A. B., who resides at"] [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence*].

Indorsement.

The plaintiff claims £——, principal and interest [*or* "£——, balance of principal and interest"], due to him as payee [*or* "indorsee," *&c.*] of a bill of exchange or promissory note, of which the following is a copy: [*Here copy bill of exchange or promissory note and all indorsements upon it* (*z*).] And also —— shillings for noting [*if noting has been paid*] and —— for costs. (*a*)

And if the amount thereof be paid to the plaintiff or his attorney within four (*b*) days from the service hereof, further proceedings will be stayed.

(*y*) The writ may be directed to all or any of the parties to the bill or note. *Ante*, Obs. p. 71.

(*z*) Maker's name omitted may be amended under 15 & 16 Vict. c. 76, s. 20, on payment of costs by plaintiff. Knight *v.* Pocock, 17 C. B. 177.

(*a*) This claim for noting and costs is not in the form prescribed by the act, but was added by R. M. T. 1855.

(*b*) The number of days was filled up by the judges by R. M. T. 1855.

Notice.

Take notice that if the defendant do not obtain leave from one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do (*c*) within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £—— for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the judge's chambers, Serjeant's Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after Service thereof.

This writ was served by X. Y. on F. M. (the defendant —— the defendant's) (*c*) on Monday, the —— day of ——, 18—. By X. Y.

L IN ORDINARY CASES — ON INLAND (*d*) BILLS.

1. *Drawer, being Payee*, v. *Acceptor.* (*e*)

Commencement, ante, 5.] For that the plaintiff (*f*) on [*&c.*], (*g*) by his bill of exchange, (*h*) now overdue, (*i*) directed to the defendant, (*k*) required the

(*c*) *Sic* in Act.

(*d*) The 19 & 20 Vict. c. 97, s. 7, provides that a bill or promissory note made in any part of Great Britain and Ireland, the Isle of Man, Guernsey, Jersey, Alderney, and Sark, and adjacent islands, part of the dominions of her majesty, shall be deemed to be an inland bill, but does not alter or affect the stamp duty, if any, which, but for that act, would be payable in respect thereof.

(*e*) It will be observed that in this form no presentment to the acceptor (the defendant) or demand of payment is stated. The reason is, that he is liable, although no presentment or demand has been made. See Turner *v.* Haydon, 4 B. & C. 1. So, also, no proof of presentment is requisite where a person, not a party to the bill, guaranties the payment by the acceptor. Hitchcock *v.* Humfrey, 5 M. & G. 557; Walton *v.* Mascall, 13 M. & W. 452; Bailey *v.* Porter, 14 M. & W. 44.

(*f*) May state that plaintiff drew, though he drew by agent. Heys *v.* Heseltine, 2 Camp. 604. Where defendant drew a bill in the name of A. & Co. held, that to make him liable on the bill, proof of want of authority from A. & Co. was requisite. Wilson *v.* Barthrupp, 2 M. & W. 863; and see Thomas *v.* Hewes, 2 Cr. & M. 530, note.

(*g*) This form does not allege that the bill bears *date* on the day named; if, therefore, the bill, when produced at the trial, do not bear date on the day named in the declaration, there will be no variance under the above allegation. Smith *v.* Lord, 2 D. & L. 759. If necessary, the judge would amend the date stated. Bentzing *v.* Scott, 4 C. & P. 24. As to the effect of the words "due the —— day of ——," written upon a bill, they may explain the date, but do not qualify the acceptance when written by the acceptor. Fitch *v.* Jones, 24 L. J. Q. B. 293; Fanshaw *v.* Peet, 2 H. & N. 57; 26 L. J. Ex. 302.

(*h*) If the instrument be in so ambiguous a form that it cannot with confidence be considered a bill or note, the judge, at the trial, will amend the declaration by allowing it to be treated as a note if necessary. Armfield *v.* Allport, 27 L. J. Ex. 42; Moilliet *v.* Powell, 6 C. & P. 233; Worley *v.* Harrison, 3 Ad. & E. 669; Hay *v.* Fisher, 2 M. & W. 779. Distinction, &c. Shelton *v.* James, 1 Car. & K. 136; S. C. 5 Q. B. 199. In some cases the instrument may be declared upon either as a bill or note. Forbes *v.* Marshall, 11 Ex. 166; Beeman *v.* Duck, 11 M. & W. 251. As to when instrument a bill or note, see Corrie *v.* Stirling, 6 El. & Bl. 333; Lloyd *v.* Oliver, 18 Q. B. 471.

(*i*) It is not, it seems, necessary, to aver that the bill became due before the commencement of the suit. Owen *v.* Waters, 2 M. & W. 91; Padwick *v.* Turner, 11 Q. B. 124; Shepherd *v.* Shepherd, 1 C. B. 847.

(*k*) If the bill is not *addressed* to the defendant, he would not be liable as acceptor, even though he had actually accepted the bill; Gray *v.* Milner, 8 Taunt. 739; Davis *v.* Clarke, 6 Q. B. 16; Polhill *v.* Walter, 3 B. & Ad. 114; but if addressed to him with others, and he individually accept it, he is

defendant to pay to the plaintiff [*or* "to the order of the plaintiff" (*l*) one hundred pounds, (*m*) two months [*or* "days," *or* "weeks"] (*n*) after date [*or* "after sight"]; and the defendant accepted the said bill, (*o*) but did not pay the same. [*If it be thought advisable, add a count on the consideration,* (*p*) *and on an account stated, ante,* 35, Form 2, *and conclude:*] And the plaintiff claims £——.

2. *Drawer, not being Payee, and having taken up the Bill, against Acceptor.*

Commencement, ante, 5.] For that the plaintiff, on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to one E. F. (*q*) or to order £——, two months after date [*or* "after sight"]; and the defendant accepted the said bill, but did not pay the same (*r*),

personally liable; Owen *v.* Van Uster, 10 C. B. 318; and when a bill is addressed to the acceptor, and he accept it, he is personally liable, though he add accepted "for the company;" Mare *v.* Charles, 5 El. & Bl. 978; where the secretary of a *limited* company accepts a bill on behalf of the company, not describing the company as "limited," he is personally liable for the amount of the bill. See Penrose *v.* Martyr, El., Bl. & El. 499, and form of declaration there.

(*l*) It need not be alleged that the plaintiff made no order. Frederick *v.* Cotton, 2 Show. 8; Fisher *v.* Pomfret, Carth. 403; Smith *v.* M'Clure, 5 East, 476. Bill "pay to my order," allegation "pay to A. or order," no variance. Bluett *v.* Middleton, 1 D. & L. 376; Beaman *v.* Duck, 11 M. & W. 251.

(*m*) It is not necessary to add "for value received," although these words are in the bill; and even if a particular consideration, as "value received in lead," &c. be stated in the bill and declaration, it is not necessary to prove it otherwise than by putting in the bill. Fox *v.* Frith, 1 Car. & M. 502.

(*n*) Some certain period for payment must be specified in a bill, or the bill is bad. Alexander *v.* Thomas, 20 L. J. Q. B. 207.

(*o*) This is correct, although the bill be accepted payable at a particular place, if the words "and not otherwise or elsewhere" be not also added. Blake *v.* Beaumont, 1 Dowl. N. S. 698. The above form suffices, although the acceptance preceded the drawing. Molloy *v.* Delves, 7 Bing. 428. As to liability of acceptor who accepts a blank bill, Armfield *v.* Allport, 27 L. J. Ex. 42. As to pleading specially that the acceptance was qualified, see Lyon *v.* Wall, 2 M. & Sc. 736. It is not necessary to aver presentment to the acceptor. Turner *v.* Haydon, 4 B. & C. 1. By 19 & 20 Vict. c. 97, s. 6, the acceptance of inland or foreign bills must be in writing on the bill, or, if in sets, on one of them, signed by the acceptor or some person duly authorized by him.

(*p*) If the consideration of a bill be stated in the particulars (as to which see *ante,* 35, note (*l*)), plaintiff may prove it, to avoid a verdict being entered against him on the common counts; Ryder *v.* Ellis, 8 C. & P. 357; but in general a plaintiff can only recover on one count if he have only one cause of action. *Ante,* 5, note (*a*). The bill itself would be evidence in the case in the text—[but not by indorsee against acceptor; Eales *v.* Dicker, 1 Mood. & Mal. 321; nor if the payee and drawer be not the same party, Early *v.* Bowman, 1 B. & Ad. 889]—of money had and received, Thompson *v.* Morgan, 3 Camp. 161, and also under the account stated; Rhodes *v.* Gent, 5 B. & Ald. 245; and therefore those counts should at all events be inserted. An indorsement is also evidence under an account stated; Wayman *v.* Bond, 1 Camp. 175, provided it be between immediate parties; Bentley *v.* Northhouse, 1 Mood. & Malk. 66; and likewise of money lent. Wells *v.* Girling, Gow, 22, note. As to when a promise to pay between parties not immediate, is evidence under the account stated, see Oliver *v.* Dovatt, 2 M. & R. 230; Breckon *v.* Smith, 1 Ad. & E. 488; Burgh *v.* Legge, 5 M. & W. 418. A count on the consideration should be added, 1. When the bill has been given to secure an actual debt for goods sold, &c. 2. When the bill itself is evidence of such contract between the plaintiff and defendant.

(*q*) If the payee's full name be not known, say, "to pay to a certain person designated in the said bill as Jno. F." (*according to the fact*). By 3 & 4 W. 4, c. 42, s. 12, in actions on bills and notes, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it suffices in the affidavit of debt, process, and declaration, to state such initial or contraction of the Christian or first name, see Kinnesley *v.* Knott, 7 C. B. 980; no demurrer would lie for a wrongful description by initials. A mistake as to the payee's name would be amended at the trial. Parks *v.* Edge, 1 Cr. & M. 429; Esdaile *v.* Maclean, 15 M. & W. 277; Levy *v.* Webb, 15 L. J. Q. B. 407; C. L. P. Act, 1852, s. 222.

(*r*) An averment of *presentment* to the

and thereupon the same was returned to the plaintiff, and remains unpaid. [*Conclude as directed in last form.*]

3. *Payee, not being Drawer, against Acceptor.*

Commencement, ante, 5.] For that one E. F., (*s*) on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff £——, two months after date [*or* "after sight"], and delivered the said bill to the plaintiff; and the defendant accepted the same, but did not pay the same. [*Conclude as directed in* Form 1, *ante,* 74.]

4. *Indorsee against Acceptor.*

Commencement, ante, 5.] For that E. F., (*t*) on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said E. F. [*or* "G. H."] or order (*u*) £——, two months after date [*or* "after sight"]; and the defendant accepted the said bill, and the said E. F. [*or* "G. H." (*x*)] indorsed the same to L. M., (*x*) who indorsed the same to N. O., (*y*) who indorsed (*z*) the same to the plaintiff; (*a*) but the defendant did not pay the same. [*Conclude as directed, with a count on the original consideration for the bill,* Form 1, *ante,* 74.]

defendant, he being acceptor, is not necessary; but it is necessary to show the defendant *did not pay* the bill, and that it was returned to the plaintiff, as he has no title except by virtue of those facts.

(*s*) As to designating the drawer's name by initials or contractions, see *ante,* 74, note (*q*). If the drawers were a firm, say "*certain persons under the name and style of M. & Co. &c. by their bill,*" *&c.*; and then state, if the plaintiff be an indorsee, that "*the said M. & Co. indorsed, &c.*" See Smith *v.* Balls, 15 L. J. Q. B. 413; Ball *v.* Gordon, 9 M. & W. 345; Tigar *v.* Gordon, 9 M. & W. 347. The indorsement of one partner must be in the name of the firm in order to bind the others. Kirk *v.* Blurton, 9 M. & W. 284; Horton *v.* Seymour, 3 C. B. 71.

(*t*) See *ante,* 74, note (*q*), and *supra,* note (*s*).

(*u*) The declaration must state to whose order the bill is drawn. Hart *v.* Proudfoot, 8 Dowl. 306; but it is sufficiently certain if it state that the defendant was to pay to "the drawer's order," he being named before. Knill *v.* Stockdale, 6 M. & W. 478.

(*x*) See *ante,* 74, note (*q*); *supra,* note (*s*).

(*y*) An indorsement may be on the *face* of bill. Young *v.* Glover, 3 Jur. N. S. 637. It is not essential to state all the indorsements; Chaters *v.* Bell, 4 Esp. 210; but if stated they must all be proved; Waynam *v.* Bend, 1 Camp. 175; however, such as are not proved, may be struck out at the trial. Mayer *v.* Jadis, 1 Moo. & R. 247. But of course the *payee's* indorsement must be shown, and those parties whose indorsements are struck out will be discharged from liability. It may be better, in cases of doubt as to the ability to prove some of the indorsements, to state them, as an amendment at the trial would doubtless be allowed. In Stein *v.* Yglesias, 1 Cr., M. & R. 565, the plaintiff sued as indorsee, and the declaration stated an indorsement to him by the first indorsee; on issue joined on the question whether the bill "was so indorsed after it was due," it was held that the defendant proved the fact by showing that the plaintiff did not become indorsee until after the bill was due, though the first or intermediate indorsement (not stated in the declaration) was before that period. The court seemed to think that if an indorsement by the first indorsee directly to the plaintiff be stated, the plaintiff cannot avail himself of the title of an intermediate party, though he may on that of a person from whom he *bonâ fide* received it, though such person's name is not on the bill. Arboni *v.* Anderson, 1 Q. B. 498; Green *v.* Steer, Ib. 707; and see Davies *v.* Dodd, 1 Wils. 110.

(*z*) The omission to state the plaintiff's title by showing the *indorsement* to him, would be fatal even after verdict. See Bishop *v.* Hayward, 4 T. R. 471. Allegation of *delivery* not sufficient. Cunliff *v.* Whitehead, 3 Bing. N. C. 828; 6 Dowl. 63. It need not be alleged that the bill was delivered to the plaintiff, that is implied in the indorsement. Brind *v.* Hampshire, 1 M. & W. 371. How to declare if the plaintiff be indorsee for *part* only of the bill, see Hawkins *v.* Gardner, 12 Mod. 213; or the indorsement be by a married woman. Prince *v.* Brunette, 1 Bing. N. C. 435.

(*a*) It need not be stated that the defendant had notice of the indorsement. Skelton *v.* Halstead, 2 Dowl. N. S. 69.

5. *Payee against Drawer — Default Acceptance.*

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, directed to E. F., (*b*) required E. F. to pay to the plaintiff or order £——, two months after date; and the same was presented for acceptance, and was dishonored, (*c*) of which the defendant had due notice, but did not pay the same. [*Conclude as in previous forms.*]

6. *Indorsee against Drawer — Default Acceptance.*

Commencement, ante, 5.] For that the defendant on, [*&c.*], by his bill of exchange, now overdue, directed to E. F., (*d*) required E. F. to pay to G. H. (*d*) or order £——, two months after date; and the said G. H. (*d*) indorsed the said bill to the plaintiff [*or* "to L. M., (*d*) who indorsed the same to the plaintiff"]; and the same was presented (*e*) to the said E. F. for acceptance, and was dishonored, of which the defendant had due notice, (*f*) but did not pay the same. [*Add count on the consideration, as ante,* Form 1.]

7. *Indorsee against Indorser — Default Acceptance.*

Commencement, ante, 5.] For that one E. F., (*b*) on [*&c.*], by his bill of exchange, now overdue, directed to G. H., (*b*) required G. H. to pay to E. F. or order £——, two months after date; and E. F. indorsed the said bill to the defendant [who indorsed the same to I. K. (*g*), who indorsed the same to the plaintiff; and the said bill was duly presented to the said G. H. for acceptance, and was dishonored; of all which the defendant had due notice, but did not pay the same. [*Add count on the consideration,* (*h*) *as directed ante,* Form 1, p. 74.]

8. *Indorsee against Drawer — Default Payment by Drawee.*

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, now overdue, directed to G. H., (*g*) required G. H. (*g*) to pay to

(*b*) As to initials or contractions of the name of a party or firm, *ante,* 74, note (*q*), and *ante,* 2, 4.

(*c*) The holder's right of action accrues immediately on the refusal to accept. Whitehead *v.* Walker, 9 M. & W. 506. The above form is given by the C. L. P. Act, 1852. It will be observed that it omits the allegation that the bill is "now overdue," these words are clearly not necessary in this form, because the right to sue depends upon the refusal by the drawee to accept, and not upon the bill having arrived at maturity; and it should seem they may in any case be omitted.

(*d*) See *ante,* 74, note (*q*).

(*e*) An averment of the presentment, or the statement of a valid excuse for not presenting the bill (where no presentment has taken place), is essential against the drawer and indorsers, or the declaration will be bad, it seems, after verdict. Williams *v.* Germaine, 7 B. & C. 477; *post,* 79, note (*y*). Where there has been an *excusable delay* in presenting the bill, the above form may suffice. Patience *v.* Townley, 2 Smith's R. 224; Lesson *v.* Pigott, Bayl. 5th ed. 401, note (145); Firth *v.* Thrush, 8 B. & C. 387. If the acceptor be dead, presentment must be made to the executors, and it should be so alleged. Caunt *v.* Thompson, 7 C. B. 400. See form where defendant dispensed with presentment, *post,* 81.

(*f*) The omission of the averment of notice, or of an excuse for not giving it, will be fatal even after verdict. Lundie *v.* Robertson, 7 East, 231. If *no* notice has been given, an excuse must be stated instead of the above allegation; but such allegation will suffice in cases where a notice has been given, though the time of giving it was *delayed* in consequence of the defendant's residence not being known at the time, &c. See Firth *v.* Thrush, 8 B. & C. 387.

(*g*) See *ante,* 75, notes (*x*), (*y*), (*z*).

(*h*) An indorsement is *primâ facie* evidence of money lent between the immediate parties, and also of an account stated; those counts therefore should at all events be inserted. *Ante,* 74, note (*p*).

the defendant or order £——, two months after date; (*i*) and the defendant indorsed the said bill to I. K., (*j*) who indorsed the same to M. N., (*j*) who indorsed the same to the plaintiff; and (*k*) the said bill was duly presented for payment and was dishonored; (*l*) of which the defendant had due notice, but did not pay the same. [*Add count on the consideration, as ante*, Form 1, p. 74.]

9. *Indorsee against Indorser—Default Payment by Drawee.*

Commencement, ante, 5.] For that E. F., (*j*) on [*&c.*], by his bill of exchange, now overdue, directed to G. H., (*j*) required G. H. to pay to E. F. (*m*) or order £——, two months after date; (*n*) and the said E. F. indorsed the said bill to the defendant, who indorsed the same to [one I. K., (*j*) who indorsed the same to] the plaintiff; and the said bill was duly presented (*l*) for payment and was dishonored; of which the defendant had due notice, but did not pay the same. [*Add count on the consideration, as ante*, Form 1, p. 74.]

10. *Indorsee against Drawer or Indorser on Bill payable after sight.*

Commencement, ante, 5.] For that the defendant [*or* "one O. P." (*j*)], on [*&c.*], by his bill of exchange, now overdue, directed to E. F., (*j*) required E. F. to pay to the defendant [*or* "the said O. P."] or order £——, [two months] after *sight;* and E. F. then [*or* "afterwards, to wit, on the —— day of ——, in the year aforesaid"] saw and accepted the same, and the defendant [*or* "O. P."] indorsed the said bill to G. H., [*or* "to the defendant,"] who indorsed the same to I. K., (*o*) who indorsed the same to the plaintiff; and the said bill was duly presented for payment and was dishonored; (*p*) of all which the defendant had due notice, but did not pay the same. [*Add count on the consideration, as ante*, Form 1, p. 74.]

II. IN PARTICULAR CASES.

11. *Indorsee against Acceptor on a Bill payable at Banker's, "and not otherwise or elsewhere."* (*q*)

Commencement, ante, 5.] For that E. F., on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to E. F. or order £——, two months after date; and the defendant accepted the said bill payable at [Messrs. G. and H., bankers, London, *and not otherwise or elsewhere* (*r*)]; and the said E. F. indorsed the same to I. K., who indorsed the

(*i*) If payable after *sight*, see Form No. 10.

(*j*) See *ante*, 75, notes (*x*), (*y*), (*z*).

(*k*) The acceptance by G. H. need not be averred, though he has accepted the bill. Parkes *v.* Edge, 1 Cr. & M. 429.

(*l*) Although the bill be accepted payable at a particular place, this averment suffices. Parkes *v.* Edge, *supra;* Boydell *v.* Harkness, 3 C. B. 168. See Sands *v.* Clarke, 8 C. B. 751. Where the bill is directed to the payee at his private residence, and is accepted by him payable at his *banker's*, presentment at the *banker's* is necessary to charge an *indorser*, and such presentment is not excused by there being no effects of the acceptor in the bank. Saul *v.* Jones, 1 El. & El. 59.

(*m*) A mistake as to the person to whom the bill is payable may be amended. Parkes *v.* Edge, *supra.*

(*n*) If payable *after sight*, see Form 10.

(*o*) See *ante*, 75, notes (*x*), (*y*), (*z*).

(*p*) See Mellish *v.* Rawdon, 9 Bing. 423; Shute *v.* Robins, 1 M. & M. 133.

(*q*) See 1 & 2 Geo. 4, c. 78.

(*r*) Amendment allowed by striking out these words. Higgins *v.* Nicholls, 7 Dowl.

same to L. M., who indorsed the same to the plaintiff; and the said bill was duly presented for payment at (*s*) the said Messrs. G. and H., bankers, London, aforesaid, and was dishonored; of all which the defendant had due notice, but did not pay the same. [*Add count on the consideration, as ante*, Form 1, p. 74.]

12. *Indorsee against Drawer in such Case.*

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, now overdue, directed to E. F., required E. F. to pay to the defendant or order £——, two months after date; and the said E. F. accepted the said bill payable [at Messrs. G. and H., bankers, London, *and not otherwise or elsewhere*]; and the defendant indorsed the said bill to [one I. K., who indorsed the same to] the plaintiff; and the said bill was duly presented for payment at the said Messrs. G. and H., bankers, London, aforesaid, and was dishonored; of all which the defendant had due notice, but did not pay the same. [*Add count on the consideration, as ante*, Form 1, p. 74.]

13. *Indorsee against Drawer on Bill drawn and accepted, payable at a particular place.* (*t*)

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, now overdue, directed to E. F., required E. F. to pay to the defendant or order *in London* £100, two months after date; and the said E. F. accepted the said bill payable at Messrs. G. H. and Co.'s, bankers, London; (*t*) and the defendant indorsed the same to [one I. K., who indorsed the same to] the plaintiff; and the said bill was duly presented for payment at (*u*) the said Messrs. G. H. and Co.'s, bankers, London, aforesaid, and was dishonored; of all which the defendant had due notice, but did not pay the same. [*Conclude as in last form.*]

14. *Drawer against Acceptor on Bill accepted payable on a Contingency.* (*x*)

Commencement, ante, 5.] For that the plaintiff, on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff or order £100, two months after date; and the defendant accepted the said bill payable [when he should have received the debt due to him from G. H.] [*following the words of the acceptance*]; and the defendant afterwards received the said debt, but did not pay the said bill. [*Insert a count on the consideration, &c. and conclude as directed, ante*, 74, Form 1.]

551. If they are not in the acceptance of the bill, presentment at the banker's need not be averred when declaring against the *acceptor*. Halstead *v.* Shelton, 5 Q. B. 86; and see Blake *v.* Beaumont, 1 Dowl. N. S. 697; 4 M. & G. 7, S. C.

(*s*) It is not necessary to aver that the bill was presented *to* the bankers. Hawkes *v.* Borwick, 4 Bing. 135; Giles *v.* Bourne, 6 M. & Sel. 73; or that *they* did not pay; Ib.; or that the *drawee* had notice.

(*t*) Where the bill is *drawn* as well as accepted payable at a particular place, it is essential to state the fact as above, and aver presentment there, in an action against the *drawer* or indorsers. See Gibb *v.* Mather, 4 Bing. 214; 2 Cr. & J. 254.

(*u*) This is sufficient in this case, and it is not necessary to state a presentment to the acceptor. Skelton *v.* Braithwaite, 8 M. & W. 252; S. C. 1 Dowl. N. S. 354; Boydell *v.* Harkness, 3 C. B. 168; 4 D. & L. 178; Wilmot *v.* Williams, 7 M. & G. 1017.

(*x*) Mendizabal *v.* Machado, 6 C. & P. 218; S. C. 3 M. & Sc. 841.

15. *Indorsee against Drawer, where Notice of Dishonor was not given or Presentment made, but the Drawer had no Effects in the Drawee's Hands, &c.* (y)

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, now overdue, directed to E. F., required E. F. to pay to the defend-

(y) See Kemble *v* Mills, 1 M. & G. 758; Terry *v.* Parker, 6 Ad. & E. 502. It seems from the last case that the excuse stated here would also be a valid one for want of *presentment*. The plaintiff may succeed upon the common form alleging due presentment and notice of dishonor, without strict proof of those facts, if he can show a subsequent promise by defendant [even though *conditional* (Campbell *v.* Webster, 2 C. B. 258)] to pay the bill. Hicks *v.* Duke of Beaufort, 4 N. C. 229; Croxon *v.* Worthen, 5 M. & W. 5; Goodall *v.* Dolley, 1 T. R. 742. [In Harrison *v.* Bailey, 99 Mass. 620, it was held that in an action by an indorsee against the indorser on a promissory note, evidence of a waiver of demand and notice is sufficient to support an allegation in the declaration of demand and notice. Other cases support the same doctrine. Taunton Bank *v.* Richardson, 5 Pick. 436, 444; Jones *v.* Fales, 4 Mass. 245; Andrews *v.* Boyd, 3 Met. 434; City Bank *v.* Cutter, 3 Pick. 414; North Bank *v.* Abbot, 13 Pick. 465; Kent *v.* Warner, 12 Allen, 561; Norton *v.* Lewis, 2 Conn. 478; Williams *v.* Matthews, 3 Cowen, 252; 2 Greenl. Ev. § 197; Stewart *v.* Eden, 2 Caines, 121; Shirley *v.* Fellows, 9 Porter, 300; Patton *v.* McFarlane, 3 Penn. St. 419, 425.] But if there be evidence that in point of fact notice of dishonor was *not* given to defendant, then the subsequent promise will not avail the plaintiff, as the promise is only *primâ facie* evidence that such notice had been given, and is not a *dispensation* with notice. Lundie *v.* Robertson, 7 East, 231; Allen *v.* Edmundson, 2 Ex. 719; Carter *v.* Flower, 16 M. & W. 749; [Rabey *v.* Gilbert, 30 L. J. Ex. 70; 6 H. & N. 536. See Dorsey *v.* Watson, 14 Misson. 59; Loose *v.* Loose, 36 Penn. St. 538, 545; Woods *v.* Dean, 3 B. & S. 101; Harrison *v.* Bailey, 99 Mass. 620; Lary *v.* Young, 13 Ark. 401; Landrum *v.* Trowbridge, 2 Met. (Ky.) 281.] Presentment of foreign bill also excused. Greenway *v.* Hindley, 4 Camp. 52. But a count in the common form will not suffice where the notice is excused, and there is no promise to pay. Burgh *v.* Legge, 5 M. & W. 418; Orr *v.* Maginnis, 7 East, 359; Legge *v.* Thorpe, 13 East, 171; Cory *v.* Scott, 3 B. & Ald. 619; Sharp *v.* Bailey, 9 B. & C. 44. That there were no effects in the drawee's hands, is no excuse as against an *indorser* for want of presentment and notice of dishonor. Beal *v.* Jones, 1 El. & Bl. 59. [See 3 Kent, 109, 110; French *v.* Bank of Columbia, 4 Cranch, 153, 154; Dickins *v.* Beal, 10 Peters, 572; Case *v.* Morris, 31 Penn. St. 100; Wollenweber *v.* Ketterlinus, 17 Penn. St. 389; Mehlberg *v.* Fisher, 24 Wisc. 607; Orear *v.* McDonald, 9 Gill, 350; Blankenship *v* Rogers, 10 Ind. 333; Durrum *v.* Hendricks, 4 Texas, 495; Coyle *v.* Smith, 1 E. D. Smith, 400; Oliver *v.* Bank of Tennessee, 11 Humph. 74; Allen *v.* King, 4 McLean, 128; Torrey *v.* Foss, 40 Maine, 74; Barbaroux *v.* Waters, 3 Met. (Ky.) 304; Maltass *v.* Siddle, 6 C. B. N. S. 494, 500, 501, and note. With regard to a subsequent promise to pay, Chancellor Kent says: "If due notice of non-acceptance or non-payment be not given, or a demand on the maker of a promissory note be not made, yet a subsequent promise to pay, by the party entitled to notice, be he either drawer or indorser, will amount to a waiver of the want of demand or notice, provided the promise was made clearly and unequivocally, and even under a mistake of law, if it was with full knowledge of the fact of a want of due diligence on the part of the holder." 3 Kent, 113; Leonard *v.* Gary, 10 Wend. 504; Thornton *v.* Wynn, 12 Wheat. 183; Reynolds *v.* Douglass, 12 Peters, 497; Robbins *v.* Pinckard, 5 Sm. & M. 51; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. 1; Story Prom. Notes, § 362; Hopkins *v.* Liswell, 12 Mass. 52; Creamer *v.* Perry, 17 Pick. 332; McPhetres *v.* Halley, 32 Maine, 72; Chitty Bills (12th Am. ed.) 501, note (4); Sigerson *v.* Mathews, 20 How. (U. S.) 496; Edwards *v.* Tandy, 36 N. H. 540; Byram *v.* Hunter, 36 Maine, 217; Meyer *v.* Hibsher, 47 N. Y. 265; Harvey *v.* Troupe, 23 Miss. 538; Golladay *v.* Bank of the Union, 2 Head, 57; Campbell *v.* Varney, 12 Iowa, 43; Blodgett *v.* Durgin, 32 Vt. 361; Morgan *v.* Peet, 32 Ill. 281. It is indispensable that this waiver should be made with a full knowledge of the want of due notice of the dishonor of the bill or note. Jones *v.* Savage, 6 Wend. 658; Story Prom. Notes, § 362; Miller *v.* Hackley, 5 John. 385; May *v.* Coffin, 4 Mass. 341; Warder *v.* Tucker, 7 Mass. 449; Garland *v.* Salem Bank, 9 Mass. 408; Martin *v.* Ingersoll, 8 Pick. 1; Townsend *v.* Wells, 32 Maine, 416; Spurlack *v.* Union Bank, 4 Humph. 336; Richter *v.* Selin, 8 S. & R. 426; Sussex Bank *v.* Baldwin, 2 Harr. 487; Crutchers *v.* Wolf, 2 Monroe, 88; Kennon *v.* M'Rea, 7 Porter, 175; Edwards *v.* Tandy, 36 N. H. 540; Otis *v.* Hussey, 3 N. H. 343; Rogers *v* Hackett, 21 N. H. 100; Farmington *v.* Brown, 7 N. H. 271; Woodman *v.* Eastman, 10 N. H. 359; Trimble *v.* Thorn, 16 John. 152; Martin *v.* Winslow, 2 Mason, 241. The weight of authority, Chancellor Kent says, is that this knowledge of the want of

ant or order £100, two months after date; and the defendant indorsed and delivered the said bill to the plaintiff; and the said bill was duly presented and dishonored; and at the time when the said bill was drawn, and from thence until and at the end of the day when the said bill became due and payable and was so presented, the defendant had no effects in the hands of E. F., nor had the defendant ever any reasonable ground for expecting that the said E. F. had or could have any such effects, or that the said bill would be paid upon presentment for payment, nor hath the defendant sustained any damage (*z*) by reason of his not having had notice of the said presentment and dishonor of the said bill; and the defendant hath not paid the same. [*Add count on the consideration, as ante*, Form 1, p. 74.]

16. *Against Drawer on Default Payment where the Drawee could not be found.* (*a*)

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, now overdue, directed to E. F., by the description and addition of [Mr. E. F., Smith Street, Pimlico,] required the said E. F. to pay to the defendant or order £100 two months after date; and the defendant indorsed the said bill to the plaintiff; and when the said bill became due and payable, due and diligent search and inquiry were made for and after the said E. F. in Smith Street, Pimlico, and elsewhere, in order that the said bill might be pre-

due diligence on the part of the holder, may be inferred as a fact from the promise to pay under the attending circumstances, without requiring clear and affirmative proof of the knowledge. 3 Kent, 113; Lundie *v.* Robertson, 7 East, 231; Pierson *v.* Hooker, 3 John. 68; Hopkins *v.* Liswell, 12 Mass. 52; Breed *v.* Hillhouse, 7 Conn. 523; Williams *v.* Robinson, 13 Louis. 421; Tebbetts *v.* Dowd, 23 Wend. 379; Robbins *v.* Pinckard, 5 Sm. & M. 51; Loose *v.* Loose, 36 Penn. St. 538, 545. Still, whatever may be the source of proof, the holder must satisfy the jury affirmatively that the drawer or indorser knew that he had not been regularly charged. Hunt *v.* Wadleigh, 26 Maine, 271; Leonard *v.* Gary, 10 Wend. 504; Davis *v.* Gowen, 17 Maine, 387; Townsend *v.* Wells, 32 Maine, 416. But it was held that this knowledge could not be inferred from the mere promise to pay, in Davis *v.* Gowen, 17 Maine, 387. If the indorser, before or at the maturity of the bill, has protected himself from loss by taking sufficient collateral security of the maker of the note, or an assignment of all of his property both real and personal, it is a waiver of his legal right to require proof of demand and notice. 3 Kent, 113; Mead *v.* Small, 2 Greenl. 207; Mechanics Bank *v.* Griswold, 7 Wend. 165; Bond *v.* Farnham, 5 Mass. 170; Prentiss *v.* Danielson, 5 Conn. 175; Duvall *v.* Farmers' Bank, 9 Gill & J. 47; Stephenson *v.* Primrose, 8 Porter, 155; Walters *v.* Munroe, 17 Md. 154; Lewis *v.* Kramer, 3 Md. 265; Seacord *v.* Miller, 3 Kernan, 55. But the mere *taking of security* of a less amount is not sufficient waiver of demand and notice. Spencer *v.* Harvey, 17 Wend. 489; Burrows *v.* Hanegan, 1 McLean, 309; Kyle *v.* Green, 14 Ohio, 495; Woodman *v.* Eastman, 10 N. H. 359; Pasey *v.* Decatur Bank, 12 Ala. 802; Marston *v.* Bank of Mobile, 10 Ala. 284; Holman *v.* Whiting, 19 Ala. 708; Creamer *v.* Perry, 17 Pick. 332, 334, 335; Develing *v.* Ferris, 18 Ohio, 170; Marshall *v.* Mitchell, 34 Maine, 227; Lewis *v.* Kramer, 3 Md. 265. Nor is taking any assignment of property after maturity of the note. Walters *v.* Munroe, 17 Md. 154; Gawtry *v.* Doane, 48 Barb. 148; Otsego County Bank *v.* Warren, 18 Barb. 290. But where an indorser of a note takes security of the maker, before it is due, to indemnify him against his liability as indorser, and after it is due receives back from the maker the property for which the note was given, and thereupon promises to deliver up the note to him without further compensation, he thereby waives demand on the maker and notice of non-payment by him, although the property so received back is not worth the sum due on the note. The taking back of the property in such case, after the note is due, and the promise to deliver up the note, are also evidence from which a jury may infer that the indorser had received due notice of non-payment by the maker. Andrews *v.* Boyd, 3 Met. 434.]

(*z*) The plaintiff need not prove this at the trial. Fitzgerald *v.* Williams, 6 Bing. N. C. 68; and see Carter *v.* Flower, 16 M. & W. 743.

(*a*) Chit. jr. B. 49; Byles on B.; Rose. Ev. Ignorance of place of residence. Chapcott *v.* Curlewis, 2 M. & R. 484.

sented for payment, but the said E. F. could not on search and inquiry, or since, be found, nor could his place of abode be discovered, nor hath he paid the said bill; of all which the defendant had due notice, but the defendant did not pay the same. [*Add a count on the consideration, as ante*, Form 1, p. 78.]

17. *Indorsee against Drawer, where Drawee was dead.* (*b*)

Commencement, ante, 5.] For that the defendant, on [*&c.*], by his bill of exchange, now overdue, directed to E. F. [by the description of E. F., Esq., Mill Street, Poplar], required E. F. to pay to the defendant or order £100, two months after date, and the defendant indorsed the same [to one G. H., who indorsed the same] to the plaintiff.* And after the making of the said bill, and before the same became due, E. F. died, and when the same became due ["and at the time this action was commenced," *if the fact be so*,] no person or persons had proved the last will or testament of E. F. [*if any*] or become executor or executors thereof, nor had any letters of administration of the estate and effects which were of the said E. F. at the time of his death been granted to any person or persons, nor had any person or persons administered thereto; and the said bill was duly presented and dishonored; of all which the said defendant had due notice, but did not pay the said bill. [*Add a count on the consideration, and conclude as directed, ante*, 74, Form 1.]

18. *Indorsee against Drawer, where the Defendant dispensed with Presentment.* (*c*)

As in the last form to the asterisk, except that the address of the drawee need not be stated.] And when the said bill became due, the plaintiff was ready and willing duly to present the said bill for payment, and would have duly presented the same; but the defendant requested the plaintiff not to present the said bill for payment, and wholly dispensed with such presentment, and discharged the plaintiff from presenting the said bill for payment; and the said E. F. hath not paid the same; of all which the defendant had due notice, but hath not paid the same. [*Add a count on the consideration, as ante*, Form 3, p. 74.]

III. ON BILLS IN THE CASE OF EXECUTORS, ASSIGNEES, HUSBAND AND WIFE, &c.

19. *By Executor of Drawer against Acceptor,* (*d*) *with the Common Counts laying a Debt to the Testator; and also on an Account stated with the Plaintiff as Executor.*

Commencement as ante, 13, Form 23.] For that E. F. in his lifetime, on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, re-

(*b*) See Chit. jr. B. 49; Byles on B. 116; and see *ante*, 79, note (*y*).

(*c*) See Chit. jr. B. 49, 60; 1 Wentw. 122. It is necessary to state this in the declaration, and it cannot be given in evidence under an allegation that actual presentment was made, or notice of dishonor was given. Burgh *v.* Legge, 5 M. & W. 420; Carter *v.* Flower, 16 M. & W. 749, 752, note; Caunt *v.* Thompson, 7 C. B. 400; *ante*, 79, note (*y*).

(*d*) Observe the notes to the forms, *post*, "Executors." The above form may readily be adapted, with the assistance of the form

quired the defendant to pay to him or order £100, two months [*or* "days," *or* "weeks," *&c. according to the fact*] after date, and the defendant accepted (*e*) the said bill, but did not pay the same.

And the plaintiff also sues the defendant for money payable by the defendant to the said E. F. in his lifetime, for goods sold and delivered by the said E. F. to the defendant, and for [*insert any other cause of action as ante* 34, Form 1, *taking care to write throughout the name of the deceased* "E. F." *for* "the plaintiff."] And also for money payable by the defendant to the plaintiff as executor as aforesaid, for money found to be due from the defendant to the plaintiff as executor as aforesaid, upon accounts stated between the plaintiff as executor as aforesaid and the defendant. And the plaintiff as executor as aforesaid claims £——.

20. *By Administrator of Drawer against Acceptor.*

Commencement as ante, 7, Forms 1 to 4.] For that the said E. F. in his lifetime, on [*&c.; proceed as in the last form, using the word* "administrator" *instead of* "executor"].

21. *By the Drawer, &c. against the Executor or Administrator of the Acceptor.*

Commencement as ante, 8 *or* 13, Forms 6, 25, *describing defendant's representative character.*] For that the plaintiff heretofore, in the lifetime of the said E. F., on [*&c.*], by his bill of exchange, now overdue, directed to the said E. F., required the said E. F. to pay to him the said plaintiff £100, two months after date, and the said E. F. accepted the said bill, but did not pay the same.

And the plaintiff also sues the defendant as executor as aforesaid for money payable by the said E. F. in his lifetime, to the plaintiff, for goods sold and delivered by the said plaintiff to the said E. F., and for [*proceed as in the forms post*, "Executors," *attending to the directions there given*]. And also for money payable by the defendant as executor as aforesaid to the plaintiff upon accounts stated between the plaintiff and the defendant as executor as aforesaid. And the plaintiff claims £——.

22. *By Indorsee of Executor of Drawer against Acceptor.*

The form will be as ante, 75, Form 4, *except that instead of the alleged indorsement by the drawer to the plaintiff, the following should be inserted:*] And the plaintiff says that on the —— day of ——, A. D. —— [*the date of the will, but the exact day is not material*], the said E. F. [*the drawer*] made his last will and testament in writing, and thereby appointed G. H. executor thereof; and the said E. F. afterwards, and after the drawing of the said bill, on the —— day of ——, A. D. —— [*exact day not material*], died, and the said G. H. then proved the said will, and took upon himself the burden of the execution thereof, and became executor as aforesaid, and as such executor

ante, 76, No. 6, to the case of an action against the *drawer* by the executor of the indorsee. Of course the presentment and notice to the defendant should be averred as in the latter form.

(*e*) Must prove on this an acceptance in testator's lifetime. Sarell *v.* Wine, 3 East, 409.

indorsed the said bill to the plaintiff. [*A profert of the will is not necessary.* See Stone *v.* Rawlinson, Willes, 559. *The above indorsement, if traversed, may be proved by the production of the probate, and proof of the executor's handwriting.*]

23. *By Indorsee of Administrator of Drawer against Acceptor.*

See last form and observations thereon. The allegation of the indorsement to the plaintiff will be thus:] "And the plaintiff saith, that afterwards, on the —— day of ——, A. D. —— [*exact day immaterial*], the said E. F. [*the drawer*] died intestate; and administration of all and singular the goods, chattels, and credits, which were of the said E. F., deceased, at the time of his death, was thereupon duly granted in due form of law by [*William by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan*] to one G. H.; and the said G. H., as such administrator, indorsed the said bill to the plaintiff."

24. *By the Assignees of a Bankrupt Drawer against the Acceptor; with the common Count, for the Consideration payable to the Bankrupt, and an Account stated with the Plaintiffs.*

Commencement as ante, 8, Form 7.] For that the said E. F., before he became a bankrupt, on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him the said E. F. or order £100 5*s.* 6*d.*, two months after date, and the defendant accepted the said bill, but did not pay the same.

And the plaintiffs, as assignees as aforesaid, also sue the defendant for money payable by the defendant to the said E. F. before his bankruptcy, for goods sold and delivered by the said E. F. to the defendant, and for [*insert any other cause of action as ante*, 39, Form 2, *taking care to write throughout the name of the bankrupt*, E. F., *for* "the plaintiff"].

*And also for money payable by the defendant to the plaintiffs, as assignees as aforesaid, for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, upon accounts stated between the defendant and the plaintiffs, as assignees as aforesaid. And the plaintiffs, as assignees as aforesaid, claim £——.

25. *Another Count, laying a Promise on the Bill to the Plaintiffs, and an Account stated with them.*

And also for that the defendant, having so accepted the said bill drawn by the said E. F. before he became bankrupt, in manner and form as in the [*first*] count mentioned, and the said bill being unpaid, the defendant in consideration thereof, after the bankruptcy of the said E. F., promised (*f*) the plaintiffs, as assignees as aforesaid, to pay them the said money on request. And the plaintiffs also sue the defendant for money payable [*as in the last form from the asterisk, unless it be necessary to insert a count on causes of action arising after the bankruptcy, in which case the* Form 3, *ante*, 53, *may be added as a further count, commencing it*, "And for money payable," *&c.*]

(*f*) Although non-assumpsit is not in general a good plea to a declaration on a bill, it would seem that in this form the defendant might deny the promise alleged.

26. *The like, by Assignees of Drawer, an Insolvent Debtor, against Acceptor.*

Commencement as ante, 8, Form 7.] For that the said E. F. heretofore and before his estate and effects vested in the plaintiffs, as assignees as aforesaid, on [*&c.*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him the said E. F. £100, two months after date; and the defendant, before the vesting of the estate and effects of the said E. F. in the plaintiffs, as assignees as aforesaid, accepted the said bill, but did not pay the same. [*Proceed as in the last form, with the necessary alterations in regard to the insolvency instead of bankruptcy, attending to the suggestions there.*]

27. *By the surviving Drawer against the Acceptor, with the common Count for a Debt to the Plaintiff and Deceased jointly, and an Account stated with the Plaintiff as Survivor.* (*g*)

Commencement, ante, 15, Form 32.] For that the plaintiff, *and one E. F., since deceased, in the lifetime of the said E. F.*, on [*&c.*], by their bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff and the said E. F. £——, [*two*] months after date; and the defendant accepted the said bill, but did not pay the same. [*Add such part of the common count as applies, laying the debt* "to the plaintiff and E. F., since deceased." *It may also frequently be advisable to add a count for debts accruing after the death entirely to the plaintiff. See post*, "Partners."]

A form against *a surviving party to a bill is not given, it being unnecessary to declare against a survivor specially as such. He may be sued as if he alone made, or indorsed, or accepted the bill, &c. He cannot plead the non-joinder in abatement, as he cannot aver that the other party is alive; and no objection can effectually be made at the trial on the ground of a variance.* Mountstephen v. Brooke, 1 B. & Ald. 224.

28. *By Husband and Wife, on a Bill drawn by and payable to the Wife before Marriage, against the Acceptor.*

Commencement as ante, 14, Form 27.] For that the said E., whilst she was unmarried, on [*&c.*], by her bill of exchange, now overdue, directed to the defendant, required the defendant to pay to her the said E. £——, [*two*] months after date, and the defendant accepted the said bill, but did not pay the same. [*Add count on the original consideration on the principle of* Form 19, *ante*, p. 81, *laying the debt* "to the said E. whilst she was unmarried." *See post*, "Husband and Wife." *The husband cannot sue alone on a bill to the wife dum sola.* Sherrington *v.* Yates, 12 M. & W. 855, 865; 1 D. & L. 1032; Richards *v.* Richards, 2 B. & Ad. 447. *The assignees of a bankrupt cannot sue alone on a note given to the wife dum sola, payable to her order.* Sherrington *v.* Yates, *supra*. See form by the executor of a deceased wife to whom a promissory note was given, *dum sola*, and not reduced into possession by the husband before her decease. Hart *v.* Stephen, 6 Q. B. 937.]

(*g*) See Jell *v.* Douglass, 4 B. & Ald. 374.

Where a bill or note is payable on the face of it to a *married woman*, the husband may sue alone or the wife may be joined with him. Philliskirk *v.* Pluckwell, 2 M. & S. 293; Bidgood *v.* Way, 2 Bl. 1236. Husband's indorsement of such bill or note, passes legal estate. Baker *v.* Bank of Australasia, 1 C. B. N. S. 515; Dawson *v.* Prince, 27 L. J. Ch. 169; 2 De G. & J. 41.

29. *Against Husband and Wife, on Bill accepted by her before Marriage.*

Commencement against defendant "and E. his wife" [*&c. as ante*, 14]. For that G. H., whilst the said E. was unmarried, on [*&c.*], by his bill of exchange, now overdue, directed to the said E. whilst she was unmarried, required the said E. to pay to the said G. H. or order £——, two months after date; and the said E., whilst she was unmarried, accepted the said bill, and the said G. H. indorsed the same to one I. K., who indorsed the same to the plaintiff, but the said E. did not pay the said bill, and the same is still unpaid. [*Add a count on the original debt*, "for money payable by the said E. whilst she was unmarried to the plaintiff," for, *&c.* See *post*, "Husband and Wife." *A count laying a promise by both the defendants since their marriage cannot be inserted.* See Morris *v.* Norfolk, 1 Taunt. 212; Pittam *v.* Foster, 1 B. & C. 248.]

IV. ON FOREIGN BILLS.

30. *Drawer (or Indorser) against Acceptor.*

Commencement, *ante*, 5.] For that the plaintiff [*or* "one E. F."], on [*&c.*], *in parts beyond the seas*, (*h*) to wit, at Paris, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay ["that his second of exchange (*according to the bill*), first and third of the same tenor and date, not paid" (*i*)] to the plaintiff [*or* "one G. H."] or order £100 5*s.* 6*d.* sterling [*or* "3,000 francs"], two months (*k*) after date [*or* "at two usances, (*l*) that is to say, at two calendar months (*l*) after date," *according to the bill*,] [*if the action be by an indorsee, state the drawer's*, E. F.'s, *indorsement* (*m*) *to the plaintiff in the common form*], and the defendant accepted (*n*) the said bill, but did not pay the same when due. [*When the bill is to be paid in foreign money, add the following averment:* (*o*)] "And the plaintiff says that the sum

(*h*) As to what are inland bills and what foreign, see 19 & 20 Vict. c. 97, s. 7, *ante*, 77, note (*a*). As to stamps on foreign bills, see 23 Vict. c. 15. This is a necessary averment though a foreign town be mentioned, otherwise the bill will be taken to be an inland bill. Sprowle *v.* Legge, 1 B. & C. 16; Kearney *v.* King, 2 B. & Ald. 301; and the defendant might treat it as such in pleading, and deny that he indorsed, &c. "the said *inland* bill;" Armani *v.* Castrique, 9 D. & L. 440; S. C. 13 M. & W. 443; and may show even as against a *bonâ fide* holder that the bill, though purporting to be drawn abroad, was drawn in England, and so bad for want of a stamp. Steadman *v.* Duhamel, 1 C. B. 888.

(*i*) As to this condition, see Holdsworth *v.* Hunter, 10 B. & C. 449.

(*k*) If payable *after sight*, see *ante*, 77, Form No. 10.

(*l*) See Buckley *v.* Campbell, 1 Salk. 131; Smart *v.* Dean, 3 Keb. 645.

(*m*) As to a transfer abroad of a foreign bill, Trimbly *v.* Vignier, 1 Bing. N. C. 151; [Lebel *v.* Tucker, 37 L. J. Q. B. 46; S. C. L. R. 3 Q. B. 77;] or note, Bentley *v.* Northhouse, 1 Mood. & M. 66.

(*n*) An acceptance of a foreign bill must be in writing on the bill, or, if in sets, on one of the parts of such bill, and signed by the acceptor or some person duly authorized by him. 19 & 20 Vict. c. 97, s. 6.

(*o*) See Simmonds *v.* Parminter, 1 Wils.

[of 3,000 francs] in the said bill mentioned, at the time of making the said bill, and when the same became due, was and is of the value of [£——] of lawful money of Great Britain." [*Add count, on the consideration and on an account stated, and conclude as directed, ante*, 33, Form No. 1.]

31. *Indorsee against Drawer of Foreign Bill — Default Acceptance.*

Commencement, ante, 5.] For that the defendant, on [*&c.*], in parts beyond the seas, to wit, at [Paris], by his bill of exchange, now overdue, directed to one E. F., required the said E. F. to pay (*p*) to the said defendant [*or* "one G. H."] or order £100 5*s.* 6*d.* sterling, (*q*) two months after date. (*r*) And the defendant indorsed the said bill [to one G. H., who then indorsed the same to one I. K., who then indorsed the same] to the plaintiff. And the said bill was then presented (*s*) to the said E. F. for acceptance, and the said E. F. then refused to accept the same. (*t*) [*If the bill be drawn in sets, add this averment:* "nor did nor would he accept the said *first* or *third* of exchange in the said bill mentioned," (*u*)] whereupon the said bill was then duly protested (*x*) for non-acceptance thereof, of all which the defendant had due notice; and the plaintiff, by reason of the premises, incurred expenses in and about the noting, protesting, and reëxchange of the said bill, and for commission and postages incidental thereto; (*y*) and the defendant hath not paid the said bill or expenses.

32. *Indorsee against Drawer of Foreign Bill — Default Payment.*

Commencement, ante, 5.] For that the defendant, on [*&c.*], in parts beyond the seas, to wit, at [Paris], by his bill of exchange, now overdue, directed to one E. F., required the said E. F. to pay to the said defendant or order £100 5*s.* 6*d.* sterling, (*z*) two months after date. (*z*) And the defendant indorsed the said bill to [one G. H., who indorsed the same to] the plaintiff. And the said E. F. did not pay the said bill, although the same was presented to him when due, whereupon the said bill was duly protested for non-payment thereof, of all which the defendant had due notice.

33. *Indorsee against Acceptor of Foreign Bill, supra Protest.* (*a*)

Commencement, ante, 5.] For that one E. F., on [*&c.*], in parts beyond the

185; Kearney *v.* King, 2 B. & Ald. 301; Sprowle *v.* Legge, 1 B. & C. 16.

(*p*) Observe last form and the notes.

(*q*) If payable in *foreign* money, observe the last form.

(*r*) If payable at usance, &c. observe the last form.

(*s*) A foreign bill, payable after sight, must be presented for acceptance within a *reasonable time* (which is a mixed question of law and fact); the want of presentment is not excused by reason of the drawer continuing solvent up to the time of presentment, or that no actual damage was caused to them by the delay. Mullick *v.* Badallissen, 9 Moore P. C. C. 469.

(*t*) An allegation that the bill is overdue is unnecessary; *ante*, 76, note (*c*); in the case in the text the right of action accrues immediately on non-acceptance, protest, and notice. Whitehead *v.* Walker, 9 M. & W. 506.

(*u*) Starke *v.* Cheeseman, Carth. 509; Wegersloffe *v.* Keene, Stra. 214.

(*x*) As to the omission of this averment, see Salomons *v.* Stavely, 3 Doug. 298; Chit. jr. B. 423. See Witherley *v.* Sarsfield, 1 Sho. 127; Chit. jr. B. 173; Ib. 61. A subsequent promise by defendant to pay the bill, even though conditional, is evidence in support of this averment. Campbell *v.* Webster, 2 C. B. 258; and see *ante*, 79, note (*y*).

(*y*) See Kendrick *v.* Lomax, 2 Cr. & J. 407.

(*z*) If payable in foreign money, or at usances or after sight, or drawn in sets, observe Form No. 30, *ante*, 85.

(*a*) See form Mitchell *v.* Baring, 4 C. & P. 35; S. C. 10 B. & C. 4.

seas, to wit, at [Paris], by his bill of exchange, now overdue, directed to one G. H., required the said G. H. to pay (*b*) to the said E. F. or order £——, (*c*) two months after date. (*c*) And the said E. F. indorsed the same to [L. M., who indorsed the same to] the plaintiff, and the said bill was presented to the said G. H. for acceptance, and he refused to accept the same, whereupon the said bill was protested for non-acceptance thereof, of all which the defendant had notice. And thereupon the defendant, in order to prevent the said bill from being sent back and returned to the said E. F. [*the drawer*], did under the said protest accept the said bill, and the said G. H. [*the original drawee*] did not pay the said bill, although the same was presented (*d*) to him for payment when due, whereupon the said bill was then duly protested (*e*) for non-payment thereof, of all which the defendant had due notice, but did not pay the said bill. [*Add a count upon an account stated, and conclude as ante*, 34, Form 1.]

FOR BOARD AND LODGING. (*f*)

Commencement as ante, 33, Form 1.] For the use and occupation of certain rooms, apartments, and furniture of the plaintiff, by the defendant ["and other persons," *if the fact be so*,] at his request, and for meat, drink, attendance, and other necessaries and goods by the plaintiff found and provided for the defendant ["and other persons"] at the defendant's request, and for [*state money paid or other debt, and conclude with account stated, &c. as ante*, 33].

[*Form prescribed under the Massachusetts Practice Act.*

And the plaintiff says the defendant owes him —— dollars for board and lodging furnished by the plaintiff for the defendant. See Raymond *v.* Eldridge, 111 Mass. 390, 391.]

BONDS.

Obs. — Bonds may, for the purpose of considering the rules of pleading thereon, be divided into — 1. *Common Money Bonds*; 2. *Bonds having special conditions for the performance of any covenant or agreement in another instrument, &c. within the statute* 8 & 9 *W.* 3, *c.* 11, *s.* 8.

1. The plaintiff has no occasion to assign any breach of the condition of a common money bond in his declaration or other pleading (unless the defendant plead specially that he has performed the condition), and need never suggest such breach on the roll. These bonds are regulated by the statute 4 & 5 Ann. c. 16, s. 12. At common law the *penalty* was the debt for which execution might be issued; but by the statute of Anne, s. 12, "where an action of debt is brought

(*b*) Observe Form No. 30, p. 85.

(*c*) If payable in *foreign* money, or at usances, or after sight, or drawn in sets, *vide* Form No. 30, p. 85.

(*d*) Presentment *for payment* to the drawee is necessary. Williams *v.* Germaine, 7 B. & C. 468.

(*e*) The second protest is necessary. Hoare *v.* Cazenove, 16 East, 391; Vandenwall *v.* Tyrrell, 1 Mood. & M. 87.

(*f*) This is the proper form where the defendant was an *inmate* in the plaintiff's house, and was boarded and lodged under an entire contract for board and lodging. Attwaters *v.* Courtney, 1 C. & M. 51. It is necessary for the plaintiff to prove that the defendant and he came first together on the terms that the board and lodging was to be paid for, and that it was not to be furnished gratuitously. Davies *v.* Davies, 9 C. & P. 87. Where the defendant was only a *lodger*, see the form *post*, tit. "Landlord and Tenant." The plaintiff should declare for necessaries as *post*, tit. "Necessaries," if the defendant were not an inmate, but was casually supplied, as in the case of an innkeeper's guest, &c.

Obs. upon any bond which hath a condition or defeasance to make void the same upon payment of *a lesser sum at a day or place certain*, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may nevertheless be pleaded in bar of such action (see *post*, 'Payment'), and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded." And by section 13 it is enacted, "That if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court where the action shall be depending all the principal, money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly." Wheelhouse *v.* Ladbrooke, 3 H. & N. 291. This, however, does not authorize the payment of the money into court being *pleaded*. England *v.* Watson, 9 M. & W. 333; London [Bishop of] *v.* McNiel, 9 Ex. 490; Hodgkinson *v.* Wyatt, 1 D. & L. 66. Upon demurrer to a declaration upon a bond, the indorsement of the court is upon the declaration and not upon the breaches assigned. Kingsford *v.* Dutton, 1 Prac. Rep. 479.

2. Pleadings on bonds having *special conditions* of the nature alluded to are regulated by the statute of 8 & 9 W. 3, c. 11, s. 8. [By s. 8 of this statute it is enacted, that in all actions upon any bond or on any penal sum for non-performance of any covenants or agreements in any deed or writing contained, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess not only such damages and costs of suit as were before usually assessed, but also damages for such of the said breaches as the plaintiff shall prove to have been broken; and that the like judgment shall be entered on the verdict as before had been usually entered on such actions; and that, if judgment shall be given for the plaintiff on demurrer, or by confession, or *nil dicit*, he may suggest upon the roll as many breaches as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury before the justice or justices of assize (or now by the 3 & 4 W. 4, c. 42, s. 16, before the sheriff) to inquire of the truth of those breaches, and to assess the damages that the plaintiff shall have sustained thereby. The section then provides, that in case the defendant shall pay into court the damages assessed for the breaches, a stay of execution shall be entered; or if the plaintiff is satisfied by execution, the defendant shall be thereby discharged, but, notwithstanding, in each case the judgment shall remain as a security against any further breaches, upon which the plaintiff may have a *scire facias*. Accordingly the judgment is entered in the usual form for the whole penalty and costs, with the addition, "that the plaintiff have execution against the defendant of the damages aforesaid to —— by the jury assessed, according to the statute."]

The C. L. P. Act, 1852, does not affect the proceedings under the 8 & 9 W. 3, c. 11, "as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches." C. L. P. Act, 1852, s. 96.

The statute 8 & 9 W. 3 applies (and breaches must therefore be assigned in the pleadings or suggested on the roll) in cases where a bond (though on the face of it a common bond) is executed contemporaneously with a separate deed, by which it is declared by the parties that the bond shall be a security for all moneys then or thereafter to be due, &c. Hurst *v.* Jennings, 5 B. & C. 650. It extends also to annuity bonds; Walcot *v.* Goulding, 8 T. R. 126; arbitration bonds; Welch *v.* Ireland, 6 East, 613; Hanbury *v.* Guest, 14 East, 401; and to bonds conditioned to pay a sum of money *by instalments*, unless it be provided that the whole sum shall become due in case of any one default. James *v.* Thomas, 5 B. & Ad. 40; Smith *v.* Bond, 10 Bing. 125; Kepp *v.* Wiggett, 4 C. B. 678; Hodgkinson *v.* Wyatt, 1 D. & L. 668.

The statute 8 & 9 W. 3 *does not extend* to common money bonds, which are pro-

Obs. vided for by 4 & 5 Ann. c. 16, s. 13; Cardozo *v.* Hardy, 2 Moore, 220; or to *post orbit bonds* for the payment of a gross sum at one time; Murray *v.* Earl of Stair, 2 B. & C. 82, 89, 3 D. & R. 78, S. C.; or a bail bond; Moody *v.* Pheasant, 2 B. & P. 446; or a replevin bond; 2 Saund. 187, note (2); Middleton *v.* Bryan, 3 M. & S. 155; or a petitioning creditor's bond; Smith *v.* Broomhead, 7 T. R. 300; Smithey *v.* Edmonson, 3 East, 22; or a bond to replace stock. Savill *v.* Jackson, 13 Price, 815. And although the statute applies to bonds to pay money at different periods, where part has not accrued due (see Vansandau *v.* Burt, 1 B. & Ald. 214; Tighe *v.* Crafter, 2 Taunt. 387), yet it does not apply to a bond conditioned for the payment of a principal sum on a named day, and interest at fixed periods before that day, pursuant to the stipulations in a deed, if the action be brought after the day when the principal was to be paid, so that the whole sum is due, and nothing but calculation is necessary to fix the precise amount claimable on the face of the bond. Smith *v.* Bond, 10 Bing. 125.

Under the statute 8 & 9 W. 3, the plaintiff may either *declare* upon the bond as a common money bond (Form 1), or he may in his declaration set out the condition, and therein *assign* a breach or breaches. See Form 2. If the declaration do not state the condition, &c. and the defendant set out the condition and plead performance thereof, the plaintiff must specially assign breaches in his *replication*. See *post*, Pleas, "Bonds." If the defendant do not plead performance, but plead some other matter irrelevant thereto, as *non est factum*, &c. the plaintiff must reply to those pleas as at common law, taking issue, and must *not assign breaches as part of his replication*, but should enter a distinct *suggestion* of breaches under the statute. See Homfray *v.* Rigby, 5 M. & S. 60; Darbyshire *v.* Butler, 5 Moore, 193; 2 Saund. 187 *a*; Tidd, 9th ed. 688; 1 Chit. Pl. 7th ed. 611; [Bush *v.* Leake, 3 Doug. 255; Roakes *v.* Manser, 1 C. B. 531.] Where the declaration does not show the condition, and the defendant does not plead at all, so that plaintiff signs judgment by default, the plaintiff must *suggest* breaches on the roll, and execute a special writ of inquiry under the statute. See Ib.; Chitty's Forms, 514; 2 Chit. Arch. Ind. "Bond;" [Ethersey *v.* Jackson, 8 T. R. 255; Lawes *v.* Shaw, 5 Q. B. 322; Roles *v.* Rosewell, 5 T. R. 538; Welch *v.* Ireland, 6 East. 613.] It was formerly deemed advisable to set out the condition and assign breaches in the *replication*, where it was anticipated that the defendant would plead to the action; for where the breaches were assigned in the *declaration*, the defendant might plead several distinct pleas or matters thereto; whereas, if breaches were assigned in the *replication* in answer to a general plea of performance, the defendant was limited to one answer in his *rejoinder;* but as several *rejoinders* to the same matter or replication are now permitted by C. L. P. Act, 1852, s. 81, these reasons no longer exist; and where expedition is material, it may be better to assign the breaches in the declaration, and thus avoid the necessity of a special replication. And this course is often material in cases where it is expected that the defendant will suffer judgment by default. In this instance, if the breaches are assigned in the declaration, no *suggestion* on the roll is necessary, and the plaintiff's *evidence* is materially diminished. He need not, on the execution on the writ of inquiry under the statute, prove averments contained or breaches *assigned* in his *declaration;* but he must prove all averments connected with the breaches that have been *suggested* on the record after judgment. See 1 Saund. 58 *a*, 6th ed. In an action on a bond against a surety, it was held, that if non-payment by the principal, after notice in writing, required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations in the declaration are not put in issue; though if the breach be suggested on the record under the statute after judgment, it would be otherwise. Barwise *v.* Russell, 3 C. & P. 608; and see Archbishop of Canterbury *v.* Robertson, 1 C. & M. 690; Webb *v.* James, 8 M. & W. 645; [Scott *v.* Staly, 4 Bing. N. C. 724; Quin *v.* King, 1 M. & W. 42.] So on the execution of the writ of inquiry after judgment on demurrer, the execution of an instrument which the defendant has stated in setting out the condition of the bond in his plea, need not be proved. Collins *v.* Rybott, 1 Esp. Rep. 157. Where in debt on bond conditioned for the performance of covenants in an

Obs. indenture, &c. or of an award, judgment is suffered to pass by default, and breaches are suggested, he must prove the condition of the bond, the award, indenture, &c. as well as the breaches. 1 Saund 58 *a*; [and see per Bramwell B. in Betts *v.* Burch, 4 H. & N. 506, 510.] The defendant cannot, on the execution of the writ of inquiry, offer evidence in excuse for the non-performance of the condition. Archbishop of Canterbury *v.* Robertson, 1 C. & M. 404; 2 Chit. Arch. Ind. "Bond." Where to a plea of performance the plaintiff has assigned breaches in his replication, it is advisable for the plaintiff to sign judgment by default for want of a *rejoinder*, and state the pleadings on the record. Lawes *v.* Shaw, 5 Q. B. 322. [Under the Massachusetts practice act, when a bond, or other conditional obligation, contract or grant, is declared on, the condition is to be deemed a part of the obligation, contract or grant, and must be set forth; breaches relied on must be assigned, and conditions precedent to the right of the party relying thereon are to be averred to have been performed, or his excuse for the non-performance thereof stated. Genl. Sts. c. 129, § 2, pt. 10. See, further, as to the remedy on bonds in Massachusetts, Genl. Sts. c. 133, §§ 9–13; Leonard *v.* Speidel, 104 Mass. 356; Fisk *v.* Gray, 100 Mass. 191; Leighton *v.* Brown, 98 Mass. 515; Goodrich *v.* Yale, 97 Mass. 15; Austin *v.* Moore, 7 Met. 116; Merrill *v.* McIntire, 13 Gray, 157; Battey *v.* Holbrook, 11 Gray, 212; Wright *v.* Quirk, 105 Mass. 44, 48; Davis *v.* Harding, 3 Allen, 302. In New York, when an action is brought upon any bond, for the breaches of any condition other than the payment of money, or for any penalty for the non-performance of any covenant, or written agreement, the complaint must contain averments of the specific breaches for which the action is brought. 2 R. S. 378, § 5; Reed *v.* Drake, 7 Wend. 345; People *v.* Brush, 6 Wend. 454; People *v.* Russell, 4 Wend. 570; Western Bank *v.* Sherwood, 29 Barb. 383. This rule does not apply to bonds for the payment of money by instalments. Spaulding *v.* Millard, 17 Wend. 331; Harmon *v.* Dedrick, 3 Barb. 192. Nor to bonds for the payment of an annuity. Wood *v.* Wood, 3 Wend. 454; Nelson *v.* Bostwick, 5 Hill, 37. The several breaches are in the nature of distinct causes of action. Beach *v.* Barons, 13 Barb. 305. In an action on a penal bond the judgment, in form, is for the penalty. Western Bank *v.* Sherwood, 29 Barb. 383.]

1. *On a Common Bond, where the Condition is not set out.*

Commencement in debt, ante, 5.] For that the defendant, (*g*) by his bond, acknowledged himself to be bound to the plaintiff in the sum of £——, (*h*) to be paid to the plaintiff, (*i*) but has not paid the same.* And the plaintiff also sues the defendant for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims £——. (*k*)

2. *On a Mortgage Bond, or other Bond for the Performance of Covenants in another Indenture, assigning a Breach.* (*l*)

For that the defendant by his bond acknowledged himself to be bound to

(*g*) As to defendant executing a bond under a different name from that by which he is sued, Williams *v.* Bryant, 5 M. & W. 447; Finch *v.* Cocken, 2 Cr., M. & R. 196. [Illegality of bond. Blakemore *v.* Yates, 36 L. J. Ex. 121; S. C. L. R. 2 Ex. 225.]

(*h*) A variance in stating the penalty was amended at the trial under 3 & 4 W. 4, c. 42, s. 23. Hill *v.* Salt, 2 Cr. & M. 420.

(*i*) Where defendant by bond acknowledged himself bound to A. in £100, to be paid to A. or B., held, that A. might sue defendant and declare against him without noticing C. or negativing non-payment to B. White *v.* Hancock, 2 C. B. 830.

(*k*) The damages are limited to the penalty. Branscombe *v.* Scarborough, 6 Q. B. 13; Beaumont *v.* Greathead, 2 C. B. 494. But enough should be stated here to cover all interest due. *Ante*, 34, note (*i*). Where by the condition a less sum than £20 is payable, and the penalty does not exceed £20, no costs are recoverable by virtue of 13 & 14 Vict. c. 61, s. 11. Govens *v.* Moore, 3 H. & N. 540. But as the penalty is the *debt* in law; *quære*, if the *penalty* exceed £20, whether costs are not recoverable. Ib.

(*l*) See Obs. *supra*; and vide the suggestion there, that it is sufficient to declare on the bond, as on a common money bond, ac-

the plaintiff in the sum of £—— conditioned [*&c. set it out*]; and the plaintiff further saith that in and by the said indenture mentioned and referred to in the said condition of the said bond, the defendant, for the consideration therein mentioned, did grant [*as in indenture*], to have and to hold [*&c. as in indenture*], but subject nevertheless to a certain proviso for the redemption of the said premises, being the proviso or condition mentioned and referred to in and by the said condition in that behalf, whereby it was provided [*&c. reciting the proviso and defendant's covenant to pay*]. And for assigning a breach of the said condition of the said bond, the plaintiff says that the defendant did not pay to the plaintiff the said sum of £—— and interest in the said condition of the writing obligatory mentioned, on the said —— day of —— next ensuing the date of the said writing obligatory, or at any time before or afterwards, according to and in discharge of the said proviso or condition, and the said sum of £——, together with £——, for [six] half year's interest (*m*) of and upon the said principal sum of £——, being the [six] half years next preceding the —— day of ——, A. D. ——, and then last elapsed, is still wholly due and unpaid to the plaintiff, whereby the said bond became forfeited. And the plaintiff claims £——.

[*2a. Form of Declaration prescribed by Practice Act of Massachusetts, on a Bond with condition to pay certain Debts of the Plaintiff, and to provide for his Support.*

And the plaintiff says the defendant executed to him a bond, a copy whereof is hereto annexed.

And the plaintiff says he owed to one O. P. the sum of one hundred dollars on a promissory note [*describing it*], which the defendant neglects to pay.

Also that he owed to one R. S. one hundred dollars, according to the account hereto annexed, which the defendant neglects to pay.

Also that the defendant neglects to provide clothing for the plaintiff.

And the plaintiff has requested the defendant to pay said debts, and provide for his support as mentioned in said bond. [*To be inserted, if proof of the request is necessary.*] Genl. Sts. c. 129, § 87.]

3. *By a Surety on a Bond of Indemnity, given to him by a Clerk on his becoming Answerable to an Insurance Office for the Fidelity of the Clerk.* (*n*)

Proceed as in last form, setting out the condition in full.] And the plaintiff says that the said E. F. remained and continued in the said service of the said —— Company as in the said condition of the said bond mentioned, for a long period of time, during which he the said E. F. had and received, (*o*) for and on the account of the said —— Company, divers moneys, to wit, £——, yet the said E. F. did not make good, (*o*) answer for, or pay the moneys due from him on the balance of accounts to the said company (although the same

cording to Form 1, *ante*, 90. When not necessary to suggest breach on a mortgage bond, *ante*, Obs.

(*m*) As to this breach, see King *v.* Greenhill, 6 M. & G. 59; and Simmons *v.* Wood, 5 Q. B. 170.

(*n*) See a similar form, Field *v.* Robbins, 8 Ad. & E. 90.

(*o*) Follow the terms of the condition.

company afterwards requested (*p*) the said E. F. so to do), but therein wholly failed and made default, whereby the plaintiff was, under and by virtue and in pursuance of his said writing obligatory, called upon and forced and obliged to pay and did pay to the said —— Company a large sum of money, to wit, £——, in part of the said moneys which the said E. F. had so neglected to pay as aforesaid [*here aver performance of all conditions precedent, as ante*, 39]; yet the defendant hath not well or sufficiently saved, defended, or kept harmless or indemnified the plaintiff from the said loss, charges, and damages which he so sustained, paid, expended, suffered, and was put unto as aforesaid, and which did happen and come unto him for and by reason and means of the plaintiff having so become security for the said E. F. as aforesaid, but hath hitherto wholly neglected and refused so to do, whereby the said bond became forfeited. And the plaintiff claims £——.

4. *On a Bond given to the Guardians of the Poor for the due Supply of Provisions, and Plea of Dispensation of the Condition.*

Elliott *v.* Martin, 2 M. & W. 13.

[4*a*. *On Bond given to Churchwardens for the Performance of the Duties of Rates Collector, and Pleas.*

Skillett *v.* Fletcher, L. R. 1 C. P. 217; L. R. 2 C. P. 469.]

5. *On Bonds in Restraint of Trade.*

Ward *v.* Byrne, 5 M. & W. 548; Mercer *v.* Irving, El., Bl. & El. 563; Tallis *v.* Tallis, 1 El. & Bl. 391.

6. *Against a Surety on a Bond given for the Fidelity of an Agent to whom the Plaintiff intrusted Goods to sell.* (*q*)

Stothert *v.* Goodfellow, 1 Nev. & Man. 202.

7. *Against the Surety in an Annuity Bond.*

White *v.* Corbett, El., Bl. & El. 1103.

8. *By the Assignee of an Administration Bond assigned by Order of the Probate Court.*

Young *v.* Hughes, 4 H. & N. 76; Archbishop of Canterbury *v.* Robertson, 1 Cr. & M. 690.

BRIBERY.

Action to recover a Penalty of £100 for bribing a Voter at a Parliamentary Election. (*r*)

Commencement as ante, 5.] For that the defendant, after the passing of

(*p*) As to this request, see Batsome *v.* Spearman, 9 Ad. & E. 298; Vyse *v.* Wakefield, 7 M. & W. 126.

(*q*) And see Bishton *v.* Evans, 2 Cr., M. & R. 12. As to when liability discharged. London Assurance Corporation *v.* Bold, 6 Q. B. 514; Chapman *v.* Beckington, 3 Q. B. 703; Mayor of Berwick *v.* Oswald, 1 El. & Bl. 295. See cases in Fisher's Index, "Bond."

(*r*) See a form, Cooper *v.* Slade, 6 El. & Bl. 447; 27 L. J. Q. B. 449, H. of L. See *post*, "Statutes."

a certain act of parliament, passed in the 17th and 18th year of the reign of Queen Victoria, called an act to consolidate and amend the laws relating to bribery, treating, and undue influence at elections of members of parliament, and before this suit, promised [*or* gave] money to or for one A. B., who was a voter within the true meaning and intent of the said statute for and at an election for a member [*or* members] of parliament for the borough of —— [*or* county of ——], in order to induce the said A. B. to vote at the said election, contrary to the form of the statute, whereby the defendant became liable to forfeit for his said offence the sum of £100. And the plaintiff claims £100.

BROKER.

See "Agent," *ante*, 38, and *post*, "Insurance Broker." [*Who is a broker within* 57 Geo. 3, c. 60, Scott *v.* Jackson, 19 C. B. N. S. 134.]

1. *Against Share Brokers for not purchasing Shares for the Plaintiff at the Market Price, according to Order.*

Williams *v.* The London Commercial Exchange Company, 10 Ex. 569.

2. *Against a Broker for not giving his Principal a true Account of the Purchases which he had effected for him.*

Form and law. Thom *v.* Bigland, 8 Ex. 725.

[3. *Against Client by Broker for not ratifying Sale.*

Biederman *v.* Stone, 36 L. J. C. P. 198; S. C. L. R. 2 C. P. 504; and see Grissell *v.* Bristowe, L. R. 3 C. P. 112; 37 L. J. C. P. 89; and Paine *v.* Hutchinson, L. R. 3 Ch. Ap. 388.

4. *Against Broker employed to purchase and accept Goods, for accepting Goods not agreeing with the Contract Description.*

Zwilchenhart *v.* Alexander, 1 B. & S. 234.

5. *Indebitatus Count by a Broker for Commission, &c.*

Money payable by the defendant to the plaintiff for work done by the plaintiff as a broker, and otherwise, for the defendant, and at his request, and for commission and reward due from the defendant to the plaintiff in respect thereof, and for stock, shares, scrip, and goods sold and delivered by the plaintiff to the defendant.

Like counts. Knight *v.* Cambers, 15 C. B. 562; Knight *v.* Fitch, 15 C. B. 566; Smith *v.* Lindo, 4 C. B. N. S. 395.

Count by broker for a share of commission payable for introducing business. Gibson *v.* Crick, 1 H. & C. 142; Allan *v.* Sundius, 1 H. & C. 123.

By a broker against his employer on the implied promise that shares delivered him to sell were genuine, the shares being in fact forged, and the plaintiff having been compelled to replace them by genuine ones. Westropp *v.* Solomon, 8 C. B. 345.

By a broker against his employer on an implied warranty that he had authority to sell. Wilson *v.* Miers, 10 C. B. N. S. 348.]

CARRIERS BY LAND.

Obs. — See Chit. jr. Cont. Index, *in voc.* The remedy is on contract or tort. See forms, *post*, Declarations in Tort, tit. "Carrier," where the law on this subject is more fully given. In general the *consignee* should be the plaintiff; Chit. & Temp. on Car. 125; Coombs *v.* The Bristol & Exeter Ry. Co. 3 H. & N. 510; [1 Chitty Contr. (11th Am. ed.) 722; Potter *v.* Lansing, 1 John. 215; McIntyre *v.* Bowne, 1 John. 229; De Wolf *v.* New York Ins. Co. 20 John. 214; Bonner *v.* Marsh, 10 Sm. & M. 376; Benj. Sales (1st Am. ed.) 399, and note (*c*); 1 Chitty Pl. 6, note (*x*) and cases cited; Krulder *v.* Ellison, 47 N. Y. 36; Thompson *v.* Fargo, 49 N. Y. 188; Southern Express Co. *v.* Caperton, 44 Ala. 101; Lawrence *v.* Minturn, 17 How. (U. S.) 100;] except where the property has not passed to him. Coates *v.* Chaplin, 3 Q. B. 483; [1 Chitty Pl. 6, 7, and notes; 1 Chitty Contr. (11th Am. ed.) 723; Price *v.* Powell, 3 Comst. 322; Carter *v.* Graves, 9 Yerger, 446; Goodwyn *v.* Douglass, 1 Cheves, 174; Mayall *v.* Boston & Maine R. R. 19 N. H. 122, 128. The consignor may sue where he has contracted for safe conveyance, although the title may have passed to the consignee. Hooper *v.* Chicago &c. R. R. Co. 27 Wisc. 81.] In case of joint bailment by A. and B. of goods partly A.'s, and partly B.'s, A. and B. may sue jointly for the loss. Metcalf *v.* London & Brighton Ry. Co. 4 C. B. N. S. 318. It is sufficient to sue one of several carriers in partnership. 1 W. 4, c. 68, s. 5. At *common law* a public carrier is liable absolutely for the loss of goods, except in case of loss by the act of God or the king's enemies. Jones on Bailm. 104; Chit. & Temp. on Car. 36; Oakly *v.* Portsmouth & Ryde Steam Navigation Co. 11 Ex. 618; [1 Chitty Contr. (11th Am. ed.) 689, and cases in note (*a*).] By the carriers' act, 1 W. 4, c. 68, s. 1, "no mail contractor, stage-coach proprietor, *or other common carrier by land* for hire shall be liable for the *loss* (Hearn *v.* London & South Western Ry. Co. 10 Ex. 793; Pianciani *v.* London & South Western Ry. Co. 18 C. B. 226) of or *injury* to any article or property of the description following, that is to say, gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in any parcel or package which shall have been delivered either *to be carried for hire or to accompany the person of any passenger* in any mail or stage-coach or other public conveyance, when the value of such article or articles or property contained in such parcel or package shall *exceed the sum of* £10; unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the *value and nature* of such article or articles or property shall have been *declared* by the person sending or delivering the same; see Boys *v.* Pink, 8 C. & P. 361; *and such increased charge* as is hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

The *second* section enacts, "that when any parcel or package containing any of the said articles shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of £10, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some *notice affixed in legible characters in some public and conspicuous part of the office*,

Obs. warehouse, or other receiving-house where such parcels or packages are *received* by them for the purpose of conveyance, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles at such office shall be bound by such notice *without further proof of the same having come to their knowledge.*"

By the *third* section, "when the value shall have been so declared, and the increased rate of charge paid, or any engagement to pay the same shall have been accepted, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured (which receipt shall not be liable to any stamp duty); and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not be entitled to any benefit or advantage under the act, but shall be liable *as at the common law*, and be liable to refund the increased rate of charge."

The *fourth* section provides, "that *no public notice* or declaration shall limit or in any wise *affect the liability at common law* of any such mail contractors, stage-coach proprietors, or other public common carriers, for or in respect of any goods to be carried and conveyed by them; but that they shall be liable *as at the common law*, to answer for the loss of or injury to any articles and goods *in respect whereof they may not be entitled to the benefit of the act*, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding."

Section *six* provides, "that nothing in the act contained shall extend or be construed to annul or in any wise affect any *special contract* between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods."

By the *seventh* section it is enacted, "that where any parcel or package shall have been delivered at any such office, and the value and contents declared, and the increased rate of charges been paid, and such parcel or package shall have been lost or damaged, the party entitled to recover damages in respect thereof shall also be entitled to recover back such increased charges in addition to the value of such parcel or package."

The *eighth* section provides, "that nothing in the act shall protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the *felonious* (see The Great Western Ry. Co. *v.* Rimell, 18 C. B. 585) *acts* of any coachman, guard, book-keeper, porter, *or other servant in his employ*; nor to protect any such *coachman, guard, book-keeper, or other servant*, from liability for any loss or injury, occasioned by his own *personal neglect or misconduct.*"

By the *ninth* section, "such mail contractors, stage-coach proprietors, or other common carriers for hire, are not to be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the plaintiff *proof of the actual value* of the contents by the ordinary legal evidence; and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges."

The statute applies even to *bulky* goods of the description mentioned in the act; and there is no distinction between gross and ordinary negligence, the carrier being equally protected in either case. Hinton *v.* Dibden, 2 Q. B. 646; he would, however, be responsible, notwithstanding the provisions of the statute, for unreasonable delay or negligence in delivering the goods; Boys *v.* Pink, *supra*; or for wilful misfeasance, as sending the goods by a wrong conveyance, or by a different route, or beyond the place of their destination. Hearn *v.* London & South Western Ry. Co. 10 Ex. 793; Chit. & Temp. Car. 50.

The liability of railway and canal companies as carriers is regulated by the railway and canal traffic act, 1854, 17 & 18 Vict. c. 31. It is enacted by section 7 of

Obs. that act, that "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; that is to say, for any horse, fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 and 1 W. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract, between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. 4 and 1 W. 4, c. 68, with respect to articles of the descriptions mentioned in the said act." [Beal *v.* South Devon Railway Co. 3 H. L. Cas. 337. A railway company is not entitled to demand an increased charge, under s. 7, for carrying a valuable horse, unless a declaration be made by the sender with an intention that it should so operate. Robinson *v.* South Western Railway Co. 34 L. J. C. P. 234; 19 C. B. N. S. 51. Declaration against company for negligence in receiving a horse. Hodgman *v.* West Midland Railway Co. 33 L. J. Q. B. 233; 5 B. & S. 178.]

As to what is or is not a reasonable condition, see McManus *v.* The Lancashire & Yorkshire Ry. Co. 4 H. & N. 327; Pardington *v.* The South Wales Ry. Co. 1 H. & N. 392; Simons *v.* Great Western Ry. Co. 18 C. B. 805; Dunham *v.* The London & North Western Ry. Co. 18 C. B. 826; 26 L. J. C. P. 31; Wise *v.* The Great Western Ry. Co. 1 H. & N. 63; White *v.* Great Western Ry. Co. 2 C. B. N. S. 7; Peek *v.* North Staffordshire Ry. Co. 27 L. J. Q. B. 465; [El., Bl. & El. 958; S. C. 10 H. L. Cas. 473, 494; Martin *v.* The Great Indian &c. Railway Co. 37 L. J. Ex. 27; L. R. 3 Ex. 9; Booth *v.* North Eastern Railway Co. 36 L. J. Ex. 83; L. R. 2 Ex. 173; Allday *v.* Great Western Railway Co. 34 L. J. Q. B. 5; S. C. 5 B. & S. 903; Lord *v.* The Midland Railway Co. 36 L. J. C. P. 170; L. R. 2 C. P. 339; Robinson *v.* Great Western Railway Co. 35 L. J. C. P. 123; 1 Chitty Contr. (11th Am. ed.) 696, and note (*f*), and cases cited, 692 *et seq.*; Railroad *v.* Manuf. Co. 16 Wallace, 318; York Co. *v.* Central R. R. 3 Wallace, 107; Western Transportation Co. *v.* Downer, 11 Wallace, 129; Graham *v.* Davis, 4 Ohio St. 362; Powell *v.* Penn. R. R. 32 Penn. St. 414; Indianapolis & C. R. R. *v.* Cox, 29 Ind. 360, 362; Southern Express Co. *v.* Caperton, 44 Ala. 101; Southern Express Co. *v.* Crook, 44 Ala. 468; Beal *v.* South Devon Railway Co. 5 H. & N. 875; S. C. 3 H. & C. 338; Sager *v.* Portsmouth, S. & P. & E. Railroad Co. 31 Maine, 228; Aldridge *v.* Great Western Rail-

Ons. way Co. 15 C. B. N. S. 582; T. P. & W. R. R. Co. *v.* Merriman, 52 Ill. 123; Wilson *v.* Chesapeake & Ohio R. R. Co. 21 Grattan, 654; Rixford *v.* Smith, 52 N. H. 355, 364, and cases cited; Louisville &c. R. R. Co. *v.* Hedger, 13 Am. Law Reg. N. S. 145, and note *ad finem*. A special contract between the shipper of goods and a common carrier, for the carriage at the shipper's risk during transportation, does not exempt the carrier from liability for an injury caused to the goods, during transportation, by his own negligence. School District in Medfield *v.* Boston &c. R. R. Co. 102 Mass. 552; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344, 383; Squire *v.* New York Central R. R. Co. 98 Mass. 239, and cases there cited; Pennsylvania R. R. Co. *v.* Butler, 57 Penn. St. 335; Welsh *v.* Pittsburg &c. R. R. Co. 10 Ohio St. 65; Wyld *v.* Pickford, 8 M. & W. 458; 1 Chitty Contr. (11th Am. ed.) 690, note (*f*), and cases cited; Willis *v.* Grand Trunk Railway Co. 62 Maine, 488, and cases cited; Western Transportation Co. *v.* Downer, 11 Wallace, 129; Powell *v.* Pennsylvania R. R. Co. 32 Penn. St. 414; Indianapolis & C. R. R. *v.* Cox 29 Ind. 360, 362; Indianapolis & C. R. R. *v.* Allen, 31 Ind. 394; Cooper *v.* Berry, 21 Geo. 526; Bissel *v.* New York Central R. R. Co. 25 N. Y. 442; Hawkins *v.* Great Western R. R. Co., 17 Mich. 57; Grace *v.* Adams, 100 Mass. 506; D'Arc *v.* The London & North Western Railway Co. L. R. 9 C. P. 325; Robinson *v.* London & S. Western Railway Co. 35 L. J. C. P. 123; Sager *v.* Portsmouth, S. & P. & E. R. R. Co. 31 Maine, 227; New York Central R. R. *v.* Lockwood, 17 Wallace, 357.]

1. *By a Carrier for the Carriage of Goods by Land.* (*r*)

Commencement as ante, 33, Form 1.] For the carriage of goods by the plaintiff for the defendant, at his request [*conclude with account stated*].

2. *For Freight of Goods.* (*s*)

Commencement as ante, 33.] For freight ["primage and average," *if claimed*], for the conveyance by the plaintiff for the defendant, at his request, of goods in ships [*conclude with account stated, as ante*, 34, Form 1].

3. *For Lighterage.* (*t*)

Commencement as ante, 33.] For the lighterage and the shipping, conveyance, and landing of goods by the plaintiff for the defendant, at his request [*account stated, as ante*, 34, Form 1].

4. *For the Tonnage of Goods.* (*u*)

Commencement as ante, 33.] For the tonnage of goods carried by the plaintiff on a certain canal in boats and vessels for the defendant, at his request [*conclude with account stated, as ante*, 34].

(*r*) The common count for work suffices. *ante*, 28. But if *money* is not to be paid for the carriage of the goods, the above account will not be supported. Bracegirdle *v.* Hincks, 1 Ex. 381.

(*s*) See, in general, Abbott on Ship.; Chit. Temp. on Carriers, 191, 209. This is the form given by the C. L. P. Act, 1852, but a delivery must be proved where it is sought to charge the consignee or indorsee of the bill of lading; Moller *v.* Young, 5 El. & Bl. 755; Moss *v.* Temperley, 8 M. & W. 798; the above common form suffices against the indorsee of a bill of lading; Dougal *v.* Kemble, 3 Bing. 383; when such indorsee liable, see Sanders *v.* Vanzeller, 4 Q. B. 260; Moller *v.* Young, *supra;* 18 & 19 Vict. c. 111; when to declare specially; Amos *v.* Temperley, *supra;* either the owner or master may sue for the freight; when freight *pro ratâ* can be recovered, see Vlierboom *v.* Chapman, 13 M. & W. 230; Christy *v.* Row, 1 Taunt. 300; Orgood *v.* Groning, 2 Camp. 466. [Lien on cargo for freight. Tamvaco *v.* Sampson, L. R. 1 C. P. 303. As to liability of indorsee of bill of lading who has indorsed over before arrival of ship. Smurthwaite *v.* Wilkins, 31 L. J. C. P. 214.]

(*t*) As to the liabilities of lightermen, see Chit. & Temp. on Carriers.

(*u*) 3 Went. 70.

5. *For Demurrage.* (*x*)

Commencement as ante, 33.] For the demurrage of a ship of the pla tiff kept on demurrage by the defendant [*conclude with account stated, ante*, 34].

6. *For Wharfage and Warehouse Room.* (*y*)

Commencement as ante, 33.] For wharfage and warehouse-room for goo provided by the plaintiff for the defendant, at his request [*account stated c conclusion as ante*, 34].

7. *For Passage Money.*

Commencement as ante, 33.] For the passage of the defendant on bo a vessel of the plaintiff, at the request of the defendant [*account stated c conclusion as ante*, 33].

[8. *By the Owner of a Ship against the Shipper and Consignee Goods for not receiving the Goods within a reasonable time.* (*z*)

That in consideration that the plaintiff received on board of his ship — certain goods of the defendant, to be by the plaintiff carried in the said s from —— to ——, and there delivered to the defendant (certain perils casualties only excepted), the defendant paying freight for the same as agr upon, the defendant promised the plaintiff to receive the said goods at — aforesaid from the plaintiff within a reasonable time after the defendant sho have notice of the plaintiff being ready to deliver the same as aforesaid, the plaintiff accordingly carried the said goods in the said ship from —— —— aforesaid, and all conditions were fulfilled, and all things happened, all times elapsed, necessary to entitle the plaintiff to have the said go received by the defendant as aforesaid; yet the defendant did not nor wo receive the said goods within such reasonable time as aforesaid, whereby said ship was detained at —— aforesaid for a long time, and the plaintiff deprived of the use of the said ship, and incurred expense in maintaining crew thereof during all the time last aforesaid.

As to this count, see Jesson *v.* Solly, 4 Taunt. 52; Evans *v.* Forster, 1 B Ad. 118; Möller *v.* Young, 5 El. & Bl. 755.

(*x*) As to demurrage generally, see Chit. & Temp. on Carriers, 212. The above count is sufficient where there is a contract expressed or implied, *not under seal*; Lear *v.* Yates, 3 Taunt. 389; if no contract, and the defendant has detained the ship longer than allowed by usage of the port of discharge, the count should be special (per Parke B. Horn *v.* Bensusan, 2 M. & Rob. 326; 9 C. & P. 709; and per Lord Abinger, Kell *v.* Anderson, 10 M. & W. 499. If the detention is *ex delicto*, the above form will not be proper. See Harrison *v.* Wilson, 2 Esp. 707.

(*y*) As to the liability of wharfingers, see Chit. & Temp. on Carriers. [When a chattel is detained under a claim of lien against the owner, and charges are incurred in keeping and taking care of it, no claim can be made against the owner in respect of s charges. Somes *v.* British Empire Shipp Co. 8 H. L. Cas. 338.]

(*z*) In the absence of any stipulation the bill of lading as to the time when goods are to be cleared from the ship, no tion is maintainable by the *master* for detention of the vessel. Evans *v.* Foste B. & Ad. 118; Brouncker *v.* Scott, 4 Ta l. But the *owner* may maintain a special tion for the detention of the ship. See H *v.* Bensusan, 9 C. & P. 709; 2 M. & R 326; *ante*, 98, note (*x*). See a form by owner of a lighter for not accepting and loading goods therefrom, Granger *v.* Da 12 M. & W. 431; and see forms on Bill Lading, *post*, 103, 104.

By master of ship against consignor on the bill of lading, stipulating that the vessel should take her regular turn in unloading, for not unloading in turn. Cawthron *v.* Trickett, 15 C. B. N. S. 754.

By the carrier against the shipper upon the implied warranty that the goods shipped were not dangerous. Brass *v.* Maitland, 6 El. & Bl. 470.]

9. *Against a Railway Company or other Common Carrier for Losing or Injuring Goods.*

Commencement as ante, 5.] For that the plaintiff, at the defendant's request, delivered to the defendant, (*a*) then being a common carrier (*b*) of goods for hire, (*c*) goods of the plaintiff to be taken care of and safely and securely carried by the defendant, as such common carrier, from —— to ——, (*d*) and

(*a*) As to what is a delivery to carriers, see Chit. & Temp. on Carriers; [Burrell *v.* North, 2 C. & K. 681; Southern Express Co. *v.* McVeigh, 20 Grattan, 264; Michigan Southern R. R. Co. *v.* McDonough, 21 Mich. 165; Hosea *v.* McCrory, 12 Ala. 349; Trowbridge *v.* Chapin, 23 Conn. 595, 597; Blanchard *v.* Isaacs, 3 Barb. 378.] The carrier's risk commences upon a delivery to himself or to his agent for the purpose of receiving goods; Buckman *v.* Levi, 3 Camp. 414; [2 Kent, 604; Angell Carriers, § 129 *et seq.*, § 135 *et seq.*; Southern Express Co. *v.* Newby, 36 Geo. 365; Reed *v.* Philadelphia &c. R. R. Co. 3 Houst. (Del.) 176; Rogers *v.* Wheeler, 52 N. Y. 262; Gass *v.* New York &c. R. R. Co. 99 Mass. 227; Story Bailments, § 453; Merritt *v.* Old Colony &c. R. R. Co. 11 Allen, 80;] the mere leaving them at a place, such as an inn, yard, or wharf, whence the carrier starts, is not sufficient; Galway *v.* Holloway, 1 Ld. Raym. 46; but a delivery of a parcel to a stage-coach driver, or to a porter or warehouse receiver, or railway official, in the ordinary course of business, is in general sufficient; Slim *v.* The Great Northern Ry. Co. 14 C. B. 647; Taff Vale Ry. Co. *v.* Giles, 2 El. & Bl. 823; Williams *v.* Cranston, 2 Stark. 82; Gilbart *v.* Dale, 5 Ad. & E. 543; [Camden & Amboy R. R. &c. Co. *v.* Belknap, 21 Wend. 354; Woods *v.* Devin, 13 Ill. 746; for the purpose of transportation; Wade *v.* Wheeler, 3 Lansing, 201; Ætna Ins. Co. *v.* Wheeler, 5 Lansing, 480; Barron *v.* Eldredge, 100 Mass. 458;] but it is not necessary that the delivery should be at the carrier's usual office, if he or his servant receive them elsewhere. Davy *v.* Mason, 1 C. & M. 45. See Baxendale *v.* Hart, 6 Ex. 769; [Phillips *v.* Earle, 8 Pick. 182. So where it is the constant usage and practice of the carrier to receive property left for transportation at a particular place, without any special notice of such deposit, the delivery of goods at that place is a good delivery to the carrier, to render him liable for the loss of the goods, although neither he nor his agent were otherwise notified of such delivery. Merriam *v.* Hartford & New Haven R. R. Co. 20 Conn. 354. But, generally, when goods are left for the carrier, express notice must be given to him, or to his authorized agent. 2 Kent, 604; Story Bailments, § 532; Packard *v.* Getman, 6 Cowen, 757; D'Anjou *v.* Deagle, 3 Harr. & J. 206; Jenkins *v.* Pickett, 9 Yerger, 480. Where a railroad corporation, being common carriers, have a warehouse, at which they receive goods for transportation, if goods are received there, with instructions to forward presently, while the goods remain in the warehouse, for the convenience of the railroad, until they can be forwarded in the usual course of business, the railroad hold them as common carriers, and are responsible for them as such. Moses *v.* Boston & Maine R. R. 24 N. H. 71; Clark *v.* Needles, 25 Penn. St. 338; Blossom *v.* Griffin, 3 Kernan, 569; Barron *v.* Eldredge, 100 Mass. 455, 458; Rogers *v.* Wheeler, 6 Lansing, 420. But if the goods are kept back in the warehouse for the convenience of the owner and by his order, the railroad will be liable as depositaries only. Moses *v.* Boston & Maine R. R. 24 N. H. 71; Barron *v.* Eldredge, 100 Mass. 455, 458.]

(*b*) As to who are common carriers, see Chit. & Temp. on Carriers, 15–19; Coggs *v.* Bernard, 2 Lord Raym. 909; 1 Smith's L. Cas. 147; [1 Chitty Contr. (11th Am. ed.) 681–684, and notes; Moss *v.* Bettis, 4 Heisk. (Tenn.) 661; Fish *v.* Clark, 49 N. Y. 122; Bussey *v.* Mississippi Valley Transp. Co. 24 La. Ann. 165; Fish *v.* Clark, 1 Lansing, 176; The Liver Alkali Co. *v.* Johnson, L. R. 9 Ex. 338.] If the defendant, being a common carrier, enter into a special contract to carry the goods in question, this averment would be improper. See White *v.* The Great Western Ry. Co. 2 C. B. N. S. 7. A London carman is not a common carrier. Brind *v.* Dale, 8 C. & P. 209; 2 M. & Rob. 80. [See Story Bailments, § 496; 2 Kent, 598, 599; Robertson *v.* Kennedy, 2 Dana, 430; Perley J. in Moses *v.* Boston & Maine R. R. 24 N. H. 40.] See forms, &c. and law against a carrier charged as a bailee for losing goods out of his warehouse, Cairns *v.* Robins, 8 M. & W. 258.

(*c*) [As to the hire of common carrier, 1 Chitty Contr. (11th Am. ed.) 687.]

(*d*) This averment does not appear to be necessary, and, at all events, a variance would be amended at the trial. As to the

there to be delivered by the defendant for the plaintiff, for reward, (*e*) to th defendant in that behalf. (*f*) Yet the defendant did not take care of or safel

delivery by a common carrier, see Chit. & Temp. 86–103; [1 Chitty Contr. (11th Am. ed.) 702 *et seq.* and notes.] Where railway companies undertake to carry goods beyond the limits of their own railway, they are liable for the non-delivery; Muschamp *v.* Lancaster & Preston Ry. Co. 8 M. & W. 421; Scothorn *v.* The South Staffordshire Ry. Co. 8 Ex. 341; Crouch *v.* London & North Western Ry. Co. 14 C. B. 259; Bristol & Exeter Ry. Co. *v.* Collins, 7 H. L. Cas. 194; 5 Jur. N. S. 1367; Mytton *v.* Midland Ry. Co. 4 H. & N. 615; 28 L. J. Ex. 385; [Blake *v.* Great Western Ry. Co. 7 H. & N. 987; Coxon *v.* Great Western Ry. Co. 5 H. & N. 274; Shepherd *v.* Bristol & Exeter Ry. Co. L. R. 3 Ex. 195; Webber *v.* Great Western Ry. Co. 3 H. & C. 771; St. John *v.* Van Santvoord, 25 Wend. 660; Becher *v.* Great Eastern Ry. Co. L. R. 5 Q. B. 241; Illinois Central R. R. *v.* Johnson, 34 Ill. 389, 394; Illinois Central R. R. *v.* Cowles, 32 Ill. 116; Illinois Central R. R. Co. *v.* Copeland, 24 Ill. 332; Illinois Central R. R. Co. *v.* Frankenberg, 54 Ill. 88; East Tennessee & Va. R. R. Co. *v.* Rogers, 6 Heisk. (Tenn.) 143; Western & Atlantic R. R. Co. *v.* McElwee, 6 Heisk. 208; Louisville & Nashville R. R. Co. *v.* Campbell, 7 Heisk. 253;] though the goods are carried partly by water; Wilby *v.* West Cornwall Ry. Co. 27 L. J. Ex. 181; 2 H. & N. 703; unless they limit their responsibility by special agreement. [See Van Santvoord *v.* St. John, 6 Hill, 158; Farmers' & Merchants' Bank *v.* Lake Champlain Transportation Co. 18 Vt. 140; S. C. 23 Vt. 186, 209; Ackley *v.* Kellogg, 8 Cowen, 223. A common carrier receiving goods within the realm, to carry them to a place without the realm, is liable to the duties of a common carrier for the whole distance. Crouch *v.* London & North Western Ry. Co. 14 C. B. 225. As to goods received without the realm, see Branley *v.* South Eastern Ry. Co. 12 C. B. N. S. 63; Le Conteur *v.* L. & S. W. Ry. Co. L. R. 1 Q. B. 54. Where goods are received by a railway company to be carried to a place beyond their line, subject to special conditions restricting their liability, the co ditions apply throughout the whole distanc Collins *v.* Bristol & Exeter Ry. Co. 1 Ex. 790; S. C. 7 H. L. Cas. 194; but s Ætna Insurance Co. *v.* Wheeler, 5 Lansing 480. Where a contract is made with or company to carry over the lines of other con panies, the latter are no parties to it, and ca not be sued upon it; Coxon *v.* Great Wes ern Ry. Co. 5 H. & N. 274; unless whe the circumstances are such as to const tute the several companies partners in th transaction. Ib. 5 H. & N. 274, 279; 1 Chitt Contr. (11th Am. ed.) 704, note (*d*). Th American cases generally concede that a con mon carrier may, by agreement, render hin self liable to deliver goods at a point beyon the limits of his own line of travel; and th it is not *ultra vires*, but within the powe implied in the incorporation of a compan established for the transportation of goo and merchandise, to make such an agre ment, if not expressly prohibited. Noyes Rutland & Burlington R. R. Co. 27 Vt. 110 Schraeder *v.* Hudson River R. R. Co. 5 Due 55; Foy *v.* Troy & Boston R. R. Co. 2 Barb. 382; Hill Manuf. Co. *v.* Boston Lowell R. R. Co. 104 Mass. 133, 134; Pe kins *v.* Portland, Saco & Portsmouth R. R Co. 47 Maine, 573; Barter *v.* Wheeler, 4 N. H. 9, 28; Nashua Lock Co. *v.* Worceste & Nashua R. R. Co. 48 N. H. 139; Naja *v.* Boston & Lowell R. R. 7 Allen, 329 333; Wilby *v.* West Cornwall Ry. Co. H. & N. 703; South Wales Ry. Co. *v.* Re mond, 10 C. B. N. S. 675; Kessler *v.* Ne York Central R. R. Co. 7 Lansing, 63; Gra *v.* Jackson, 51 N. H. 9; Maghee *v.* Camde & Amboy R. R. Co. 45 N. J. (Law) 514 Baltimore & Phila. Steamboat Co. *v.* Brow 54 Penn. St. 77; Root *v.* Great Western R R. Co. 45 N. Y. 524; but see Hood *v.* Ne York & New Haven R. R. 22 Conn. 502 S. P. 22 Conn. 1; Elmore *v.* Naugatuc R. R. 23 Conn. 457; Naugatuck R. R. Button Co. 24 Conn. 468. But the case Muschamp *v.* Lancaster & Preston Junctio Railway Co. and other English cases cite above, and those cited below, go much furthe

(*e*) [See Jeffersonville &c. R. R. Co. *v.* Gent, 33 Ind. 39; Deming *v.* Grand Trunk R. R. Co. 48 N. H. 455. It is the duty of a common carrier of goods to carry for a reasonable reward, and deliver them within a reasonable time. Hales *v.* London & North Western Ry. Co. 4 B. & S. 66.]

(*f*) This imports the absolute and extensive common law responsibility, Ross *v.* Hill, 2 C. B. 877, and is the contract implied by law which casts on a common carrier a duty to carry. He is an *insurer*, and is liable in all events, the acts of God and the queen's enemies excepted; Chit. & Temp. 15; [1 Chitty Contr. (11th Am. ed.) 688, 689, and cases cited in note (*a*), 690; Kohannan *v.* Hammond, 42 Cal. 227;] and being the co tract implied by law resulting from the bai ment, it is not necessary to aver a *promise* i the declaration to the above effect; Com. I P. Act, 1852, s. 4; [1 Chitty Pl. 397;] a carrie may, however, limit his liability by speci agreement, but then he ceases to be a co mon carrier; see note (*b*); and the *speci* contract must be alleged in the declaratio See *post*, 106; [1 Chitty Contr. (11th Am ed.) 690 *et seq.*; notes and cases; Nelson in New Jersey Steam Nav. Co. *v.* Merchant Bank, 6 How. (U. S.) 382; Sager *v.* Port mouth, Saco, P. & Eastern R. R. Co. 3 Maine, 228; Kansas &c. Co. *v.* Reynolds, Kans. 623.]

and securely carry or deliver the said goods for the plaintiff, but lost [*or* injured] (*g*) the same. And the plaintiff claims £——.

and decide that a common carrier, receiving goods directed to places beyond the terminus of his route, and giving acceptances for the same without limiting his responsibility to his own route, will be, *primâ facie*, liable for the loss of such goods, at any point of the transit, even after their delivery to other forwarders. And hence, it seems to be settled in such case that the carrier to whom the goods are first delivered is alone liable in the event of the goods not being safely delivered. Thus it was said by Martin B. in Shepherd *v.* Bristol & Exeter Ry. Co. L. R. 3 Ex. 195: "When two railway companies are connected in business together, so that one of them receives cattle to be conveyed over the line of the other, I think there is but one contract, and that is made between the customer and the receiving railway company, and that their liability is just the same as if they had been the owners of the railway the whole way upon which the cattle are to be conveyed." Collins *v.* Bristol & Exeter Ry. Co. 11 Ex. 700; S. C. 1 H. & N. 517, 519; 27 L. J. Ex. 47; 7 H. L. Cas. 194; Crouch *v.* Great Western Ry. Co. 2 H. & N. 491, 503; Mytton *v.* Midland Ry. Co. 4 H. & N. 615; Becher *v.* Great Eastern Ry. Co. L. R. 5 Q. B. 241; Webber *v.* Great Western Ry. Co. 3 H. & C. 771; Illinois Central R. R. *v.* Cowles, 32 Ill. 116; Illinois Central R. R. *v.* Johnson, 34 Ill. 389, 394; Wilson *v.* York, Newcastle & Berwick Ry Co. 18 Eng. Law & Eq. 557; Condict *v.* Grand Trunk R. Co. 54 N. Y. 500, 502; Ward *v.* Vanderbilt, 4 Abb. N. Y. App. Dec. 521; Williams *v.* Vanderbilt, 28 N. Y. 217; Buskirk *v.* Roberts, 31 N. Y. 661. The American decisions, on this point, not only differ from the English, but they are not entirely in harmony with each other. See Elmore *v.* Naugatuck R. R. Co. 23 Conn. 457; Nutting *v.* Conn. River R. R. Co. 1 Gray, 502; Burroughs *v.* Norwich & Worcester R. R. Co. 100 Mass. 26; Hill Manuf. Co. *v.* Boston & Lowell R. R. Corp. 104 Mass. 122; Gass *v.* New York, Providence & Boston R. R. Co. 99 Mass. 220; Mosher *v.* Southern Express Co. 38 Geo. 37; Cutts *v.* Brainard, 45 Vt. 466; Condict *v.* Grand Trunk Ry. 4 Lansing, 106; Woodward *v.* Illinois Central R. R. Co. 1 Biss. 403; Cohen *v.* Southern Express Co. 45 Geo. 148; Pennsylvania R. R. Co. *v.* Berry, 68 Penn. St. 272. In Barter *v.* Wheeler, 49 N. H. 9, Bellows C. J. said: "Where several railroads make a business arrangement, by which a continuous line is formed, and each sells tickets over the whole line, and contracts to convey goods through the entire route, receives the price for it in one entire sum, which is to be divided in stipulated proportions among the several roads, there is a decided weight of authority here in favor of the rule that the company receiving goods to any point in said continuous line is responsible, as carriers, for their loss or injury on any part of the line." Locke Co. *v.* Worcester & Nashua R. R. Co. 48 N. H. 339; Condict *v.* Grand Trunk Ry. 4 Lansing, 106. But, on the other hand, in Burroughs *v.* Norwich & Worcester R. R. Co. 100 Mass. 26, it is said by Gray J. that "the law is well settled in Massachusetts, and in most of the United States, that a corporation established for the transportation of goods for hire, between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line, as a common carrier, but only as a forwarder, unless it makes a

(*g*) [Loss of goods, measure of damages. O'Hanlan *v.* The Great Western Ry. Co. 19 C. B. N. S. 310; Rice *v.* Baxendale, 7 H. & N. 96.] It is not necessary to prove negligence on the part of the carrier although it be averred; Richardson *v.* London & South Coast Ry. Co. 7 C. B. 832; unless in a case where there is a special contract; Chit. & Temp. on Carriers, 142, 233; [1 Chitty Contr. (11th Am. ed.) 688, 689. Proof of negligence is unnecessary to charge him; and proof of diligence will not excuse him. McCall *v.* Brock, 5 Strobh. 119. See Mershon *v.* Hohensack, 2 N. J. 372. As to the burden of proof, see Hubbard *v.* Harnden Express Co. 10 R. I. 244, 254; Story Bailments, §§ 529, 573; Sager *v.* Portsmouth, Saco, P. & Eastern R. R. Co. 31 Maine, 228; Patterson *v.* Clyde, 67 Penn. St. 500; The J. Russell &c. *v.* New Haven Steamboat Co. 50 N. Y. 121; Kansas &c. Co. *v.* Reynolds, 8 Kans. 623; Arend *v.* Liverpool Steamship Co. 6 Lansing, 457; S. C. 64 Barb. 118. Proof of a delivery of the goods to the common carrier, and a failure on his part to deliver them at their place of destination, is *primâ facie* evidence to charge him, and the burden then falls on the carrier to exempt himself from liability. 2 Greenl. Ev. § 219; McCall *v.* Brock, 5 Strobh. 119; Hastings *v.* Pepper, 11 Pick. 41; Lewis *v.* Smith, 107 Mass. 334; Cobb *v.* McMechen, 10 John. 160; Clark *v.* Spence, 10 Watts, 335; King *v.* Shepherd, 3 Story, 349; The Mary Washington, 1 Abb. (U. S.) 1; Whitesides *v.* Russell, 8 Watts & S. 44; Westcott *v.* Fargo, 6 Lansing, 319; S. C. 63 Barb. 349; Bazin *v.* Steamship Co. 3 Wallace jr. 229; Chapman *v.* New Orleans &c. R. R. Co. 21 La Ann. 224; Midland Ry. Co. *v.* Bromley, 17 C. B. 372; Atwood *v.* Reliance Transp. Co. 9 Watts, 87; Murphy *v.* Staton, 3 Munf. 239; Ewart *v.* Sweet, 2 Bailey, 161; M'Arthur *v.* Sears, 21 Wend. 190. The Oriflamme, 1 Sawyer, 176; The Live Yankee, Deady, 420. So where the goods are found to have been damaged during the voyage. Clark *v.* Barnwell, 12 How. (U. S.) 272; Alden *v.* Pearson, 3 Gray, 342; Hunt *v.* The Cleveland, 6 McLean, 76.]

[9*a*. *Declaration for negligently shipping and carrying.*

Sandeman *v.* Scurr, L. R. 2 Q. B. 86; Laveroni *v.* Drury, 8 Ex. 166 White *v.* Humphrey, 11 Q. B. 43; Kay *v.* Wheeler, L. R. 2 C. P. 302.]

positive agreement extending its liability." Nutting *v.* Conn. River R. R. Co. 1 Gray, 502; Judson *v.* Western R. R. Co. 4 Allen, 520; Darling *v.* Boston & Worcester R. R. Co. 11 Allen, 295, and cases cited; Perkins *v.* Portland, Saco & Portsmouth R. R. Co. 47 Maine, 573; Brintnall *v.* Saratoga & Whitehall R. R. Co. 32 Vt. 665; McMillan *v.* Michigan Southern & Northern Indiana R. R. Co. 16 Mich. 119, 120; Briggs *v.* Boston & Lowell R. R. Co. 6 Allen, 244; Pratt *v.* Ogdensburg & Lake Champlain R. R. Co. 102 Mass. 567; Gass *v.* New York & Providence R. R. Co. 99 Mass. 226; Hill Manuf. Co. *v.* Boston & Lowell R. R. Co. 104 Mass. 133; Bissel *v.* Price, 11 Ill. 407; Stratton *v.* New York & New Haven R. R. 2 E. D. Smith, 184; Ingalls *v.* Brooks, 1 Edm. Sel. Cas. 104; Bowman *v.* Hilton, 11 Ohio, 303; Briggs *v.* Vanderbilt, 19 Barb. 222; Skinner *v.* Hall, 60 Maine, 477. From this it follows that, if several companies associate for the transportation of goods over the entire route of a continuous line, an intermediate company is liable for the loss of the goods happening upon its part of the line. See Barter *v.* Wheeler, 49 N. H. 9, 25; Converse *v.* Norwich & New York Transp. Co. 33 Conn. 166, 178; Cin., H. & D. R. R. *v.* Spratt, 2 Duvall, 4; McDonald *v.* Western R. R. Co. 34 N. Y. 397; Fitchburg & Worcester R. R. Co. *v.* Hanna, 6 Gray, 539; Gray *v.* Jackson, 51 N. H. 9; Knight *v.* P. S. & P. R. Co. 56 Maine, 234, and cases above cited; Lamb *v.* Camden &c. R. R. Co. 2 Daly (N. Y.), 454; Root *v.* The Great Western Ry. Co. 65 Barb. 619; Railroad *v.* Manuf. Co. 16 Wallace, 318; Conkey *v.* Milwaukee &c. R. R. Co. 31 Wisc. 619; Babcock *v.* Lake Shore &c. R. R. Co. 49 N. Y. 491. When several corporations join together, and form a continuous line of transportation for freight and passengers, as common carriers, each being empowered to contract for freight and passengers for the whole line, and to receive payment for the same, which is to be divided among them in certain stipulated proportions, they become jointly liable for losses or injuries upon any part of the line. Barter *v.* Wheeler, 49 N. H. 9, and cases cited; Fitchburg & Worcester R. R. Co. *v.* Hanna, 6 Gray, 539; Darling *v.* Boston & Worcester R. R. Corp. 11 Allen, 297, 298; Parmelee *v.* Western Transportation Co. 26 Wisc. 439. But this rule has been held not to prevail where the arrangement made between them is, that goods to be carried over the whole length of their connecting lines shall be delivered by each to the next succeeding carrier, and each carrier so receiving them shall pay to his predecessor the amount alread due for the carriage, and the last one collec the whole from the consignee. In such cas each carrier has been held liable only for th transit of the goods upon his own part of th line. Darling *v.* Boston & Worcester R. R Corp. 11 Allen, 295; Judson *v.* Western R R. Corp. 4 Allen, 520; C., H. & D. & D. M. R. R. Co. *v.* Porteus, 19 Ohio (N. S.), 221 Ætna Ins. Co. *v.* Wheeler, 5 Lansing, 480 Gass *v.* New York &c. R. R. Co. 99 Mass. 22 Where goods in a box were shipped by se eral successive carriers, and when delivere to the consignee (although there were no e ternal indications of the fact), the box w found to have been opened, and certain goo taken therefrom, it was held that the ju might presume, in the absence of evidenc to the contrary, that the box remained u opened until it came into the possession the last carrier, and that the loss occurre through his fault. Laughlin *v.* Chicago & R. R. Co. 28 Wisc. 204. By the rule as no established in Massachusetts, when a com mon carrier is a corporation, whose busine it is to transport goods over a particul route, goods delivered to such corporatio directed to a more distant place, are pr sumed to be received for the purpose of bei carried by it over its own route only, a then forwarded by another carrier, employe on behalf of the consignor, to their place destination. Pendergast *v.* Adams Expre Co. 101 Mass. 123; Jacobs *v.* Hooker, 1 Edm Sel. Cas. 742; Root *v.* Great Western R. Co. 45 N. Y. 524. For other cases upon th subject, see 1 Chitty Contr. (11th Am. ed 704, note (*d*), 705, 706, and note (*e*). New York, when a carrier receives goods f transportation, addressed to a point on th line of a connecting carrier, and charges a receives a price for the entire distance, contracts that the goods shall be carri through for the price paid, and is bound f the risks of a common carrier to the pla of destination. Condict *v.* Grand Trun Ry. 4 Lansing, 106. But it is otherwi where through charges have not been pai and the carrier receiving the goods express limits his liability to that of a forwarder, undertakes merely to transport over his ow route. Reed *v.* United States Ex. Co. N. Y. 462; Babcock *v.* Lake Shore R. Co. How. Pr. 317; S. C. 49 N. Y. 491; Ætna In Co. *v.* Wheeler, 5 Lansing, 480. See Illino Central R. R. Co. *v.* Frankenberg, 54 I 88; Wahl *v.* Holt, 26 Wisc. 703. The ca rier's duty, then, is to deliver safely to th carrier on the next route beyond. Dunsc *v.* New York &c. R. R. Co. 3 Lansing, 265

10. *Against a Railway Company or other Common Carrier for not delivering Goods within a Reasonable Time.*

Commencement as ante, 5.] For that the plaintiff, at the defendant's request, delivered to the defendant, then being a common carrier of goods for hire, goods of the plaintiff to be carried by the defendant as such common carrier from —— to ——, and there to be delivered by the defendant for the plaintiff within a reasonable time, (*h*) for reward to the defendant. Yet the defendant did not deliver the said goods as aforesaid within a reasonable time [*state any special damage*]. (*i*) And the plaintiff claims £——. (*k*)

(*h*) This duty to deliver within a *reasonable* time is implied by law; Raphael *v.* Pickford, 5 M. & G. 556; 2 Dowl. N. S. 917; see *ante*, 100, note (*f*); [Favor *v.* Philbrick, 5 N. H. 358; Wallace *v.* Vigus, 4 Blackf. 261; Erskine *v.* Thames, 6 Miss. 371; Eagle *v.* White, 6 Whart. 505; Parsons *v.* Hardy, 14 Wend. 215; Boyle *v.* McLaughlin, 4 Harr. & J. 291; Hand *v.* Baynes, 4 Wheat. 204; Angell Carriers, § 283; Ward *v.* New York &c. R. R. Co. 47 N. Y. 29; 1 Chitty Contr. (11th Am. ed.) 702, note (*z*);] but a reasonable time must be understood with reference to ordinary circumstances, for a carrier is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God; such as snow; Briddon *v.* Great Northern Ry. Co. 28 L. J. Ex. 51; [The Great Northern Ry. Co. *v.* Taylor, L. R. 1 C. P. 385; Parsons *v.* Hardy, 14 Wend. 215; Bonner *v.* Merchants' Steamboat Co. 1 Jones Law (N. Car.), 211; 1 Chitty Contr. (11th Am. ed.) 685, 689, note (*a*), and cases, 702;] if there be a special contract to deliver within a specified time, it must be declared upon. See Form 13. See a form against shipowners for negligent delay by the captain, Leslie *v.* Wilson, 6 Moore, 415, 3 B. & B. 171; [Scoville *v.* Griffith, 2 Kernan, 509; Nettles *v.* R. R. Co. 7 Rich. (S. Car.) 790. As to right to recover, Woodger *v.* Great Western Ry. Co. L. R. 2 C. P. 318.]

(*i*) [See Hadley *v.* Baxendale, 9 Ex. 341.]

(*k*) [The ordinary measure of damages, in an action against a common carrier, for a failure to deliver in time goods intrusted to him for carriage, is the difference between the market value at the time when and place where they ought to have been delivered, and their market value at that place on the day when they were in fact delivered; and this rule was applied in a case where, without notice to the carrier, the goods had been sold to arrive before being delivered to him for transportation; and it was claimed that the measure of damages was the decline in the market value of the goods at the port of delivery between the time of the sale and the time they were delivered. Scott *v.* Boston & New Orleans Steamship Co. 106 Mass. 468; Cutting *v.* Grand Trunk R. R. Co. 13 Allen, 381, 386. But a different rule was applied where the carrier had full knowledge that the goods were sold, if forwarded seasonably. Deming *v.* Grand Trunk R. R. Co. 48 N. H. 455. See, further, as to the measure of damages for non-delivery, delay in the delivery, or deterioration of goods intrusted to a carrier, Rice *v.* Ontario Steamboat Co. 56 Barb. 384; Rome R. R. Co. *v.* Sloan, 39 Geo. 636; Cutting *v.* Grand Trunk Ry. Co. 13 Allen, 381; Smith *v.* New Haven &c. R. R. 12 Allen, 531; Hamilton *v.* McPherson, 28 N. Y. 77; King *v.* Woodbridge, 34 Vt. 565; Wilson *v.* Lancashire &c. Ry. 9 C. B. (N. S.) 632; Gee *v.* Lancashire &c. Ry. Co. 6 H. & N. 211; Collard *v.* South Eastern Ry. 7 H. & N. 79; Great Western Ry. *v.* Redmayne, L. R. 1 C. P. 330; Smeed *v.* Foord, 1 El. & El. 602; Boyd *v.* Fitt, 14 Irish C. L. 43; Sisson *v.* Cleveland &c. R. R. 14 Mich. 489; Vroman *v.* The American Merchants' Union Express Co. 9 N. Y. Sup. Ct. 512; Horne *v.* Midland Ry. Co. L. R. 8 C. P. 131; Rice *v.* Baxendale, 7 H. & N. 96; Hadley *v.* Baxendale, 9 Ex. 341. If there is no market value for such goods at the place of delivery, the jury must ascertain their value by taking the cost price, together with the cost of carriage, and allowing a reasonable sum for importer's profit. O'Hanlan *v.* Great Western Railway Co. 6 B. & S. 484. Loss of hire of goods sent for hire cannot be recovered, unless the carrier had notice that they were sent for that purpose. Hales *v.* London &c. Ry. Co. 4 B. & S. 66. Nor loss of profit by a sale at a particular market, unless the carrier had notice that they were sent there to be sold. Great Western Ry. Co. *v.* Redmayne, L. R. 1 C. P. 329. An agreement may be made by the parties as to the value to be put upon the goods in case of loss or injury. See McCance *v.* London &c. Ry. Co. 3 H. & C. 343. As to damages for injury to goods transported, see Winne *v.* Illinois Central R. R. Co. 31 Iowa, 583. Rule where carrier had lost machinery for which he was notified the consignee was waiting. Cincinnati Chronicle Co. *v.* White Line Transit Co. 1 Cinc. (Ohio) 300. See Vicksburg &c. R. R. Co. *v.* Ragsdale, 46 Miss. 458.]

[10*a*. *Declaration for refusing to carry a Passenger.*
Jennings *v.* Great Northern Railway Co. L. R. 1 Q. B. 7.]

11. *Another Form against a Common Carrier for the Loss of or Damage to Goods.*

Commencement as ante, 5.] For that the defendant lost [*or* damaged] the plaintiff's goods, that is to say, ——, which the plaintiff had delivered to the defendant as a common carrier of goods for hire, and which he had received and then held as such carrier to be carried by him for the plaintiff, for reward to the defendant. And the plaintiff claims £——. [See Syms *v.* Chaplin, 5 Ad. & El. 634.]

12. *Against a Carrier for carelessly delaying the Carriage and Delivery of a Parcel.*

For that the plaintiff delivered to the defendant, as and being a common carrier, goods of the plaintiff, upon the terms that the same should be carried and conveyed by the defendant from —— to ——, and there delivered by the defendant to the plaintiff within a reasonable time in that behalf, for reward to the defendant; and although such reasonable time elapsed before the commencement of this suit, yet the defendant did not deliver the said goods within such reasonable time, and the said goods were not delivered to the plaintiff until the expiration of a long and unreasonable time after the time when the same should have been delivered to the plaintiff, and by reason of the premises the said goods were depreciated in value, and became and were of no use to the plaintiff, and he thereby lost the means and opportunity of selling the same, and was deprived of divers great gains and profits, and also incurred expenses in endeavoring to obtain the delivery of the said goods, and was otherwise injured. And the plaintiff claims £——. (*l*)

13. *Against a Railway Company or other Carrier under a special Contract, for Non-delivery or Loss of or Injury to Goods.* (*m*)

Commencement as ante, 5.] For that the plaintiff delivered to the defendant, being a carrier of goods for hire, goods of the plaintiff to be carried by the defendant for the plaintiff from —— to ——, and there to be delivered for the plaintiff, for reward to the defendant in that behalf, upon and subject to, amongst other terms and conditions agreed upon by and between the plaintiff and defendant, the terms and conditions following, that is to say [*here set out such of the conditions as are material*]. And the plaintiff says that he has performed all conditions precedent [*&c. as ante*, 39, *between the* **]. And

(*l*) [See Beal *v.* South Devon Ry. Co. 5 H. & N. 875; Hales *v.* London &c. Ry. Co. 4 B. & S. 66.]

(*m*) A carrier may, in general, limit his liability by special acceptance or special contract; but railway and canal companies cannot protect themselves absolutely against the loss of or injury to cattle or goods occasioned by their or their servants' *neglect* or *default*. [1 Chitty Contr. (11th Am. ed.) 690, and cases cited in note (*f*); Sager *v.* Portsmouth, Saco, P. & Eastern R. R. Co. 31 Maine, 228.] They may make "*just and reasonable* conditions" for receiving, forwarding, and delivering animals, articles, goods, or things; 17 & 18 Vict. c. 31, s. 7; Chit. & Temp. on Carriers, 70; *ante*, 96, 97; under the above act a special contract is not binding, unless signed by the party contracting or person delivering the cattle or goods for carriage.

the plaintiff further says that the defendant did not deliver the said goods for the plaintiff at —— aforesaid, on —— aforesaid [*this must depend upon the time agreed upon by the terms of the special conditions*]. And the said goods, by and through the carelessness and negligence of the defendants, (*n*) became and were damaged and injured, although the said goods were not damaged or injured by or through [*&c.; here negative any damage or injury to the goods through any of the causes against which the carrier is protected by the terms of the special conditions*]. And by reason of the premises the said plaintiff [*&c.; here aver any special damage that the plaintiff has sustained, and conclude:*] And the plaintiff claims £——.

14. *Against a Booking-office Keeper for not taking Care of Goods, and safely delivering them to the Proprietor of the Wagon by which they were directed to be forwarded.* (*o*)

For that the plaintiff, at the request of the defendant, caused to be delivered to him a parcel containing goods of great value, and which said parcel was directed to C. A. Esq., of ——, upon the terms then agreed upon between the plaintiff and defendant, that the said parcel should be taken care of and safely and securely kept by the defendant for the plaintiff until the same could be delivered by the defendant to the proprietor of a certain wagon commonly called [*&c.*], or his servant, in order that the same might be safely and securely carried and conveyed in and by the said wagon from a certain inn called [*&c.*], situate and being [*&c.*], to ——, and there be safely and securely delivered to the said C. A., pursuant to the direction aforesaid, for reward to the defendant in that behalf, and the defendant had and received the said parcel and its contents upon the terms and for the purpose aforesaid [*here aver performance of all conditions precedent, as ante, 39, between the* **], yet the defendant did not nor would take due or proper care of the said parcel and its contents aforesaid until the same could be delivered, nor did nor would deliver the same to the proprietor of the said wagon, or his servant, for the purpose aforesaid, but negligently lost the same. And the plaintiff claims £——.

[15. *Against a Carrier for not delivering according to the Directions of the Plaintiff.*

That in consideration that the plaintiff would deliver to the defendant, as and being a carrier for hire, certain goods to be by the defendant carried from —— to ——, and there delivered according to the directions of the plaintiff, for reward to the defendant, the defendant promised the plaintiff to carry the said goods from —— to —— aforesaid, and there deliver the same according to the directions of the plaintiff in that behalf; and the plaintiff delivered the

(*n*) [In a declaration in contract against a common carrier, it is common, though not necessary, to allege that the goods were injured by the negligence of himself and his servants. And, under such a declaration, actual negligence may be given in evidence. Gray J. in School District in Medfield *v.* Boston &c. R. R. Co. 102 Mass. 555. In this case the declaration alleged that the injury occurred "through the fault of the defendants" [the carriers] while in their care and custody, and before delivery to the plaintiff, and it was held that the plaintiff might recover for an injury to the goods through their actual negligence.]

(*o*) See another form against a booking-office keeper and law. Gilbart *v.* Dale, 5 Ad. & E. 543; and see Muschamp *v.* Lancaster & Preston Ry. Co. 8 M. & W. 422.

said goods to the defendant, and the defendant received the same for the purpose and on the terms aforesaid, and the plaintiff directed the defendant to deliver the said goods at a certain place in —— aforesaid, called ——; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods delivered by the defendant at the last-mentioned place; yet the defendant did not deliver the said goods at the last-mentioned place, whereby the plaintiff lost the said goods. [*As to the destination of the goods being altered by the consignee, see* London &c. Ry. Co. *v.* Bartlett, 7 H. & N. 400.]

A like count. Scothorn *v.* South Staffordshire Ry. Co. 8 Ex. 341.

16. *Against a Carrier for Damages done to Furniture in removing it.*

That in consideration that the plaintiff would employ the defendant to remove and carry from —— to —— certain furniture of the plaintiff, for reward to the defendant, the defendant promised the plaintiff to use due care, skill, and diligence in removing and carrying the said furniture as aforesaid, and the plaintiff employed the defendant for the purpose, and on the terms aforesaid; yet the defendant did not use due care, skill, and diligence in removing and carrying the said furniture as aforesaid, but in so doing broke and injured the same, whereby the said furniture was much damaged and lessened in value.

17. *Against a Railway Company for not safely keeping Goods left in their Custody at one of their Stations.*

That in consideration that the plaintiff would deliver to the defendants certain goods of the plaintiff, to be by the defendants safely and securely kept, and redelivered to the plaintiff on request, for reward to the defendants. the defendants promised the plaintiff safely and securely to keep the said goods, and to redeliver the same to the plaintiff on request; and the plaintiff delivered to the defendants and the defendants received the said goods for the purpose and on the terms aforesaid, and the plaintiff afterwards, and within a reasonable time in that behalf, requested the defendants to redeliver the same to the plaintiff; and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods safely and securely kept, and redelivered by the defendants to the plaintiff as aforesaid; yet the defendants did not safely and securely keep the same, and redeliver the same to the plaintiff as aforesaid, whereby the said goods were lost to the plaintiff, and he was put to expense in endeavoring to recover possession of them.

A like count. Van Toll *v.* South Eastern Ry. Co. 12 C. B. N. S. 75.]

CARRIERS BY WATER.

1. *Against a Carrier by Water for losing Goods.*

Gatliffe *v.* Bourne, 2 Bing. N. C. 314; S. C. in error, 3 M. & G. 643. A second count might be added for losing the goods between the place of landing and the plaintiff's place of business. James *v.* Bourne, 4 Bing. N. C. 420.

2. *Against a Carrier by Water for damaging a Cargo.*

Bennion *v.* Davison, 3 M. & W. 183. And see *post*, "Tort," "Carriers." Form in tort against a ferryman for neglect in landing goods, Walker *v.* Jackson, 10 M. & W. 161.

3. *Against a Carrier by Water, by the Consignor (with whom the Contract was made), for not giving the Consignee Notice of the Arrival of the Goods or forwarding them to him. (p)*

For that the plaintiff, at the request of the defendant, delivered (*q*) to him certain goods of the plaintiff upon certain terms agreed upon between the plaintiff and defendant, that is to say, that the said goods should be carried by the defendant in a certain barge or vessel from —— to L. H., in order that upon their arrival there the goods might be forwarded, or sent, or delivered by the defendant to one F. S. at Bognor, and there delivered to him for the said plaintiff, or otherwise that the defendant might, upon the arrival of the said goods at L. H., or within a reasonable time next following, notify such arrival to the said F. S. at Bognor, for reward to the defendant in that behalf. And although the defendant conveyed the goods to L. H., and although a rea-

(*p*) See Hyde *v.* Trent Company, 5 T. R. 394; Storr *v.* Crowley, M'Clel. & Y. 129; Golden *v.* Manning, 3 Wils. 429; Stephenson *v.* Hart, 4 Bing. 476; Duff *v.* Budd, 6 Moore, 469; Chit jr. Cont.; Chit. & Temp. on Carriers. In general it is not the duty of the master of a ship to give notice to the consignee of the ship's arrival; Harman *v.* Clark, 4 Camp. 159; Muddle *v.* Stride, 9 C. & P. 380; [but see 1 Chitty Contr. (11th Am. ed.) 708, and note (*k*); Chickering *v.* Fowler, 4 Pick. 371; Gibson *v.* Culver, 17 Wend. 305; Price *v.* Powell, 2 Comst. 322; The Peytona, 2 Curtis, 21, 25, 26;] a carrier by land need not give notice to the consignor that the consignee refuses to receive the goods. Hudson *v.* Baxendale, 2 H. & N. 575; 27 L. J. Ex. 93; [Kremer *v.* Southern Express Co. 6 Coldwell, 356.] But the carrier is not justified in taking them back to the place whence they were sent. Crouch *v.* The Great Western Ry. 2 H. & N. 491. [The duty of the master is to deliver property to the consignee; where such mode of delivery is usual, it may be made by depositing the goods on a customary wharf, and giving notice thereof to the consignee. But this notice, or some equivalent for it, or excuse for not giving it, is indispensable. Curtis J. in The Peytona, 2 Curtis C. C. 25, 26; Bourne *v.* Ratcliff, 11 Cl. & Fin. 45, and cases cited in note (1); Chickering *v.* Fowler, 4 Pick. 371; Gibson *v.* Culver, 17 Wend. 305; Merwin *v.* Butler, 17 Conn. 138; Scholes *v.* Ackerland, 15 Ill. 474; McAndrews *v.* Whitlock, 52 N. Y. 40; Mills *v.* Michigan &c. R. R. Co. 45 N. Y. 622; Maignan *v.* New Orleans &c. R. R. Co. 24 La. Ann. 333; Zinn *v.* New Jersey Steamboat Co. 49 N. Y. 442; Redmond *v.* Liverpool &c. S. S. Co. 56 Barb. 320; The Mary Washington, 1 Abb. (U. S.) 1; Mierson *v.* Hope, 2 Sweeny, 561; Solomon *v.* Philadelphia Steamboat &c. Co. 2 Daly, 104; Lamb *v.* Camden &c. R. R. Co. 2 Daly, 454; Shenk *v.* Philadelphia Steam Propeller Co. 60 Penn. St. 109. The carrier will continue liable as such until the consignee has received, from some source, information of the arrival of the goods, and has opportunity to remove them. The Mary Washington, 1 Abb. (U. S.) 1. In the case of railroads, they continue liable as carriers until the expiration of a reasonable time for delivery of the goods after arrival at their place of destination. Winslow *v.* Vermont &c. R. R. Co. 42 Vt. 700. When a common carrier undertakes to transport goods, consigned to a person residing beyond his route, at a point to which there is no regular carrier, his liability is terminated by delivery of the goods to a warehouseman, at the point upon his route nearest to the residence of the consignee, and giving notice to the latter. Salinger *v.* Simmons, 8 Abb. Pr. N. S. As to the duty of a common carrier of goods by water, when he cannot find the consignee, or some person to represent him at the place or port of delivery, see Hamilton *v.* Nickerson, 11 Allen, 308, 309, 310. As to duty of carrier where consignee is not found, see American Express Co. *v.* Hockett, 30 Ind. 250; Salinger *v.* Simmons, 2 Lansing, 325. Measure of damages for delay in giving notice. See New Orleans &c. R. R. Co. *v.* Tyson, 46 Miss. 729.]

(*q*) A bill of lading is evidence of a shipment as against a ship-owner in favor of a shipper of goods or of an indorsee for value. Berkeley *v.* Watling, 7 Ad. & E. 29. See Chit. & Temp. on Carriers, 167; *post*, 109, note (*t*).

sonable time for forwarding and sending or delivering the same, or notifying the arrival thereof, had elapsed before the commencement of this suit, yet the defendant did not forward or send or deliver the said goods for the plaintiff to the said F. S. at Bognor, within such reasonable time or at any other time, or notify or cause to be notified to the said F. S. within such reasonable time, or at any other time, such arrival of the said goods; but the defendant wrongfully detained the same in his possession for a long and unreasonable time, without sending or forwarding or delivering or causing to be delivered the said goods to the said F. S. for the said plaintiff, or otherwise notifying or causing to be notified to the said F. S. the arrival of the same; and by reason thereof the said F. S. afterwards refused and declined to accept and purchase and pay for the same as he otherwise would have done, whereby the plaintiff hath been deprived of gains and profits which would otherwise have accrued to him, and hath lost other opportunities of disposing of the said goods, and the benefit of the profits which would otherwise have arisen therefrom, and hath incurred expenses in endeavoring to obtain the goods, and the same are injured and lessened in value. And the plaintiff claims £——.

4. *Upon a Bill of Lading by the Consignee against the Master for not delivering or for damaging the Cargo.*

For that the defendant, by a bill of lading made by him on the —— day of ——, A. D. ——, and delivered to the plaintiff, acknowledged certain goods therein mentioned to have been shipped in good order and well conditioned on board a ship called ——, of which the defendant was the master, and thereby promised the plaintiff that the same should be delivered (in like order and well conditioned) to the plaintiff at ——, [the act of God, the queen's enemies, fire, and all and every other dangers of the seas, rivers, and navigation, of whatever nature and kind soever, excepted, (*r*)] he paying freight for the same, with primage and average accustomed; and although all conditions precedent have been performed, and all events have happened and periods of time have elapsed to entitle the plaintiff to a performance of the defendant's contract, and to maintain this action, and the delivery of the said goods was not prevented, and no loss of or damage to the said goods arose by any of the perils and dangers so excepted, yet the defendant did not deliver the said goods to the plaintiff at —— aforesaid, but wholly lost the same [*or did not deliver the said goods to the plaintiff at —— aforesaid in the like good order and condition in which they were so shipped, but in a wet and damaged state*]. And the plaintiff claims £——. (*s*)

[*A like count.* Bradley *v.* Dunipace, 7 H. & N. 200. *A like count, charging loss of goods by a collision.* Lloyd *v.* General Iron Screw Collier Co. 3 H. & C. 284.]

(*r*) This will depend upon the terms of the bill of lading; other special exceptions are frequently introduced in the *margin* of the bill of lading, and these should also be mentioned in the declaration; Chit. & Temp. on Carriers, 166, 176; as to the ship-owner's protection against damage by fire or loss by robbery, see 17 & 18 Vict. c. 104, s. 503; but the master is not protected against damage or loss by fire or robbery; Ib. s. 510; unless the exceptions are introduced into the bill of lading.

(*s*) [As to the damages, see The Boston, 1 Lowell, 464; Sturgess *v.* Bissell, 46 N. Y. 462; Merchant Shipping Act, 1862, s. 67. Declaration by consignee for not delivering goods, Wilson *v.* London &c. Navigation Co. L. R. 1 C. P. 61.]

5. *Upon a Bill of Lading, by an Indorsee against the Master, for not delivering or for damaging the Cargo.* (*t*)

For that the defendant, by a bill of lading made by him on the —— day of ——, A. D. ——, and delivered to A. B., acknowledged certain goods of the said A. B. to have been shipped in good order and well conditioned, on board a ship called ——, of which the defendant was the master, and thereby promised the said A. B. that the said goods should be delivered (in the like good order and condition) at ——, [the act of God, the queen's enemies, fire, and all and every other dangers of the seas, rivers, and navigation, of whatever nature and kind soever, excepted, (*u*)] unto the said A. B., or to his assigns, he or they paying freight for the same, with primage and average accustomed; and the said A. B. indorsed and delivered the said bill of lading to the plaintiff, and the property in the said goods thereby passed to him. And although all conditions precedent have been performed, and all events have happened and periods of time have elapsed to entitle the plaintiff to a performance of

(*t*) A bill of lading is now a negotiable instrument transferable by indorsement, and an action may be maintained upon it against the master by the consignee of the goods, or by an indorsee to whom the property in the goods therein mentioned shall pass, as if the contract therein mentioned had been made with him; 18 & 19 Vict. c. 111, s. 1; [Short v. Simpson, L. R. 1 C. P. 248; Dracachi v. Anglo-Egyptian Co. L. R. 3 C. P 190; Coventry v. Gladstone, L. R. 6 Eq. 44;] *aliter*, before that statute; Howard v. Shepherd, 9 C. B. 297; Thompson v. Dominy, 14 M. & W. 403. [Aside from the above statute, the effect of an indorsement of a bill of lading is only to transfer the property in the goods, and not the right upon the contract itself, and the indorsee cannot maintain an action on the bill itself in his own name, nor an action on the case for the non-delivery of the goods. Dows v. Cobb, 12 Barb. 310; Howard v. Shepherd, and Thompson v. Dominy, *ubi supra;* Lineker v. Aveshford, 1 Cal. 75; Stanton v. Eager, 16 Pick. 474.] As against the *master* or person signing the bill of lading, such bill of lading, representing goods to have been shipped on board, is, in the hands of a consignee or indorsee for a valuable consideration without notice of non-shipment, conclusive evidence of such shipment, unless the master can show that the misrepresentation was caused without any default on his part, and wholly by the fraud of the shipper or the holder of the bill of lading, or some person under whom he claims; 18 & 19 Vict. c. 111, s. 3; but the *ship-owner* is not liable even to an innocent third person by the master signing bills of lading for goods which have never been shipped on board; Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; or by his signing a *second* bill of lading for the same goods; Hubbersty v. Ward, 8 Ex. 330. [As to fraudulently disposing of third bill to one person after having raised money upon first two from another, Meyerstein v. Barber, L. R. 2 C. P. 38. Fraud on part of shipper. Valieri v. Bayland, L. R. 1 C. P. 382.] An indorsee of a bill of lading may also be sued upon it; he is subject to the *same liabilities* in respect of the goods, as if the contract contained in the bill of lading had been made by himself. 18 & 19 Vict. c. 111, ss. 1, 2. [A bill of lading, in the usual form, is both a receipt and a promise; and so far as it is a receipt, in a suit between the parties to it, being the shipper and the master who signed the bill for the delivery of the goods, it is open to the master to show that the quantity of goods received was less than that acknowledged in the bill. O'Brien v. Gilchrist, 34 Maine, 554; Dickerson v. Ledge, 12 Barb. 102; Grimes v. Harwood, 9 Barb. 447; Wolfe v. Myers, 3 Sandf. 7; Wayland v. Mosely, 5 Ala. 430; McTyer v. Steele, 26 Ala. 487; Bissel v. Price, 16 Ill. 408; Shepherd v. Naylor, 5 Gray, 591; Sutton v. Kettell, 1 Sprague, 309; The J. W. Brown, 1 Biss. 76; Abbe v. Eaton, 51 N. Y. 410. So it may be shown by parol that the goods, though admitted in the bill of lading to have been "in good order," were not in fact in good order when received. Ellis v. Willard, 5 Selden, 529; Barrett v. Rogers, 7 Mass. 297; Clark v. Barnwell, 12 How. (U. S.) 272. But, inasmuch as a "clear" bill of lading, that is to say, a bill of lading which is silent as to the place of storage, imports a contract that the goods are to be stored under deck, parol evidence of an agreement that they were to be stored on deck is inadmissible; The Delaware, 14 Wallace, 579; The Wellington, 1 Biss. 279; Creesy v. Holly, 14 Wend. 26; nor can such a bill be contradicted as to the course designated in it which the vessel is to take. Barber v. Brace, 3 Conn. 9; May v. Babcock, 4 Ham. 334; Sayward v. Stevens, 3 Gray, 97; Fitzhugh v. Wiman, 5 Selden, 559; Ellis v. Willard, 5 Selden, 529, 531; Barrett v. Rogers, 7 Mass. 297.]

(*u*) See *ante*, 108, note (*r*).

the defendant's contract and to maintain this action, and the delivery of the said goods was not prevented, and no loss of or damage to the said goods occurred by any of the perils and dangers so excepted, yet the defendant did not deliver the said goods to the plaintiff at —— aforesaid, [*or did not deliver the said goods at —— aforesaid in the like good order and condition in which they were shipped,*] but the same were [*damaged or*] wholly lost to the plaintiff. And the plaintiff claims £——.

[CARRIERS OF PASSENGERS, *post*, "Declarations in Tort."]

CHARTER-PARTIES.

OBS. — It does not now often occur that a charter-party is under seal, but where it is so the declaration must be framed specially upon the deed; Atty *v.* Parish, 1 New Rep. 104; White *v.* Parkin, 12 East, 578; Fletcher *v.* Gillespie, 3 Bing. 635; unless the plaintiff's claim arises out of a collateral agreement, or one express or implied, after the contract of charter-party; when the charter-party is not under seal, and the plaintiff's claim is simply for freight earned or for demurrage, the indebitatus counts for freight or demurrage may be adopted. See *ante*, 97, 98, tit. "Carriers." As to the parties to be made plaintiffs and defendants in actions on charter-parties, see in general Abbott on Ship.; 1 Chit. Pl. 6–8; Carr *v.* Jackson, 7 Ex. 382; Downman *v.* Williams, 7 Q. B. 103. Where persons sign *as agents* for named charterers, they are not liable to be sued as principals; Deslandes *v.* Gregory, 29 L. J. Q. B. 93; when plaintiff may sue, he having signed the charter-party as agent for the freighter; Schmalz *v.* Avrey, 20 L. J. Q. B. 228; Humble *v.* Hunter, 12 Q. B. 310; when defendant liable to be sued on a charter-party signed by his *general* agent for him, "per procuration," he having received special instructions which he has exceeded; Smith *v.* M'Guire, 3 H. & N. 554; 27 L. J. Ex. 465.

1. *On a Charter-party (not under Seal) for not loading pursuant to Charter-party.* (*x*)

Commencement as ante, 5.] For that the plaintiff and the defendant agreed by charter-party (*y*) that the plaintiff's ship, called the "Ariel," should with all convenient speed (*z*) sail to R., or so near thereto as she could safely

(*x*) This form is given by the Com. Law Pr. Act, 1852, sch. B, 22, and is here printed almost verbatim from the act. [See Rutty *v.* Benthall, L. R. 2 C. P. 488. As to liability of ship-owner for act of stevedore appointed by charterer, Blaikie *v.* Stembridge, 28 L. J. C. P. 329; 29 L. J. C. P. 212; Sack *v.* Ford, 13 C. B. N. S. 90; Sandeman *v.* Scurr, L. R. 2 Q. B. 86.]

(*y*) A charter-party generally contains a statement that the ship "being tight, staunch, and strong, and every way fitted for the voyage," &c. shall sail. This clause amounts to a warranty of seaworthiness, though such a warranty would be *implied*, Lyon *v.* Mills, 5 East, 428; but only applies to the time of contract, and is not a warranty for the continuance of the ship in the state described in the charter-party; Hurst *v.* Usborne, 18 C. B. 144; 25 L. J. C. P. 209; Worms *v.* Store, 11 Ex. 427; Dimech *v.* Corlett, 33 L. T. 21, P. C.; it also means that the ship is properly victualled and manned, and that the master is ready to receive his cargo; Oliver *v.* Fielden, 4 Ex. 135; and when necessary, that the port to which the vessel was to proceed is named; 5 Ex. 374; as to effect of misdescription of the ship's tonnage, Windle *v.* Barker, 25 L. J. Q. B. 349. [Meaning of words "any other accident beyond his control." Fenwick *v.* Schmalz, 37 L. J. C. P. 78. Of clause for payment of freight, "per ton of 50 cubic feet *delivered* for cotton." Buckle *v.* Knoop, L. R. 2 Ex. 125; in Ex. Ch. 333.]

(*z*) This will depend upon the terms of the charter-party; in some cases a particular day is named for the sailing of the ship, and sailing on such day is a condition precedent to the performance of the defendant's contract; to sail with convenient speed or in a reasonable time is not such condition

get, (*a*) and that the defendant should there load her with a full cargo (*b*) of tallow or other lawful merchandise, (*c*) which she should carry to H. and there deliver (*d*) on payment of freight, £—— per ton, and that the defendant should be allowed ten days for loading, and ten for discharge, and ten for demurrage, if required, at £—— per day, *and that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at R., and that the time for so doing has elapsed, (*e*) yet the defendant made default in loading the agreed cargo. (*f*) And the plaintiff claims £——. (*g*)

[*Like counts.* Clipsham *v.* Vertue, 5 Q. B. 265; Bruce *v.* Nicolopulo, 11 Ex. 129; Tarrabochia *v.* Hickie, 1 H. & N. 183.

For not loading a full cargo. Anglo-African Co. *v.* Lamzed, L. R. 1 C. P. 226.

For not supplying broken stowage necessary to complete a full cargo. Cole *v.* Meek, 15 C. B. N. S. 795.

For not loading in regular turn according to charter-party. Taylor *v.* Clay, 9 Q. B. 713. *The like, stating special damage by expense of maintaining the crew and paying dock dues.* Hudson *v.* Clementson, 18 C. B. 213.

For not loading with "usual dispatch" according to charter-party, setting out the charter-party verbatim. Kearon *v.* Pearson, 7 H. & N. 386.]

precedent, unless the omission frustrates the object of the voyage. Clipsham *v.* Vertue, 5 Q. B. 265; Tarrabochia *v.* Hickie, 1 H. & N. 183; Crookewit *v.* Fletcher, 1 H. & N. 893; Oliver *v.* Fielden, 4 Ex. 353; Dimech *v.* Corlett, 33 L. T. 21, P. C.; [Behn *v.* Burness, 3 B. & S. 751; Seeger *v.* Duthie, 8 C. B. N. S. 45; Routh *v.* McMillan, 33 L. J. Ex. 38; McAndrew *v.* Chapple, L. R. 1 C. P. 643.]

(*a*) As to the construction of this clause, see Shield *v.* Wilkins, 5 Ex. 304.

(*b*) What is a compliance with this term; Warren *v.* Peabody, 8 C. B. 800; Hunter *v.* Fry, 2 B. & Ald. 421; Cuthbert *v.* Cumming, 10 Ex. 809; the charterer has no right to fill the cabins as well as the carrying part of the ship, if he do so by permission of the master, he must pay the current freight and not the charter price. Mitcheson *v.* Nicol, 7 Ex. 929.

(*c*) As to the construction of this clause, Cockburn *v.* Alexander, 6 C. B. 791; and see Brass *v.* Maitland, 6 El. & Bl. 470; 26 L. J. Q. B. 49; 3 Kent, 218.

(*d*) Exceptions are generally introduced in a charter-party against restraints of princes and rulers, the dangers of the sea and navigation, the act of God, fire, pirates, and enemies. It will be observed that the above form does not notice these exceptions; but it should seem that where such exceptions are *mentioned in the charter*, they should be noticed in the declaration, and it should be shown that the non-performance of the contract was not prevented by any of the excepted perils or casualties See Wheeler *v.* Bavidge, 9 Ex. 668, per Martin B. *post*; *aliter*, if the exceptions be merely implied, then the defendant must plead them specially if they afford him any excuse. Ib.

(*e*) See a fuller averment of the performance of conditions precedent, *ante*, 39, between the **.

(*f*) What is a default; Spence *v.* Chadwick, 10 Q. B. 517; whether the defendant has loaded within a *reasonable time*, depends upon the usage of the port as to the turns or order of loading. Leidemann *v.* Schultz, 14 C. B. 38. [Detention by ice. Hudson *v.* Ede, L. R. 2 Q. B. 566.]

(*g*) The measure of damage is the amount of freight which would have been earned after deducting expenses, and also any profit which the ship might have earned during the period over which the charter extended; Smith *v.* M'Guire, 3 H. & N. 554; 27 L. J. Ex. 465; and *semble*, the ship-owner is not bound to take a new cargo for the most he can get in order to reduce the damages; Ib.; if the plaintiff sues for delay in loading, and has sustained any special damage, it should be alleged; as by the expense incurred in maintaining the master and crew, and in payment of extra dock dues, &c. see a form, Hudson *v.* Clementson, 18 C. B. 213; 25 L. J. C. P. 234; Adams *v.* Royal Mail Steam Packet Company, 28 L. J. C. P. 33. Parties to charter-parties frequently bind themselves to each other in a penal sum for the performance of their respective stipulations, but this does not preclude one party from bringing his action on any of the other clauses, and he may recover damages beyond the amount of the penalty. Harrison *v.* Wright, 13 East, 343; Winter *v.* Trimmer, 1 Bl. Rep. 395; Dimech *v.* Corlett, 33 L. T. 21.

2. *On a Charter-party (not under Seal) for not discharging the Cargo within the laying Days, and for Demurrage and Detention.*

Commencement as ante, 5, and proceed as in Form 1 *to the* *, *and then as follows:*] And the said ship afterwards sailed to R., and was there loaded by the defendant with the agreed cargo, which she carried to H. aforesaid, [*here aver performance of all conditions precedent, as ante, 39, between the* * *,] yet the defendant did not discharge the said cargo at H. aforesaid within the said ten days allowed by the said charter-party, but detained the said ship on demurrage after she was ready to discharge (*h*) such cargo, and the defendant had notice thereof, for the space of ten days over and above the said ten days allowed for discharge, and the defendant also detained the said ship for a long time after the expiration of the days allowed for loading, unloading, and demurrage, (*i*) whereby the plaintiff lost the use of his ship and the profits thereof, and incurred expenses in keeping and maintaining the said ship and the master and crew thereof, and in paying dock, harbor, and other dues, in respect of the said ship. (*k*) [*Add a common count for demurrage, post,* "Demurrage."] And the plaintiff claims £——.

[*Like counts.* Brown *v.* Johnson, 10 M. & W. 331; Benson *v.* Blunt, 1 Q. B. 870; Jackson *v.* Galloway, 1 C. B. 280; Lennard *v.* Robinson, 5 El. & Bl. 125; Alexander *v.* Dowie, 1 H. & N. 152.

For detention before loading. Esposito *v.* Bowden, 4 El. & Bl. 963; Erichsen *v.* Barkworth, 3 H. & N. 6.]

[3. *Against a Charterer for not having an Agent at a Foreign Port, according to Agreement, amended at the Trial.*

Whitwill *v.* Scheer, 8 Ad. & E. 312. (*l*)

4. *By Charterer against Ship-owner for deviating from and abandoning the Voyage to the Port of Loading.*

That the plaintiff and the defendant agreed by charter-party that the defendant's ship, ——, then at ——, should with all convenient speed, having liberty to take an outward cargo for owner's benefit, sail to ——, or so near thereto as she could safely get, and there load from the factors of the plaintiff a full cargo of ——, which she should carry to ——, and there deliver on payment of freight (certain perils and casualties in the said charter-party mentioned only excepted); and the said ship was not prevented by any of the said perils and casualties from completing the said outward voyage, (*m*) and

(*h*) As to when a ship is ready to discharge, see Brown *v.* Johnson, 10 M. & W. 331; in general the lay days commence running from the period of the ship's *arrival*, and not from the time when she gets to her berth; Ib.; and see Lindsay *v.* Janson, 4 H. & N. 699; 28 L. J. Ex. 315; and in the absence of custom or contract "Sundays" ["and holidays"] are included, unless the expression be *working* days. Kell *v.* Anderson, 10 M. & W. 498. [See Niemann *v.* Moss, 29 L. J. Q. B. 206.]

(*i*) See Benson *v.* Blunt, 1 G. & D. 449.

(*k*) See *ante*, 111, note (*g*).

(*l*) Where the vessel is consigned to the charterer's agents, and there is no clause stipulating that the ship is to be "free of commission," the agents are, in general, entitled to commission on the freight If the agents of the charterers compel, by detention of the ship's papers, payment of charges to which they are not entitled, counts should be added for money had and received, and money paid.

(*m*) [It has been held that, in an action by the charterer against the ship-owner, the

all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said charter-party performed by the defendant on his part; yet the said ship did not with all convenient speed sail to —— aforesaid, or so near thereto as she could safely get, and the defendant caused the said ship to deviate from her said voyage, and abandon the said voyage.

Like counts. Schilizzi *v.* Derry, 4 El. & Bl. 873; Pope *v.* Bavidge, 10 Ex. 73.

For delaying and deviation in the voyage to the port of landing. M'Andrew *v.* Adams, 1 Bing. N. C. 29; Porter *v.* Izat, 1 M. & W. 381.

For refusing to proceed to port of ultimate destination according to orders. Pole *v.* Cetcovich, 9 C. B. N. S. 430.

By charterer against ship-owner for not repaying freight paid in advance upon failure to deliver cargo. Charles *v.* Altin, 15 C. B. 46.

*Count by charterer against ship-owner on a warranty in the charter-party that the ship was classed A*1, *at Lloyds.* Routh *v.* Macmillan, 2 H. & C. 705.]

5. *On a Charter-party, setting out the Charter in Terms.* (*n*)

For that a certain agreement or charter-party of affreightment was made between the plaintiff and defendant, which was and is in the words and figures following: [*Here set out the charter-party verbatim.*] And the plaintiff says that the said person therein described as A. B. is the plaintiff, and the person therein described as C. D. is the defendant; and that all conditions [*&c. averring performance of all conditions precedent, as ante*, 89, *and alleging breaches as in the preceding forms*].

6. *On a Charter-party under Seal.*

For that by an indenture of charter-party, made between [*&c. stating the parties to the deed*], and sealed with the defendant's seal, the defendant covenanted with the plaintiff that the ship —— should, with all convenient speed [*&c.; here set out the material covenants and clauses in the charter-party upon the principle of the preceding forms, averring performance of conditions precedent, and alleging breaches according to the circumstances of the particular case*].

7. *Form of Declaration upon a Charter-party by the Ship-owner against the Charterer for not loading the Ship upon her Homeward Voyage.*

Freeman *v.* Taylor, 8 Bing. 124; 1 M. & Sc. 182.

8. *Other Forms for not loading the agreed or a full and complete Cargo.*

Irving *v.* Clegg, 1 Bing. N. C. 53; Reid *v.* Hoskins, 4 El. & Bl. 979; Cuthbert *v.* Cumming, 10 Ex. 809; Croockewit *v.* Fletcher, 1 H. & N. 893; Tarrabochia *v.* Hickie, 1 H. & N. 183; Smith *v.* McGuire, 3 H. & N. 554.

plaintiff need not negative the exceptions in the charter-party; and if the defendant relies upon such exceptions, he must plead that he comes within them. Wheeler *v.* Bavidge, 9 Ex. 668; but see as to pleading provisos and exceptions, Dawson *v.* Wrench, 3 Ex. 359; Browne *v.* Knill, 2 B. & B. 395; Crow *v.* Falk, 8 Q. B. 467, 471; 1 Chitty Pl. 311.]

(*n*) Where the terms of the charter-party are very special, and it is difficult to determine what are conditions precedent to be performed by the plaintiff, this form may be adopted with advantage.

9. *For not loading a Cargo of Coals "in the Customary Manner, or in Regular Turn."*

Adams *v.* Royal Mail Steam Packet Co. 5 C. B. N. S. 492; Hudson *v.* Clementson, 18 C. B. 213.

10. *For not loading before the expiration of the Lay Days.*

Avery *v.* Bowden, 5 El. & Bl. 714; Barwick *v.* Buba, 2 C. B. N. S. 563.

11. *By the Owners of Ship against a Person to whom the Freighter assigned the Goods, and who promised to perform the Charter-party for Damages in detaining the Ship beyond the Days of Demurrage, and for Freight, Primage, and Demurrage.*

2 Chit. Pl. 7th ed. 165; Benson *v.* Blunt, 1 G. & Dav. 449.

12. *Against the Ship-owner for not carrying according to Charter-party.*

Vaughan *v.* Glenn, 5 M. & W. 577; 8 Dowl. 396.

13. *Against the Master of a Ship by the Charterer for Deviation.*

McAndrew *v.* Adams, 1 Bing. N. C. 29.

14. *On a Charter-party against Ship-owner for not performing Six Successive Voyages.*

Wheeler *v.* Bavidge, 9 Ex. 668; Pope *v.* Bavidge, 10 Ex. 73.

15. *Against Ship-owner for proceeding on the Voyage after his Vessel had become in an Unseaworthy Condition, and causing the Loss of the Plaintiff's Goods.*

See form and law, Worms *v.* Storey, 11 Ex. 427.

[16. *By Ship-owner against Charterer on a Contract substituted for a Charter-party.*

Carr *v.* The Wallachian Petroleum Co. L. R. 1 C. P. 636; L. R. 2 C. P. 468.]

CHECKS.

Obs. — By 21 Vict. c. 20, and 23 Vict. c. 15, all drafts or orders for the payment by any banker or person acting as a banker, of any sum of money, though not made payable to the bearer or to order, and whether delivered to the payee or not, require a penny stamp; and by 16 & 17 Vict. c. 59, s. 3, the stamp may be impressed or affixed thereto; by 23 Vict. c. 15, s. 12, the drawer of drafts or orders having *adhesive* stamps shall, upon paying the same, write or impress the word paid upon such adhesive stamp under a penalty of £20; by s. 13, the stamps on foreign drafts or orders are to be adhesive.

The law relating to crossed checks is now regulated by 21 & 22 Vict. c. 79; by ss. 1 & 2, the crossing on a check is a material part of the check and unalterable, and the banker on whom it is drawn is to pay it only to the banker whose name is written across it; but by s. 4, the banker is not to be held re

sponsible for paying a check which does not plainly appear to have been crossed or altered. It would seem that a check is a bill of exchange, and may be sued upon under the summary procedure on bills of exchange act, 1855. See *ante*, 71; Rochford *v.* Daniel, 1 F. & F. 602. [As to the characteristics which distinguish checks from ordinary bills of exchange, see Matter of Brown, 2 Story, 502. A check is not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. Hopkinson *v.* Forster, L. R. 19 Eq. 74. Checks are not entitled to days of grace. See Andrew *v.* Blachly, 11 Ohio St. 89; Bowen *v.* Newell, 4 Selden, 190; Minturn *v.* Fisher, 4 Cal. 35; Taylor *v.* Sip, 1 Vroom, 284.]

1. *Payee of Check against Drawer.*

Commencement as ante, 5.] For that the defendant, on [*&c.*], (*o*) by his heck directed to certain bankers in London, to wit, "The London & Westminster Bank" [*or* "to Messrs. E. F. & Co." *according to the check*], required em to pay (*p*) to the said plaintiff or bearer [*or* order], £——, and delivred (*q*) the same to the plaintiff. And the said check was duly presented (*r*) r payment and was dishonored, of all which the defendant had due notice, t did not pay the same. [*If due notice or a subsequent promise cannot be arly proved, and the bankers had no effects of the defendant in their hands, ve on the check as above, except that the averment of notice should be itted, and there should be inserted in lieu thereof an allegation of such want effects, as ante*, 79, Form 15. *Of course the word* "acceptance" *in that rm will be omitted as inapplicable to a check. Add count on the original bt, &c.* (*see ante*, 35, Form 2, and 74, *note* (*p*), *and conclude as usual.*]

2. *Bearer, not being Payee, against the Drawer.*

Commencement as ante, 5.] For that the defendant, on [*&c.*], by his check, rected to certain bankers, to wit, to Messrs. E. F. & Co. [*according to the eck*], required them to pay to G. H. or bearer [*or* order], £——, and deliv- ed the said check to the said G. H., who transferred and delivered [*or in- rsed*] the same to the plaintiff [*if there were an intermediate transfer, the rument may be*, "and the said draft or order was duly transferred and deliv- ed to the plaintiff," *but if an indorser's name is on the check, the intermediate*

(*o*) As to post-dated checks, see Obs. *supra*, 1 *post*, Pleas, "Checks."

(*p*) A draft payable generally is payable demand. Whitlock *v.* Underwood, 2 B. C. 157.

(*q*) There must be a delivery to the plain- with the intention of vesting the property him. Samuel *v.* Green, 10 Q. B. 262.

(*r*) If a check be not presented on, or *for- ded for presentment* to the drawees if they on business at a distance by the post e day after that on which the holder ived it, and the bankers afterwards fail, holder cannot recover from the drawer; nader *v.* Burchfield, 1 Car. & M. 75; 3 Scott N. R. 555; 7 M. & G. 1061; le *v.* Brown, 5 Scott, 694; 4 Bing. N. 87; [St. John *v.* Homans, 8 Missou. 382; ica *v.* Smith, 1 Black, 29; Smith *v.* r, 43 N. Y. 171, 176; Taylor *v.* Sip, 1 m, 284; Veazie Bank *v.* Winn, 40 e, 60; Ritchie *v.* Bradshaw, 5 Cal. 228; ford *v.* First National Bank of Chicago, 42 Ill. 238; 3 Kent, 88;] but where the drawees continue solvent and have effects of the drawer in their hands, delay in presenting the check for a period less than six years does not disentitle the holder to sue the drawer. Robinson *v.* Hawksesford, 9 Q. B. 52; Serle *v.* Norton, 2 M. & Rob. 401; Robson *v.* Oliver, 10 Q. B. 704; Laws *v.* Rand, [3 C. B. N. S. 442. A bank check is substantially the same as an inland bill of exchange; it passes by delivery when payable to bearer; and the rules in regard to presentment, diligence of the holder, &c. which govern the one, are generally applicable to the other. Cruger *v.* Armstrong, 3 John. Cas. 5; Conroy *v.* Warren, 3 John. Cas. 259; Merchants' Bank *v.* Spicer, 6 Wend. 445; Smith *v.* Jones, 20 Wend. 192; Murray *v.* Judah, 6 Cowen, 484; Glenn *v.* Noble, 1 Blackf. 104; Woods *v.* Schraeder, 4 Harr. & J. 276; Sutcliffe *v.* M'Dowell, 2 Nott & McC. 251; Humphries *v.* Bicknell, 2 Litt. 299.]

indorsement should be averred so that the plaintiff may avail himself of such indorser's title, ante 75, *note* (*u*)], who thereby became the bearer thereof.(*s*) And the said check was duly presented for payment and was dishonored, of which the defendant had due notice, but did not pay the same.

3. *By Bearer of a Check against an Indorser, not being the Maker.* (*t*)

For that A. B., on [*&c.*], by his check, directed to certain bankers, to wit, Messrs. ——, required them to pay to the defendant or bearer [*or* "to the defendant or order," *as in check*], £——, and delivered the same to the defendant, and the defendant indorsed and delivered the said check to the plaintiff, who became the bearer and holder thereof [*or* transferred and delivered (*t*) the said check to the plaintiff, who became the bearer thereof]. And the said check was duly presented for payment and was dishonored, of which the defendant had due notice, but did not pay the same. (*u*) [*Add a count on the consideration and upon accounts stated, as ante*, 35.]

[4. *Indorsee of Check against Indorser.* (*x*)

That G. H., on the —— day of ——, A. D. ——, by his check or order for the payment of money, directed to Messieurs J. K. & Co., bankers, required them to pay to L. M. or order, $——, and the said L. M. indorsed the said check to the defendant, who indorsed the same [to N. O., who indorsed the same] to the plaintiff, and the said check was duly presented for payment, and was dishonored; whereof the defendant had due notice, but did not pay the same.

A like count. Keene *v.* Beard, 8 C. B. N. S. 372.]

COMMISSION. See "Agents," *ante*, p. 38.

COMPANY. See *post*, "Public Company."

COPYHOLD FINES. (*y*)

Commencement as Form 1, *ante*, 33.] For fines payable by the defendant as tenant of customary tenements of the manor of (Hampstead) to the plaintiff as lord of the said manor, for the admission of the defendant into the said customary tenements. [*Add a count on accounts stated, and conclude as ante*, 34.]

(*s*) [Flax & Hemp Co. *v.* Ballantine, 16 N. J. (Law) 454.]

(*t*) *Quære*, is the action maintainable against a transferrer who does not *indorse*? Moule *v.* Brown, 5 Scott, 694. [A check on a banker payable to bearer is a negotiable instrument, and passes by indorsement, so as to enable the holder to sue the maker thereon as on a bill of exchange. Keene *v.* Beard, 8 C. B. N. S. 372.]

(*u*) As to presentment and notice of dishonor, see Moule *v.* Brown, 5 Scott, 694; 4 Bing. N. C. 267; *ante*, 116, note (*r*); 3 Kent, 88, 104; 4 Ib. 549, in note. [Sherman *v.* Comstock, 2 McLean, 19; Harker *v.* Anderson, 21 Wend. 372; True *v.* Thomas, 27 Maine, 36; Salter *v.* Burt, 20 Wend. 205.]

(*x*) [Although the check is drawn payable "to bearer," it may be indorsed so as to make the indorsee liable. Keene *v.* Beard, 8 C. B. N. S. 372.]

(*y*) This form is given by Com. L. P. Act 1852, sch. B, 11. See a form, Pochin *v.* Duncombe, 1 H. & N. 842. As to the fees due

CORPORATION. See *ante*, 13, and *post*, "Public Company."

CROPS.

1. *Indebitatus Count for Crops sold to the Defendant.* (*z*)

Commencement as ante, 33.] For crops bargained and sold by the plaintiff to the defendant. [*Add account stated, as ante*, 34.]

2. *By an outgoing against an incoming Tenant to recover the Amount of a Valuation of Crops, Tillages, &c. relinquished to the Incomer.* (*a*)

For that the plaintiff was possessed of and entitled to a certain a farm, lands, and premises, upon which certain crops of the plaintiff were growing, and upon divers parts of which said farm, lands, and premises, the plaintiff had done, performed, and bestowed work and labor, and used and expended materials in and about the preparing and making the same ready for tillage, of which said work and labor and materials the plaintiff had not derived the benefit, and thereupon it was agreed by and between the plaintiff and defendant that the plaintiff should relinquish and give up to him the defendant the said crops and the benefit of the said work and labor and materials, to be paid for by the defendant, according to a valuation thereof to be made by a certain person to be appointed by and on behalf of the plaintiff, and a certain other person to be appointed by and on behalf of the defendant, to value the same [*here aver performance of conditions precedent as ante*, 39, *between the* **]; and the plaintiff saith, that afterwards the said growing crops, work, and labor, and materials were fairly valued by one J. D., a person for that purpose duly appointed by and on behalf of the plaintiff, and one W. P., a person for that purpose duly appointed by and on behalf of the defendant, (*b*) at a certain sum of money, yet the defendant has not paid to the plaintiff the said sum of money [*add count as last form, and account stated*].

DEMURRAGE. (*c*)

Commencement as ante, 33.] For the demurrage of a ship of the plaintiff

to the steward of a manor under the lands clauses consolidation act, Cooper *v.* The Norfolk Ry. Co. 3 Ex. 546. When the steward is entitled to separate fees for separate tenements, Evans *v.* Usscher, 16 M. & W. 675; R. *v.* Eton Coll. 8 Q. B. 526; R. *v.* Everdon, 16 L. J. Q. B. 18.

(*z*) See form, &c. Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89, and next note; Mayfield *v.* Wadsley, 3 B. & C. 357. When a contract for crops is within the statute of frauds, [1 Chitty Contr. (11th Am. ed.) 414 *et seq.* and notes.]

(*a*) See form, &c. Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89. It seems the common *indeb.* count suffices Leeds *v.* Burrows, 12 East, 1; Poulter *v.* Killingbeck, 1 B. & P. 397; *post*, "Tillages." See 14 & 15 Vict. c. 25, as to Emblements. The right to *take away growing* crops arises either by the custom of the country, or by express agreement, and in the absence of either they vest in the landlord as part of the land. Caldecott *v.* Smithies, 9 C. & P. 805. See *post*, "Landlord and Tenant," for forms by and against landlords and tenants — upon customs of the country — agreements and covenants in leases.

(*b*) If the defendant would not appoint a valuer on his part, then aver that fact. See Thurnell *v.* Balburnie, 2 M. & W. 786; Lattimore *v.* Garrard, 1 Ex. 809.

(*c*) This form is given by Com. Law P. Act, 1852, sch. B, 14. See, in general, Abb. on Shipping; Chitty & Temp. on Carriers, 212. Demurrage is a term used to express a sum of money *agreed to be paid* for the detention of a vessel by the shipper or owner

kept on demurrage by the defendant [*&c.; conclude with account stated, ante*, 34, Form 1].

DRAMA.

1. *Actions for Penalties for acting Unlicensed or Prohibited Plays are now regulated by* 6 & 7 *Vict. c.* 68, *ss.* 15 *&* 19.

2. *For Penalties for infringing Dramatic Literary Property.*

Planché *v.* Braham, 8 C. & P. 68; Lee *v.* Simpson, 3 C. B. 871; Shepherd *v.* Conquest, 25 L. J. C. P. 127. 3 & 4 W. 4, c. 15, is the act for the protection of copyright in dramatic literary property; and 4 & 5 Vict. c. 45, s. 20, protects musical compositions. See Russell *v.* Smith, 12 Q. B. 217; Russell *v.* Briant, 8 C. B. 836; Hatton *v.* Kean, 29 L. J. C. P. 20; [7 C. B. N. S. 268.] See *post*, Tort, "Copyright."

[ENTRY.

Writ of Entry to recover the Possession of Land.

In a plea of land, wherein the said P. P. demands against said D. D. one messuage situated in [*describe it*], whereof the said D. D., unjustly, and without judgment, disseised the said P. P., within twenty years now last past; and thereupon the said P. P. says that he was seised of the messuage aforesaid, with the appurtenances in his demesne as of fee, and thereof the said D. D., unjustly, and without judgment, disseised him, the said P. P., within twenty years last past.

Plea of General Issue.

And now the said D. D. comes and defends his right when, *&c.* and says that he did not disseise the said P. P. of the messuage aforesaid, as the said P. P. has above in his writ and declaration alleged against him; and of this he puts himself on the country.]

of goods at the port of shipment or discharge after the expiration of the time allowed for the loading or unloading of the cargo by the consignee. [3 Kent, 203.] If there be no express contract to pay *demurrage*, a shipowner cannot, on a common count for demurrage, recover for the detention of the ship for an unreasonable time in loading and unloading, but must declare specially. Horn *v.* Bensusan, 9 C. & P. 709; 2 M. & Rob. 326, S. C.; Kell *v.* Anderson, 10 M. & W. 499. See Erichsen *v.* Barkworth, 3 H. & N. 894; Möller *v.* Young, 5 El. & Bl. 755. Where there is an express contract to pay demurrage, the above count suffices, unless the contract *be under seal*, in which case it must be declared on. Where, by the bill of lading, demurrage is expressly made payable, or where the goods are deliverable "to the consignee or his assigns," he or they paying for them, *as per charter-party*, which provides for demurrage, the consignee, or, since the 18 & 19 Vict. c. 111, the indorsee of the bill of lading, by accepting the goods, may be liable to be sued for *demurrage* at the port of *discharge*; Möller *v.* Young, 5 El. & Bl. 755; Smith *v.* Sieveking, 5 El. & Bl. 589; Sanders *v.* Vanzeller, 4 Q. B. 260; Stindt *v.* Roberts, 5 D. & L. 560; Wegener *v.* Smith, 15 C. B. 285; in the latter cases, the *master* may be the plaintiff. Where there is no contract for demurrage with the master by the bill of lading or otherwise, the master cannot sue, but the owner must sue on the charter-party, or specially for an improper detention of the ship. Horn *v.* Bensusan, Kell *v.* Anderson, *supra*; Jesson *v.* Solly, 4 Taunt. 52; Evans *v.* Foster, 1 B. & Ad. 118; Möller *v.* Young, 5 El. & Bl. 855; Granger *v.* Dacre, 12 M. & W. 432; and see form, *ante*, 112; as to demurrage on railways, see Oxlade *v.* The North Eastern Ry. Co. 26 L. J. C. P. 129. [And as to demurrage generally, see further, Gray *v.* Carr, L. R. 6 Q. B. 528, 544; The Hyperion's Cargo, 2 Lowell Clendaniel *v.* Tuckerman, 17 Barb. 184.]

EXCHANGE.

1. *For not delivering Goods and paying Money on a Contract of Exchange.* (*d*)

For that it was agreed by and between the plaintiff and defendant that the plaintiff should deliver to the defendant a horse of the plaintiff, in exchange (*e*) for a horse of the defendant to be delivered by the defendant to the plaintiff, and £—— to be paid by the defendant to the plaintiff. And although the plaintiff delivered the said horse of the plaintiff to the defendant, and [*here aver performance of conditions precedent, as ante*, 39, *between the* **], (*f*) yet the defendant hath not delivered to the plaintiff the said horse of the defendant, or paid to the plaintiff the said sum of money. [*Add account stated, ante*, 34.]

2. *For Money payable on an Exchange of Goods.*

Commencement, ante, 33.] For money agreed by the defendant to be by him paid to the plaintiff, together with [*describe goods*] of the defendant, in exchange for goods of the plaintiff delivered by the plaintiff to the defendant. [*Add account stated, as ante*, 34.]

EXECUTORS AND ADMINISTRATORS.

Obs. — As to the parties to be made plaintiffs and defendants in actions by and against executors and administrators, see 1 Chit. Pl. [22, 58; 2 Wms. Exrs. (7th Eng. ed.) pt. V. bk. I. c. i. p. 1864 *et seq.*] An action for the breach of a mere *personal* contract or covenant, not running with the land, made with *one* person who is dead, must be brought in the name of his executors or administrators. For the breach of a covenant relating to the *realty*, the heir or devisee must in general sue, unless the executor or administrator can show special damage to the *personal estate* of the testator or intestate. Executors and administrators cannot sue for the breach of a contract occasioning only personal suffering to the testator or intestate and no damage to his estate, as a breach of promise of marriage. If a personal contract be made jointly with *several* persons, during the life of a *survivor* the action must be brought in his name, and at his death by *his* executors and administrators. If an executor die after he has proved the will, his executor, or the executor of such executor, is the party to sue on the contract of the original testator to recover money being assets of his estate; Anderson *v.* Martindale, 1 East, 497; but in the case of the death of an administrator, his executor does not in gen-

(*d*) Nature, &c. of this contract, [Benj. Sales (1st Am. ed.), § 2, note (*e*), and cases; Shaw C. J. in Commonwealth *v.* Clark, 14 Gray, 372; Howard *v.* Harris, 8 Allen, 297; Chitty Contr. (11th Am. ed.) 518.] See Thomas, Parker *v.* Rawlings, 12 Moore, 529; Bunn. 280; Siboni *v.* Kirkman, 1 M. & W. 420. In general the declaration must be special; [Mitchell *v.* Gile, 12 N. H. 390; Vail *v.* Strong, 10 Vt. 457; Loomis *v.* Wainwright, 21 Vt. 520;] but if the defendant has delivered the goods the plaintiff was to receive, the money he was to pay may be recovered on the common count for goods sold. Waddon *v.* Cox, 3 B. & C. 420; Atkinson *v.* Smith, 14 M. & W. 695. But the special count would even then be advisable, omitting the allegation that defendant has not delivered his goods. Upon an agreement to exchange goods, lapse of time will not entitle the person in whose favor there is a balance to bring an action for goods sold. The proper form of action is for not delivering the goods. Harrison *v.* Luke, 14 M. & W. 139; Bracegirdle *v.* Hincks, 9 Ex. 361.

(*e*) [Proof of an exchange will not support an averment of a sale of goods. Vail *v.* Strong, 10 Vt. 457; Mitchell *v.* Gile, 12 N. H. 390.]

(*f*) A contract of exchange is an entire contract, and the plaintiff must aver a delivery or tender of all the goods to be delivered by him. A delivery of part of the goods which the plaintiff was to deliver will not be sufficient. Atkinson *v.* Smith, 14 M. & W. 139.

Obs. eral represent the estate of the intestate, but an administrator *de bonis non* must be appointed and be made plaintiff.

The right of action and title of executors and administrators vest in them from and relate back to the time of the death of the testator or intestate; Woolley *v.* Clark, 5 B. & Ald. 744; Welchman *v.* Sturgis, 13 Q. B. 552; Foster *v.* Bates. 12 M. & W. 226; Bodger *v.* Arch, 10 Ex. 333; 24 L. J. Ex. 19; [Hatch *v.* Proctor, 102 Mass. 353; Lawrence *v.* Wright, 23 Pick. 128;] an executor may commence an action before probate; [Strong *v.* Perkins, 3 N. H. 517; Hutchins *v.* State Bank, 12 Met. 421; Gay *v.* Minot, 3 Cush. 352; Kittredge *v.* Folsom, 8 N. H. 111;] but an administrator cannot do so until after the grant of letters of administration. [Woolley *v.* Clark, *supra*:] and see Tharpe *v.* Stallwood, 5 M. & G. 760; 1 D. & L. 24; as to the effect of probate, see 20 & 21 Vict. c. 77, s. 22. [But an administrator may have an action of trespass or trover for goods of the intestate taken before letters granted. When the wrong-doer has sold the property taken, the administrator may waive the tort and recover in contract for money had and received. Colt J. in Hatch *v.* Proctor, 102 Mass. 353. By the law of Massachusetts, as laid down in Alvord *v.* Marsh, 12 Allen, 603, the letters of administration, by operation of law, make valid all acts of the administrator in settlement of the estate from the time of the death. They become by relation lawful acts of administration for which he must account. Colt J. in Hatch *v.* Proctor, 102 Mass. 354. In Missouri an executor has no authority until he has qualified: although if he intermeddles and subsequently qualifies, his letters will relate back and cover his former acts. Stagg *v.* Green, 47 Missou. 500.] All the executors named in the will must be made plaintiffs, though some of them be within the age of seventeen years, or have not proved, unless they have actually disclaimed and renounced probate in the ecclesiastical court; 1 Saund. 291 *i*; Webster *v.* Spencer, 3 B. & Ald. 360; Venables *v.* East India Co. 2 Ex. 633; Munt *v.* Stokes, 4 T. R. 565; Hensloe's case, 9 Co. Rep. 37 *a*; Pemberton *v.* Chapman, 7 El. & Bl. 210, per Bramwell B.; [2 Wms. Exrs. (7th Eng. ed.) pt. V. bk. I. c. i. p. 1867 *et seq.*; 1 Chitty Pl. 22;] but the non-joinder of another co-executor as plaintiff can only, it seems, be taken advantage of by plea in abatement. 1 Saund. 291 *i*, *k*; Tuckey *v.* Hawkins, 4 C. B. 655; Com. L. Pr. Act, 1852, s. 36. The character in which executors or administrators are stated to sue or be sued is admitted unless specially denied. Pl. R. Tr. T. 1853, r. 5. As to the description of executors and administrators in the writ, *ante*, 3, Obs. Executors and administrators, suing in right of their testator or intestate, are liable for costs to the defendant unless the court or a judge otherwise order. 3 & 4 W. 4, c. 42, s. 31; Lysons *v.* Barrow, 2 Dowl. 807; observed upon in Ashton *v.* Poynter, 3 Dowl. 465; 1 Cr., M. & R. 738; Lakin *v.* Massie, 4 Dowl. 239; Jobson *v.* Foster, 1 B. & Ad. 6; Slater *v.* Lawson, Ib. 893.

Parties to contracts bind not only themselves but their personal representatives, though not named in the contract; [2 Wms. Exrs. (7th Eng. ed.) pt. IV. bk. II. c. i. § 1, p. 1724;] executors and administrators may therefore, as a general rule, be sued as such on all contracts of the testator or intestate, upon which the latter would be liable, if living, whether the breach happened in their lifetime or after their decease; but executors cannot be sued for breaches, after the testator's death, of contracts requiring the *personal* performance, skill, or taste of the deceased; per Parke B.; Siboni *v.* Kirkman, 1 M. & W. 418, 423; [2 Wms. Exrs. (7th Eng. ed.) pt. IV. bk. II. c. i. § 1, p. 1724 *et seq.*; Wentworth *v.* Cock, 10 Ad. & El. 45; Robinson *v.* Davison, L. R. Ex. 269, 274;] as a contract to marry; Chamberlain *v.* Williamson, 2 M. & S. 408; [1 Wms. Exrs. (7th Eng. ed.) pt. II. bk. III. c. i. § 1, p. 800 *et seq.*; 2 Chitty Contr. (11th Am. ed.) 792; but see Shuler *v.* Millspaps, 71 N. Car. 297, *contra*;] to write a book; Marshall *v.* Broadhurst, 1 Cr. & J. 405; to teach; Baxter *v.* Burfield, 2 Stra. 1266; or for other *personal* services; Werner *v.* Humphreys, 2 M. & G. 853; Campanari *v.* Woodburn, 15 C. B. 500.

If one of several *joint* contractors die, his executor or administrator is discharged from liability *at law*, and the survivors only can be sued; if the contract were *several*, or joint and several, the executor or administrator of the deceased contractor may be sued, but not jointly with the survivor, because

Obs. one is chargeable *de bonis testatoris*, the other *de bonis propriis*. See, *post*, "Partners;" 1 Chit. Pl. "Exrs.;" Carth. 171; Hall *v.* Hubfarn, 2 Lev. 228; Richards *v.* Heather, 1 B. & Ald. 29; Calder *v.* Rutherford, 3 Br. & B. 302; Prior *v.* Hembrow, 8 M. & W. 873.

All the executors named in the will should be sued, but if one hath not proved nor *administered*, he may be omitted. 2 Wms. Exrs. 1750; Com. Dig. Abatement, F. 10; Ryalls *v.* Bramall, 1 Ex. 734. A person who, as executor, intermeddles with (Edward *v.* Harben, 2 T. R. 587) or takes possession of or deals with goods of a person deceased, becomes an executor *de son tort*, and may be sued as though he were lawful executor; Meyrick *v.* Anderson, 14 Q. B. 749; [1 Wms. Exrs. (7th Eng. ed.) pt. I. bk. III. c. v. p. 257, *et seq.*, 265 *et seq.*; Lee *v.* Chase, 58 Maine, 432; 1 Chitty Pl. 59;] though the person died intestate, or there be a lawful executor; [1 Wms. Exrs. (7th Eng. ed.) 261, and note (*y*);] and he may be joined as defendant with a lawful executor, though not with a lawful administrator. 1 Saund. 265, note (2); [1 Wms. Exrs. (7th Am. ed.) 266.] What acts are sufficient to charge a defendant as executor *de son tort*. Serle *v.* Waterworth, 4 M. & W. 9; Seally *v.* Powis, 1 Har. & W. 2; Paull *v.* Simpson, 9 Q. B. 365; [1 Wms. Exrs. (7th Eng. ed.) pt. I. bk. III. c. v. p. 257 *et seq.*; Leach *v.* Pillsbury, 15 N. H. 139; Willard *v.* Hammond, 21 N. H. 385; Haskins *v.* Hawkes, 108 Mass. 381.] A person ordering the funeral of the deceased, or selling goods or receiving debts sufficient only to pay for the funeral expenses, will not render himself executor *de son tort*. Harrison *v.* Rowley, 4 Ves. jr. 216; Camden *v.* Fletcher, 4 M. & W. 378; Samuel *v.* Morris, 6 C. & P. 620; Hobby *v.* Ruel, 1 Car. & K. 716; [1 Wms. Exrs. (7th Eng. ed.) pt. I. bk. III. c. v. p. 261 *et seq.* A person who deals with the goods of a testator as agent of executors who afterwards prove the will, cannot be treated as executor *de son tort*. Sykes *v.* Sykes, L. R. 5 C. P. 113; 1 Wms. Exrs. (7th Eng. ed.) 264. So it has been held with regard to the acts of a person as agent for one who afterwards becomes administrator. Hill *v.* Curtis, L. R. 1 Eq. 90; but see Parsons *v.* Mayesden, 1 Freem. 152. In an action by a creditor the executor *de son tort* is to be deemed executor generally. 1 Wms. Exrs. (7th Eng. ed.) 265.]

Executors are only liable to the extent of the assets which come to their hands.

An executor is not liable *personally* for a debt of his testator, except upon his promise *in writing signed* by him or his agent, and founded upon a new and sufficient consideration. 29 Car. 2, c. 3, s. 4; 1 Chit. Contr. [(11th Am. ed.) 371, 372.]

As to the remedy against "Heirs and Devisees," see those titles, *post*.

By or against Husband and Wife, executrix or administratrix, *ante*, 7, 13, and *post*, "Husband and Wife."

Common Count by an Executor or Administrator on Causes of Action accruing to the Deceased, with an Account stated with the Plaintiff as Executor.

Commencement as ante, 13, Form 23.] For money payable by the defendant to the said E. F. in his lifetime, for goods sold and delivered by the said E. F. to the defendant, and for [*insert any other debts, as ante*, 33, Form 1, *taking care to write throughout the name of the deceased*, "E. F." *for* "the plaintiff." *If it is probable that a promise to the plaintiff can be proved, here insert the next form as a second count*; (*g*) *if not, proceed thus:*] And also for money payable by the defendant to the plaintiff as executor [*or* "as administrator"] as aforesaid, for money found to be due from the defendant to the plaintiff, as executor [*or* "administrator"] as aforesaid, on accounts stated between the plaintiff, as (*h*) executor [*or* "as administrator"] as aforesaid, and the defendant. And the plaintiff, as executor as aforesaid, claims £——. (*i*)

(*g*) See *ante*, 53, note (*p*).

(*h*) The word "as" is here necessary, to show that the plaintiff claims the debt strictly in his representative character. See Cowell *v.* Watts, 6 East, 405; Henshall *v.* Roberts, 5 East, 150; Ferguson *v.* Mitchell, 2 Cr., M. & R. 687.

(*i*) Profert of the will or letters of admin-

the plaintiff, for goods sold and delivered by the plaintiff to the said E. F. in his lifetime, and for [*&c. If there be a cause of action against the defendant as executor, &c. arising after the death, insert the next form*].

9. *Against an Executor on a Cause of Action arising after the Testator's Death.* (*o*)

Commencement as ante, 13, Form 25.] For money payable by the defendant, *as* executor as aforesaid, to the plaintiff, for money paid by the plaintiff for the use of the defendant, *as* executor as aforesaid, at his request, and for money found to be due from the defendant, *as* executor as aforesaid, to the plaintiff, upon accounts stated between the plaintiff and the defendant, *as* executor as aforesaid. And the plaintiff claims £——.

10. *Against an Executor on his Promise to pay a Sum of Money in Consideration that the Plaintiff would rescind a Contract for the hire of a Carriage, made with the Testator.*

See form and law, Birch *v.* Earl of Liverpool, 9 B. & C. 392; Chit. jr. Contr. Index, "Executors."

11. *Form of an Indeb. Count against an Executor for a Legacy, which the Executor had retained by Agreement with the Legatee.*

Whitehouse *v.* Apperley, 1 Car. & K. 642. (*p*)

(*o*) An executor is liable, and may be sued *as executor*, for money paid for his use. Ashby *v.* Ashby, 7 B. & C. 444; Prior *v.* Hembrow, 8 M. & W. 873. Or on an account stated by the defendant as *executor* respecting moneys due from the testator; and counts upon such causes of action may be joined with counts alleging a debt from the testator in his lifetime. But an executor is not liable in his representative character for goods sold to or work done for him; Corner *v.* Shew, 3 M. & W. 350 (except, perhaps, for the testator's funeral); or money lent to or had and received by him as executor; Waite *v.* Gale, 2 D. & L. 925, 932; 2 Saund. 117 *d*; Jennings *v.* Newman, 4 T. R. 347; or for interest for money forborne *to him*; Bignell *v.* Harpur, 4 Ex. 773; or for use and occupation by him after the testator's death; Atkins *v.* Humphrey, 2 C. B. 654; Wigley *v.* Ashton, 2 B. & Ald. 101; for such debts he is *personally* liable, and counts thereon charging him in his representative capacity, will be treated as charging him personally, and would create a misjoinder if joined with counts properly charging him *as executor*; Bignell *v.* Harpur, *supra*; Ashby *v.* Ashby, 7 B. & C. 444; Kitchenman *v.* Skeel, 3 Ex. 49; [2 Wms. Exrs. (7th Eng. ed.) pt. IV. bk. II. c. ii. § 1, p. 1771 *et seq.*; Cronan *v.* Cotting, 99 Mass. 334;] the C. L. P. Act, 1852, s. 41, only allowing the joinder of different causes of action where they are against the same parties and in the same rights. As to when an executor is liable for the funeral of the testator; Brice *v.* Wilson, 8 Ad. & E. 349, note; Corner *v.* Shew, 8 M. & W. 350; an infant widow is liable on her contract for the funeral of her insolvent husband. Chapple *v.* Cooper, 13 M. & W. 252.

(*p*) In general an executor cannot be sued at law by a legatee for recovery of a legacy; Deeks *v.* Strutt, 5 T. R. 690; Jones *v.* Tanner, 7 B. & C. 542; [see Kent *v.* Somervell, 7 Gill & J. 458; Sutton *v.* Craine, 10 Gill & J. 458; Beecker *v.* Beecker, 7 John. 99; Van Orden *v.* Van Orden, 10 John. 30; Pelletreau *v.* Rathbone, 18 John. 428; 2 Wms. Exrs. (7th Eng. ed.) pt. V. bk. I. c. i. p. 1931 *et seq.*; 1 Chitty Pl. 113;] unless he has admitted the receipt of it, and that he retains it to the use of the legatee, in which case he is personally liable for money had and received to the legatee's use; Hart *v.* Minors, 2 Cr. & M. 700; Waite *v.* Gale, 2 D. & L. 925; Gregory *v.* Harman, 1 M. & P. 209; Wasney *v.* Earnshaw, 4 Tyr. 806; or upon an account stated; Topham *v.* Morecraft, 8 El. & Bl. 972; Braithwaite *v.* Skinner, 5 M. & W. 513. [In Massachusetts, every legatee may recover his legacy in an action at common law; Genl. Sts. c. 97, § 22; Miles *v.* Boyden, 3 Pick. 213; Prescott *v.* Parker, 14 Mass. 431; Cowdin *v.* Perry, 11 Pick. 503; Jones *v.* Richardson, 5 Met. 247; Colwell *v.* Alger, 5 Gray, 67 (specific legacy); Brooks *v.* Lynde, 7 Allen, 64; Whiting *v.* Cook, 8 Allen, 63; Kent *v.* Dunham, 106 Mass. 586; Prescott *v.* Morse, 62 Maine, 447; 1 Chitty Pl. 113, note; after a demand upon the executor. Brooks *v.* Lynde, 7 Allen, 64, 68; Miles *v.* Boyden, 3 Pick. 213, 218; Prescott *v.* Parker, 14 Mass. 431. It seems the action will not lie sooner than one

12. *Against Executors for Use and Occupation of Premises held by them as Executors under a Demise to the Testator.*

Atkins *v.* Humphrey, 2 C. B. 654; 3 D. & L. 612; *ante*, 124, note (*o*). See other forms by and against executors for recovery of rent, &c. under leases, *post*, "Landlord and Tenant."

13. *By Husband and Wife, Administratrix or Executrix.*

See *ante*, 7, 13; and *post*, "Husband and Wife."

EXTORTION.

Obs. — See forms of declarations against the sheriff for extortion and law, Holmes *v.* Sparkes, 12 C. B. 242; Scarfe *v.* Halifax, 7 M. & W. 288; Evans *v.* Moseley, 2 Cr. & M. 490; 2 Chit. Plead. 7th ed. 358; Martin *v.* Bell, 6 M. & S. 220; Ashby *v.* Harris, 2 M. & W. 673; S. C. 5 Dowl. 742; Usher *v.* Walters, 4 Q. B. 553; and see 1 Vict. c. 55, which regulates sheriff's fees on an execution; and Davies *v.* Griffiths, 4 M. & W. 377; Slater *v.* Hawes, 7 M. & W. 413; Curlewis *v.* Bird, 1 Dowl. N. S. 752; Masters *v.* Lowther, 9 C. B. 948; 1 Chit. Arch. Pr. 598. The remedy against a sheriff for extortion under the stat. 28 Eliz. c. 4, is not repealed by 1 Vict. c. 55. Pilkington *v.* Cook, 16 M. & W. 615. The declaration should state what ought to be taken, and what was the excess. Wrightup *v.* Greenacre, 10 Q. B. 1; Berton *v.* Laurence, 5 Ex. 816; [Livermore *v.* Boswell, 4 Mass. 437; Moore *v.* Boswell, 5 Mass. 306.]

If an officer of any of the courts at Westminster be guilty of extortion, or of taking an improper fee, he is liable to an action. Figgins *v.* Wyllie, 2 Bl. R. 1187; Worgate *v.* Knatchbull, 2 T. R. 148; Scarfe *v.* Halifax, 7 M. & W. 288. Money paid under duress or extortion may in some cases be recovered back as money had and received. *Ante*, 29.

FACTOR. See "Agents," "Brokers."

See form of declaration against a factor for selling contrary to orders, Smart *v.* Sandars, 3 C. B. 380; 5 C. B. 895. Plea, that the sale was made after notice, to reimburse defendant for advances, held no defence. Ib.

year from the appointment of the executor. Brooks *v.* Lynde, 7 Allen, 64, 67; Howland *v.* Howland, 11 Gray, 469, 476; Pollard *v.* Pollard, 1 Allen, 490, 491. But there is no limit of time within which the action may be brought. Kent *v.* Dunham, 106 Mass. 586, 591. In Connecticut it has been decided that an action will lie for a legacy against an executor, upon a promise implied from his having assets. Knapp *v.* Hanford, 6 Conn. 170. So in New Hampshire. Pickering *v.* Pickering, 6 N. H. 120; Piper *v.* Piper, 2 N. H. 439. In Massachusetts an action lies for a legacy against a devisee, or terre-tenant, of land charged with the payment of it. Swasey *v.* Little, 7 Pick. 296; Felch *v.* Taylor, 23 Pick. 133; Adams *v.* Adams, 14 Allen, 186; Sheldon *v.* Purple, 15 Pick. 528; Taft *v.* Morse, 4 Met. 523. So in New Hampshire. Perry *v.* Hale, 44 N. H. 363; Piper *v.* Bennett, 2 N. H. 439. But in this case, it is not necessary to a recovery to prove a demand of the legacy, nor a promise on the part of the defendant to pay. Pickering *v.* Pickering, 6 N. H. 120.] See a form against an executor on a promise by him to pay a legacy in consideration of forbearance, *post*. The legatee of a *specific* chattel may recover it from the executor after the latter has assented to the bequest. Doe *v.* Guy, 3 East, 120. A demand not exceeding "£50," which is the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will, may be sued for in the county court. 9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61.

FARRIER.

Against a Farrier [or Veterinary Surgeon] for not using due Care, &c. in his Treatment of the Plaintiff's Horse, which was lame. (q)

[That in consideration that the plaintiff employed the defendant, as and being a farrier [*or* veterinary surgeon], to treat and endeavor to cure a horse of the plaintiff, then laboring under [lameness], for reward to the defendant, the defendant promised the plaintiff to use due and proper care and skill in treating and endeavoring to cure the said horse, (r); yet the defendant did not use due or proper care or skill in treating and endeavoring to cure the said horse, and so carelessly, ignorantly, and unskilfully treated it, (s) that by means thereof it became and was [more lame and wholly] incurable, and of no use or value to the plaintiff].

FEIGNED ISSUE. (t)

1. In the ——.

—— (*venue*), (u) to wit. Whereas A. B. affirms, and C. D. denies, that [*here state the question to be tried, which may be as follows:*] certain goods and chattels mentioned [*&c.*], were on the —— day of ——, A. D. ——, (x) the goods and chattels of him the said A. B. as against the said C. D. And the

(q) See 1 Saund. 312, note (2); Chit. jr. Contr. Index, "Bailment." A smith or farrier on the road may be sued for refusing to shoe a horse, being tendered satisfaction. Jackson *v.* Rogers, 2 Show. 327; Lane *v.* Cotton, 12 Mod. 484, per Holt C. J. A farrier may recover his bill on the common count for work and materials. Clarke *v.* Mumford, 3 Camp. 37; Meeke *v.* Oxlade, 1 New Rep. 289.

(r) These are the terms of the contract implied by law from the retainer; but, independently of any contract, the law casts a *duty* on farriers, carriers, surgeons, attorneys, &c. to exercise care and skill in their professions, and they may, therefore, be sued in tort for a breach of such duty. See Legge *v.* Tucker, 1 H. & N. 500.

(s) It is not necessary to specify the nature of the negligence.

(t) This form is nearly in the terms of that given in the schedule to the 8 & 9 Vict. c. 109, s. 19, and is substituted for the old form of a feigned issue, alleging a wager between the plaintiff and defendant; but the old form may still be adopted. Luard *v.* Butcher, 2 C. B. 858; 3 D. & L. 815. It is necessary to be particular in seeing that by the form of the question as stated admissions are not made which are not intended. In Linnel *v.* Chaffers, 4 Q. B. 762, where a question between the execution creditor and assignees of a bankrupt was stated as being "whether the aforesaid execution was valid against the said fiat," it was held that the plaintiff could not dispute the bankruptcy. But in Lott *v.* Melville, 3 M. & G. 40; 3 Scott N. R. 346, where the question was "whether the plaintiffs were entitled to the goods seized as against and free from the defendant's execution, and whether they were liable to be seized as against the plaintiffs," it was held that the plaintiffs, claiming as assignees under the bankruptcy of a judgment debtor, were bound to prove the trading, petitioning creditor's debt, and act of bankruptcy, though no notice had been given to dispute them. See form to try a disputed title to goods under the interpleader act; Morewood *v.* Wilkes, 6 C. & P. 144. See, as to the construction of the form of feigned issues, Bosanquet *v.* Woodford, 5 Q. B. 310; Cummings *v.* Ince, 11 Q. B. 112; Gadsden *v.* Barrow, 9 Ex. 514; 23 L. J. Ex. 134. Where the issue was whether goods at the time of the seizure by the sheriff under a *fi. fa.* were the goods of the plaintiff (a claimant under a valid bill of sale to him): held, that the defendant, the execution creditor, might defeat the plaintiff's title by proving a prior bill of sale to a third person. Gadsden *v.* Barrow, *supra*; but see Carne *v.* Brice, 7 M. & W. 183; Belcher *v.* Patten, 6 C. B. 606; Rogers *v.* Kenney, 9 Q. B. 592.

(u) The rule or order directing the issue, generally specifies where the issue is to be tried. [Reasonable order. Tanner *v.* The European Bank, L. R. 1 Ex. 261.]

(x) This should be the date of the *seizure* by the sheriff; the *delivery* of a writ of *fi. fa.* to the sheriff does not now bind goods as against a *bonâ fide* purchaser for a valuable consideration without notice of the writ. 19 & 20 Vict. c. 97, s. 1; Williams *v.* Smith, 4 H. & N. 559; Withers *v.* Parker, 4 H. & N. 524.

ourt of —— is desirous of ascertaining the truth by the verdict of a jury low let a jury [*&c.*]

[2. *Order for Issues.*

"Inasmuch as it does not satisfactorily appear to the court that any agreement has been made by and between the parties, as to the amount of such amages and compensation [*in dispute*], to the end that the same may be satfactorily ascertained, it is further ordered, adjudged, and decreed, that an sue be made up between the parties, to ascertain by the verdict of a jury, c. the amount of such damages and compensation." *Directions as to the ourt and term; form of the issue; restrictions on plaintiff in the trial; admisions to be made by the defendant; allowances by the jury;*] "and that all furher directions be reserved until the said issue shall be tried, and the postea eturned to this court." Phillips *v.* Thompson, 1 John. Ch. 152.

3. *Another Form for same.*

—— ss. S. J. C. In Equity.
J. H. Exr. *v.* D. P.
D. P. *v.* J. H. Exr.

And now, after hearing the parties, it is ordered that issues be framed in the bove cases for the purpose of submitting to a jury the following questions:

1. What shares or proportions did G. H. [the testator] during his lifetime wn in the lot or parcel of land first set out and described in the bill of said J. ., executor?

2. Did G. H. [the testator] during his lifetime own any share or part in the t of land secondly set out and described in the bill of said J. H., executor, nd, if any, what share or part did he so own?

A separate issue is to be framed for the purpose of presenting each of the bove questions, in which the said executor is to aver the share or proportion hich he claims that his testator owned in each of said lots or parcels of land; nd the said D. P. is to traverse said averments; but in the issue embracing he inquiry as to the title to the first lot or parcel described in the bill of said xecutor, the said D. P. will not be permitted to traverse the fact of title in aid testator to some portions of said lot or parcel.

The above issues are to be framed by the counsel and submitted to the ourt for approval, on or before the —— Tuesday of —— next, on which day further order will be passed for the trial thereof.

Hodges *v.* Pingree, Essex County, Mass. Jan. 18, 1860.

G. T. B., J. S. J. C.

4. *Issues in the above Case.*

—— ss. S. J. C. In Equity.
J. H. Exr. *v.* D. P. *et al.*
D. P. *v.* J. H. Exr.

Under an order of this court passed January 18, 1860, directing issues to be ade up for trial by jury of certain questions of fact arising in the above suits, he following issues have been framed, and are now submitted to the court for pproval, viz:

1.

And now J. H., the above named executor of G. H. [*&c.*] deceased, comes and avers that said G. H. in his lifetime and during all the time alleged in the bill of complaint [*state time*] was seised in his demesne as of fee and held in common and undivided with said D. P. a certain parcel of real estate [*describe it*]; the share and proportion of the said G. H. was [*stating it*], and the share or proportion of said D. P. was [*stating it*] during the time aforesaid; and this said J. H. is ready to verify. By his solicitors.

And now the said D. P. comes and denies that the said G. H. held the above described premises in common and undivided in manner and form as averred by said J. H.; but the above denial does not, under the order of court above referred to, include a traverse of the fact of a title in said G. H. to some portion of the said premises. And of this he puts himself on the country.

By his solicitors.

And the said plaintiff doth the like. By his solicitors.

2.

And the said J. H., executor of G. H. as aforesaid, also avers that said G. H. in his lifetime and during all the time alleged in said bill of complaint, viz: [*state time*] was seised in his demesne as of fee, and held in common and undivided with said D. P. a certain other parcel of real estate [*describe it*]; the share or proportion of said G. H. was [*state share*]; and the share or proportion of said D. P. was [*state share*] during the time aforesaid. And this said J. H. is ready to verify. By his solicitors.

And now the said D. P. comes and denies that the said G. H. held the above described premises in common and undivided in manner and form as above averred by said J. H. And of this he puts himself on the country.

By his solicitors.

And the plaintiff doth the like. By his solicitors.

March —, 1860.

And now it is ordered that the above issues be duly signed by the solicitors of the respective parties, and that the same stand for trial before a jury at the bar of the supreme judicial court, at the term thereof next to be holden within and for the county of E——. G. T. B., J. S. J. C.

5. *Issue devisavit vel non, Modern English Form.*

And this court being desirous of having the following question of fact decided by a jury, that is to say, "whether the paper writing dated [*&c.*], in the pleadings mentioned, purporting to be the will of C., of [*&c.*], is or is not the last will and testament of the said C." It is ordered that an issue [*or* issues] [*&c.*]

6. *Issues in Probate Proceedings to establish a Will. Due Execution; Sanity of Testator; Undue Influence.*

E—— ss. S. J. C.

K. M. P. Executrix,

v.

S. F. G. Appellant from decree of judge of probate.

Issues to the Jury.

1.

And now comes said K. M. P., executrix, and says that the paper writing propounded for probate as and for the last will and testament [*or* as and for a codicil to the last will and testament] of T. P., deceased, was executed by said T. P. as such last will and testament [*or* as such codicil] in the presence of three competent subscribing witnesses, who subscribed their names thereto in his presence and at his request. (x^1) And this she is ready to verify.

By her attorney, J. C. P.

And the said S. F. G., appellant, comes and says that said paper writing propounded for probate as and for the last will and testament [*or* as and for a codicil to the last will and testament] of said T. P., deceased, was not executed by said T. P., deceased, as such last will and testament [*or* as such codicil], in the presence of three competent subscribing witnesses, who subscribed their names thereto at his request and in his presence. And of this she puts herself on the country. By her attorney, S. B. I., Jr.

2.

And the said K. M. P., executrix aforesaid, comes and says that said T. P., the said deceased, at the time of executing said paper writing propounded for probate as and for his last will and testament [*or* as and for a codicil to his last will and testament], was of sound and disposing mind and memory. (x^2) And this she is ready to verify. By her attorney, J. C. P.

And the said S. F. G., appellant, comes and says that said T. P., deceased, at the time of executing said paper writing propounded for probate as and for his last will and testament [*or* as and for a codicil to his last will and testament], was not of sound and disposing mind and memory. And of this she puts herself on the country. By her attorney, S. B. I., Jr.

And the said K. M. P., executrix, doth the like.

By her attorney, J. C. P.

3.

And the said S. F. G., appellant, comes and says that said T. P., deceased, was induced to make and execute said paper writing propounded for probate as and for his last will and testament [*or* as a codicil to his last will and testament], by undue and unlawful influence. (x^3) And this she is ready to verify.

By her attorney, S. B. I., Jr.

(x^1) [As to this issue the burden of proof is on the proponent of the will.]

(x^2) [As to this issue the burden of proof is on the proponent of the will, notwithstanding the presumption in favor of sanity, which is a mere presumption of fact, liable to be controlled, and leaving the burden still with the proponent.]

(x^3) [As to this issue the burden of proof is on the contestant.]

And the said K. M. P., executrix, comes and says that said T. P., deceased was not induced to make and execute said paper writing propounded for pr bate as and for his last will and testament [*or* as and for a codicil to his la will and testament], by undue and unlawful influence. And of this she pu herself on the country. By her attorney, J. C. P.

And the said S. F. G., appellant, doth the like.

By her attorney, S. B. L, Jr.]

FISHERY.

Commencement as ante, 33.] For the defendant's use by the plaintiff's pe mission of a fishery of the plaintiff. (*y*)

FIXTURES.

Obs. — As to the law upon the subject of fixtures, and contracts respecting the see Amos & F. on Fixtures; [1 Chitty Contr. (11th Am. ed.) 489 *et se* 491, and note (*f*), and cases; 495 *et seq.* and notes and cases cited; Wa leigh *v.* Janvrin, 41 N. H. 503; Voorhies *v.* McGinnis, 46 Barb. 2 O'Dougherty *v.* Felt, 65 Barb. 220; Quinby *v.* Manhattan Cloth &c. Co. C. E. Green, 260; Stockwell *v.* Campbell, 39 Conn. 362; Fifield *v.* Mai Central &c. R. R. Co. 62 Maine, 77, 80, and cases cited; Alvord Carria Co. *v.* Gleason, 36 Conn. 86; Cromie *v.* Hoover, 40 Ind. 49; Allen *v.* Ke nedy, 40 Ind. 142;] Woodfall's Land. & Ten.; and see the authorit collected in Walmsley *v.* Milne, 7 C. B. N. S. 115. It seems a written co tract is not necessary under the statute of frauds. Hallen *v.* Runder, 1 C M. & R. 266, 273; Horsfall *v.* Kay, 17 L. J. Ex. 266; Hodgson *v.* Johns [El., Bl. & El. 685; Strong *v.* Doyle, 110 Mass. 92, 93; Bostwick *v.* Leach Day, 476.] The price of fixtures cannot be recovered upon a count *goods* sold; Lee *v.* Risdon, 7 Taunt. 188; Pitt *v.* Shew, 4 B. & Ald. 206; less they have been severed before the sale. Dalton *v.* Whittem, 3 Q. B. 9 Wilde *v.* Walters, 16 C. B. 637. The acceptance of a demise of a house co taining fixtures does not raise an implied contract to pay for such fixtur Goff *v.* Harris, 5 M. & G. 573. Where a tenant agreed with his landlord t he should forbear removing his fixtures at the end of his tenancy, on con tion that the landlord should take them at a valuation, and the valuation made the day after the tenant quitted, it was held the tenant might reco on the common count. Hallen *v.* Runder, 1 Cr., M. & R. 266. In order get an admission of part of the plaintiff's case, it may sometimes be advi ble to declare specially. In such case the declaration should state that plaintiff was possessed of, and entitled to remove or sell, certain fixtures effects, &c. being in a certain house, and that it was agreed between plain and defendant that plaintiff should bargain, sell, and relinquish said fixtu to defendant, and that he should buy same at a valuation to be made, showing agreement for valuation, the valuation that plaintiff relinquish &c. and non-payment of price. See Form 2, *ante*, 117. See form by outgo against incoming tenant for fixtures left on premises by license of landlo Roffey *v.* Henderson, 17 Q. B. 574. See other forms relating to fixtures between landlord and tenant, *post*, "Landlord and Tenant."

Commencement as ante, 33, Form 1.] For *fixtures* and effects bargain and sold, and given up by the plaintiff to the defendant [*add account stat* Salmon *v.* Watson, 4 Moore, 73].

(*y*) This form is given by the C. L. P. Act, 1852, sch B, 10. See Holford *v.* Bailey, 13 Q. B. 426. [Declaration for refusal to grant license to fish, Mills *v.* Mayor of C chester, L. R. 2 C. P. 476.]

FORBEARANCE TO DEFENDANT.

Obs. — An agreement to forbear absolutely; Mapes *v.* Sidney, Cro. Jac. 683; or for a given time; Semple *v.* Pink, 1 Ex. 74; to *commence* or to *prosecute* (Wade *v.* Simeon, 2 C. B. 548, 565, 567) proceedings at *law* or in *equity* for a *well-founded* legal or equitable demand; Jones *v.* Ashburnham, 4 East, 455; Edwards *v.* Baugh, 11 M. & W. 641; is a good consideration for a promise by the debtor or a third person; Maud *v.* Waterhouse, 2 C. & P. 579; Smith *v.* Algar, 1 B. & Ad. 603; to pay the debt or more, or do any other legal act; Wade *v.* Simeon, 2 C. B. 548; Llewellyn *v.* Llewellyn, 3 D. & L. 318; Bidwell *v.* Calton, Hob. 216; Parker *v.* Leigh, 2 Stark. R. 229; Poolley *v.* Gilberd, 2 Bulst. 41; [1 Chitty Contr. (11th Am. ed.) 35 *et seq.* There must be a *bonâ fide* claim. Cook *v.* Wright, 1 B. & S. 559; Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449; Wade *v.* Simeon, 2 C. B. 548; Gould *v.* Armstrong, 2 Hall, 266; Palfrey *v.* Portland, Saco & Portsmouth R. R. Co. 4 Allen, 55, 57.] But forbearance of such claim is no consideration unless there be a person liable to be sued. Jones *v.* Ashburnham, *supra;* Bacher *v.* Fox, 2 Saund. 136; Hunt *v.* Swaine, 1 Lev. 165; [Nelson *v.* Searle, 4 M. & W. 795.] Forbearance by the *assignee* of a bond, or of a debt, or other *chose in action*, is a sufficient consideration, being as beneficial to the debtor as if the assignee had been the original creditor, and had forborne. Morton *v.* Burn, 7 Ad. & E. 19; 1 Saund. 210; Fish *v.* Richardson, Cro. Jac. 47; 1 Roll. Ab. 20, pl. 11.

The abandonment of a *doubtful* claim or a suit to try a question upon which a *reasonable doubt* existed; Llewellyn *v.* Llewellyn, Edwards *v.* Baugh, *supra;* Longridge *v.* Dorville, 5 B. & Ald. 117; Walters *v.* Smith, 2 B. & Ad. 889; Stracy *v.* Bank of England, 6 Bing. 754; Bridgman *v.* Dean, 7 Ex. 199; Tempson *v.* Knowles, 7 C. B. 651; [Stewart *v.* Stewart, 6 Cl. & Fin. (Am. ed.) 911, and note (1), and cases cited; 1 Chitty Contr. (11th Am. ed.) 46, and note (*m*[1]) and cases cited;] or an agreement to give up proceeding in a pending reference; Smyth *v.* Holmes, 10 Jur. 860; are sufficient considerations to support a promise. [The surrender or discharge of a claim which is utterly without foundation, and known to be so, is not a good consideration for a promise. Kidder *v.* Blake, 45 N. H. 330; Pitkin *v.* Noyes, 48 N. H. 304. Nor does a discharge from an oral contract inoperative under the statute of frauds. North *v.* Forest, 15 Conn. 400.] As to promises in consideration of forbearance, &c. to *third persons*, see *post*, "Guaranties."

1. *On Defendant's Promise to pay Debt and Costs if the Plaintiff would suspend an Action against him.*

For that an action had been commenced and was pending by and at the suit of the plaintiff against the defendant in the court of ["queen's bench"] at Westminster for the recovery of a certain sum of money, due and owing (*x*) from the defendant to the plaintiff, and thereupon, in consideration that the plaintiff would stay (*a*) all further proceedings in the said action until the —— day of —— then next, (*b*) he the defendant promised the plaintiff to pay

(*x*) It is not necessary to state the subject-matter of the debt; Com. Dig. Action on the Case on Assumpsit; but there must in general be a legal or equitable claim. See Obs. *supra*.

(*a*) As to the mode of laying the promise, see Payne *v.* Wilson, 7 B. & C. 423; Tanner *v.* Moore, 9 Q. B. 1. If the defendant's promise be in consideration that plaintiff would not sue him, the declaration may be as follows: "For that in consideration that the plaintiff would forbear to sue the defendant for recovery of a certain debt of £——, due and owing from the defendant to the plaintiff, until, &c."

(*b*) A suspension of proceedings for a given time, Semple *v.* Pink, 1 Ex. 74, or for a reasonable time, suffices to constitute a good consideration; [Sage *v.* Wilcox, 6 Conn. 81; Silvis *v.* Ely, 3 Watts & S. 420; Watson *v.* Randall, 20 Wend. 201; Jennison *v.* Stafford, 1 Cush. 168; Robinson *v.* Gould, 11 Cush. 55; Bixler *v.* Ream, 3 Penn. 282; Gilman *v.* Kibler, 5 Humph. 19; Colgin *v.* Henley, 6 Leigh, 85;] there need not be a total abandonment of the suit. Chit. Contr.; Oldershaw *v.* King, 2 H. & N. 517. [The better opinion seems now to be, that an agreement to forbear, in which no time is mentioned, is good; and that, in declaring

him the said debt and the costs (*c*) of the plaintiff by him incurred in commencing and prosecuting the said action, on the —— day of —— then next; and the plaintiff says, that he ceased to prosecute, and hath hitherto stayed all proceedings in the said action, and that the plaintiff's costs of the said action amounted, to wit, to £——, and that all conditions precedent have been performed, and all events have happened, and periods of time have elapsed to entitle the plaintiff to maintain this action; (*d*) yet the defendant hath not paid the said debt and costs or any part thereof. [*Add account stated, &c. as ante*, 34, 35.]

2. *Against the Obligor of a Bond on the Forbearance by the Assignee to sue him; and Law.*

Morton *v.* Burn, 7 Ad. & El. 19.

3. *Similar Forms on the Forbearance by the Grantee of a Warrant of Attorney or Cognovit.*

Twight *v.* Prescott, 2 Dowl. N. S. 4; Payne *v.* Wilson, 7 B. & C. 423.

4. *Against an Executor on his Promise to pay a Legacy in Consideration of Forbearance.*

See form, 2 Chit. Pl. (7th ed.) 179; and see Deeks *v.* Strutt, 5 T. R. 690; Jones *v.* Tanner, 7 B. & C. 542; Topham *v.* Morecraft, 8 El. & Bl. 972; Braithwaite *v.* Skinner, 5 M. & W. 313; *ante*, 124, note (*p*).

FRAUDULENT CONVEYANCES.

On the 13 *Eliz. c.* 5, *to recover the Penalties for making a Fraudulent Conveyance.* (*e*)

Butcher *v.* Harrison, 4 B. & Ad. 129.

on such an agreement, it may be treated as an agreement to forbear for a reasonable time. Oldershaw *v.* King, 2 H. & N. 517; and per Bovill C. J. and Brett J. in Coles *v.* Pack, L. R. 5 C. P. 65, 71; King *v.* Upton, 4 Greenl. 552; Elting *v.* Vanderlyn, 4 John. 237; Hamaker *v.* Eberly, 2 Binn. 506. But it appears that a promise to forbear "for a little time," or for some time, is too indefinite to constitute a good consideration for a contract. Lonsdale *v.* Brown, 4 Wash. C. C. 148; 1 Roll. Abr. 23, pl. 25, 26.] If there be any doubt as to the time of forbearance agreed upon, the declaration may allege it to be "for a period of time which has long since elapsed." [See Mapes *v.* Sidney, Cro. Jac. 683; Lonsdale *v.* Brown, 4 Wash. C. C. 148; Sidwell *v.* Evans, 1 Penn. 385; Downing *v.* Funk, 5 Rawle, 69; Hakes *v.* Hotchkiss, 23 Vt. 231.]

(*c*) If there was any agreement as to the costs being costs between attorney and client, or costs to be taxed, the declaration should be framed accordingly.

(*d*) Where in consideration of forbearance defendant promised payment on a particular day, the stay of proceedings until that day was held a condition precedent. Rolt *v.* Cozens, 18 C. B. 673.

(*e*) As to when conveyances are fraudulent, see [1 Chitty Contr. (11th Am. ed.) 57 *et seq.*; Spirett *v.* Willows, 3 De G., J. & S. (Am. ed.) 293, and notes.] A *bonâ fide* sale is not fraudulent merely because it is made with the intention to defeat the expected execution of a judgment creditor. Wood *v.* Dixie, 7 Q. B. 892; and see Thompson *v.* Webster, 28 L. J. Ch. 700; Michael *v.* Gay, 1 F. & F. 409; [Darvill *v.* Terry, 6 H. & N. 807; 1 Chitty Contr. 575.]

FRAUDULENT REMOVAL.

y a Landlord on 11 *Geo.* 2, *c.* 19, *s.* 3, *for Penalties for assisting a Tenant in fraudulently removing his Goods to prevent a Distress.*

See a form and law, 2 Chit. Pl. 345; and see Dibble *v.* Bowater, 2 El. & l. 564.

FREIGHT. See *ante*, "Carriers."

GARNISHEE. See *ante*, 16.

GENERAL AVERAGE.

By the Owner of a Ship against the Owner of Goods on Board for his Proportion of General Average Loss accruing from Injury done to the Ship by the loss of an Anchor, &c. cut away to preserve the Ship and Cargo, and Expenses incurred in putting back to preserve the Ship. (*f*)

For that the plaintiff was owner of a ship called the ——, and of her ckle, anchors, masts, boats, and appurtenances, which ship was proceeding on certain voyage, from —— towards ——, with certain goods of the defend- t on board thereof, to be carried therein on freight during the said voyage. nd thereupon, during the said voyage, one of the anchors of the plaintiff, longing to the said ship, was by storms and tempest forced and driven over- ard, and became and was suspended on the side of the said ship, and en- ngled in the rigging thereof; and thereupon, in order to preserve the said ip and the goods on board thereof, it became and was expedient and neces- ry to cut away the said anchor and parts of the rigging belonging to the id ship, and the same were accordingly cut away, and were wholly lost to e plaintiff; and by means of the said damage and loss, and other damage to e said ship occasioned by the said storms and tempest, the said ship be- me and was so greatly damaged that it became and was necessary, in order preserve the said ship *and her cargo*, for the said ship to put back again —— aforesaid, and to repair the said damage; and the said ship with the id goods of the defendant so on board thereof, thereupon put and sailed ck again to —— aforesaid, and the said damage was there repaired, and the cessary expenses incurred by the plaintiff in the premises amounted to the m of £——; and whilst the said ship was so repairing as aforesaid, the aintiff necessarily incurred expenses in the payment of the wages and the

(*f*) See forms, 2 Chit. Pl. 7th ed. 159; rkley *v.* Presgrave, 1 East, 220; Price *v.* bble, 4 Taunt. 124; damage done to the ip by *tempest* falls on the owner. As to e law of "average," see Abbott on Ship- ng, Holt on Shipping, Marshall on Insur- ce, Arnould on Insurance, Stevens on Av- erage; Gould *v.* Oliver, 4 Bing. N. C. 134; Hallett *v.* Wigram, 9 C. B. 580; Hall *v.* Janson, 4 El. & Bl. 508; Job *v.* Langton, 6 El. & Bl. 779; Moran *v.* Jones, 7 El. & Bl. 523; and *post*, title "Insurance." [What is recoverable as general average, see Wilson *v.* Bank of Victoria, L. R. 2 Q. B. 203.]

maintenance of the crew of the said ship, in the whole amounting to £——; and the said goods were, by means of the premises, saved and preserved, and arrived safely into the hands and possession of the defendant, of all which the defendant had notice; and by reason of the premises the defendant, as such owner of the said goods, was and is liable to pay and contribute to the said losses, damages, and expenses, in a general average, the sum of £—— [*here aver performance of all conditions precedent as ante*, 39]; yet the defendant hath not paid the said sum of £—— to the plaintiff.

2. *Indebitatus Count for General Average.* (*g*)

Commencement as ante, 134, Form 1.] For general average due and payable from the defendant for and in respect of goods of the defendant having been carried by the plaintiff on board a ship of the plaintiff upon a certain voyage for the defendant at his request; and in respect of certain losses, damages, and expenses incurred by the plaintiff in and about the preservation of the said ship and her cargo, and the said goods of the defendant from damage and loss during the said voyage [*add account stated and conclusion, as ante*, 34].

GOODS SOLD. See "Sale of Goods," *post.*

GOOD-WILL.

Obs. — A contract for the transfer of the good-will of a business is good in law; Bunn *v.* Guy, 4 East, 190; Wyburd *v.* Stanton, 4 Esp. 179; and though in such a case there is no *implied* contract on the part of the vendor not to set up again in a similar business, equity will in some cases interfere and restrain him from doing so. Churton *v.* Douglass, 1 Johns. 174; 28 L. J. Chanc. 841; Benwell *v.* Inns, 24 Beav. 307; Davies *v.* Hodgson, 25 Beav. 127; [Spier *v.* Lambdin, 45 Geo. 319; Hall's Appeal, 60 Penn. St. 458. As to the meaning and force of the term "good-will," see Austen *v.* Boys, 2 De G. & J. 626; 2 Lindley Partn. (2d Eng. ed.) 884–890; Collyer Partn. (5th Am. ed.) §§ 161–164, and notes; Bradford *v.* Peckham, 9 R. I. 250.]

An agreement which operates in *general* and *universal* restraint of trade is void as being contrary to public policy. Pilkington *v.* Scott, 15 M. & W. 657; Hilton *v.* Eckersley, 6 El. & Bl. 47, 73; where see the cases upon this subject collected; [2 Chitty Contr. (11th Am. ed.) 982 *et seq.* and notes; Alger *v.* Thatcher, 19 Pick. 51; Lange *v.* Werk, 2 Ohio (N. S.) 519; Taylor *v.* Blanchard, 13 Allen, 370; Brewer *v.* Marshall 19 N. J. Eq. 537.] But if such agreement be merely in limited and partial restraint of trade, it is good, provided it be not unreasonable and oppressive, which is a question of *law*, not of *fact*. Tallis *v.* Tallis, 1 El. & Bl. 391; Mallan *v.* May, 11 M. & W. 653, 667; [Clark *v.* Crosby, 37 Vt. 188; Gilman *v.* Dwight, 13 Gray, 356; Pierce *v.* Woodward, 6 Pick. 206; Chapman *v.* Brockway, 21 Wend. 158; Lawrence *v.* Kidder, 10 Barb. 641; Mott *v.* Mott, 11 Barb. 127; James V. C. in Leather Cloth Co. *v.* Lorsont, L. R. 9. Eq. 345, 354; Kellogg *v.* Larkin, 3 Chand. (Wis.) 133; Whitney *v.* Slayton, 40 Maine, 224; Noble *v.* Bates, 7 Cowen, 307; Bowser *v.* Bliss, 7 Blackf. 344; Palmer *v.* Stebbins, 3 Pick. 188; Heichew *v.* Hamilton, 3 Iowa, 396; Ross *v.* Sadgebeer, 21 Wend. 166; Hoyt *v.* Holly, 39 Conn. 326;] and be founded upon such a good and valuable consideration as is essential to support any contract not under seal Pilkington *v.* Scott, 15 M. & W. 660, per Alderson B.; Hitchcock *v.* Coker, 6 Ad. & El. 438; Benwell *v.* Inns, 24 Beav. 307; [Vaughan B. in Young *v.*

(*g*) See *ante*, 134, note (*f*), and *post*, "Insurance."

Obs. Timmins, 1 Tyr. 226, 241; Duffy *v.* Shockey, 11 Ind. 70; Grasselli *v.* Lowden. 11 Ohio St. 349; Holmes *v.* Martin, 10 Geo. 503.] The *adequacy* of the consideration is not, however, the test of the *reasonableness* of the restriction. Sainter *v.* Ferguson, 7 C. B. 706, per Coltman J.; [Pilkinton *v.* Scott, 15 M. & W. 657; Hitchcock *v.* Coker, 6 Ad. & El. 438.] The restraint must only be *partial*, not larger than is necessary for the protection of the party with whom the contract is made. Tallis *v.* Tallis, Mallan *v.* May, *supra;* [James V. C. in Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 354; Lawrence *v.* Kidder, 10 Barb. 641; Lange *v.* Werk, 2 Ohio (N. S.) 519; California Steam Nav. Co. *v.* Wright, 6 Cal. 258.] It may be indefinite as to the duration of *time*, if limited as to *space*, and in other respects reasonable. Elves *v.* Croft, 10 C. B. 251; Hitchcock *v.* Coker, *supra;* Hastings *v.* Whitley, 2 Ex. 611, 615; Mallan *v.* May, 11 M. & W. 653; Pemberton *v.* Vaughan, 10 Q. B. 87; Sainter *v.* Ferguson, *supra;* Jones *v.* Lees, 189; 26 L. J. Ex. 9; [McClurg's Appeal, 58 Penn. St. 51; Butler *v.* Burleson, 16 Vt. 176. As to the mode of measuring distances in such case, 2 Chitty Contr. (11th Am. ed.) 985, note (*g*).]

If the only limit be as to time, and none as to space, it will be considered void. See Ward *v.* Byrne, 5 M. & W. 541; Hinde *v.* Gray, 1 M. & G. 195; Mumford *v.* Gething. 7 C. B. N. S. 305. [An agreement not to use certain machines in any of the United States, except two, was held good in Stearns *v.* Barrett, 1 Pick. 443.]

Agreements in restraint of trade are divisible, and may be enforced in part, though some stipulation may be *void* as in restraint of trade; as in the case of a covenant not to carry on a business within the city of London or Westminster, *or within the distance of* 600 *miles from the same;* the latter restriction would be void, but the other portion of the clause may be enforced. Price *v.* Green, 16 M. & W. 346; Mallan *v.* May, *supra;* [Erie Railway Co. *v.* Union Loco. & Express Co. 6 Vroom, 240. A contract to sell the secret of making a certain medicine, and binding the vendor not to disclose the secret to any other person than the vendee, and not to use it himself, is valid. Hardy *v.* Seeley, 47 Barb. 428; Jarvis *v.* Peck, 10 Paige, 118; Billings *v.* Ames, 32 Missou. 265.]

1. *Common Count for the Good-will of a Business.* (*h*)

Commencement as ante, 33.] For the good-will of a business of the plaintiff, sold and given up by the plaintiff to the defendant, and for [*add goods sold, if applicable, account stated, as ante*, 34, Form 1.]

2. *By the Purchaser of the Good-will of a Business against the Vendor on his Covenant not to carry on Business within a certain Limit as to Distance, or of Time.*

For that the defendant, by deed dated the —— day of ——, A. D. ——, for good and valuable consideration in the said deed mentioned, (*i*) covenanted with the plaintiff that he the defendant would not, during the space of —— years then next following [*or* "during the lifetime of the plaintiff," *or* "during such time as the plaintiff should reside and carry on business at ——," *or* "at any time thereafter," *according to the terms of the covenant in the particular case*], directly or indirectly, by himself, or by any agent or agents, or in copartnership with any other person or persons, carry on or exercise the practice or profession of a "surgeon and apothecary," or either of them, either by residing,

(*h*) This form is given by the C. L. P. Act, 1852, sch. B, 8. If the plaintiff's claim is also for the "Lease" of the premises, see the form *post*, "Vendor and Purchaser." See a special count for the price of a good-will &c. Smart *v.* Harding, 15 C. B. 652.

(*i*) See *supra*, Obs. as to the necessity for such consideration to support a contract of this kind.

or visiting any patient, within the distance of —— miles (*k*) from ——, (*k*) and that in case of any breach or non-performance of the said covenant, he the defendant would pay to the plaintiff the full sum of £——, to be recovered against him the said defendant as and for liquidated damages, and not as a penalty. (*l*) [*Aver performance of conditions precedent, &c. as ante*, 39.] Yet the defendant, after the making of the said deed, and during the said term of —— years [*according to the terms of the covenant in the particular case*], carried on and exercised the practice and profession of a "surgeon and apothecary" within the said distance of —— miles from —— aforesaid, (*m*) and hath not paid the plaintiff the said sum of £——. And the plaintiff claims £——.

3. *On an Agreement not to exercise a Trade within Certain Limits.*

For that by an agreement made and entered into by and between the plaintiff and the defendant, after reciting that the plaintiff had taken the defendant into his service as an assistant, at a certain annual salary, upon condition, among other things, that the defendant should enter into and observe and perform the agreement thereinafter contained, the defendant did, in and by the said agreement, promise and agree with the plaintiff, that if the defendant should at any time thereafter, (*n*) directly or indirectly, either in his own name or in the name of any other person, use, exercise, carry on or follow the trades or businesses of a chemist and druggist, or either of them, within the town of ——, in the county of ——, or within three miles thereof, then that he the defendant would on demand pay to the plaintiff £—— as and for liquidated damages, (*o*) and although [*aver performance of conditions precedent, as ante*, 39], yet the defendant afterwards, (*p*) in his own name, used and exercised, and carried on and followed the trades and businesses of a chemist and druggist within [*or* "within —— miles of"] the town of —— aforesaid. And although the plaintiff afterwards demanded the said sum of £——, yet the defendant hath not paid the same. And the plaintiff claims £——. (*q*)

GUARANTIES.

Obs. — See the treatises on principal and surety by Fell and Theobald; 3 Chit. Com. Law, Index, tit. "Guarantee;" [1 Chitty Contr. (11th Am. ed.) 738 *et seq.*]

(*k*) See Observations, *supra;* and see *post*, 136, note (*m*).

(*l*) Under this clause the sum is recoverable as the measure of damages sustained by the plaintiff. Galsworthy *v.* Strutt, 1 Ex. 659; Mallan *v.* May, 11 M. & W. 653; Rawlinson *v.* Clarke, 14 M. & W. 187; Sainter *v.* Ferguson, 7 C. B. 717.

(*m*) As to what is a breach of such a covenant, see Rawlinson *v.* Clarke, 14 M. & W. 187; the distance is to be measured by a straight line on a horizontal plane, *i. e.* "as the crow flies," and not by the nearest practicable mode of access. Duignan *v.* Walker, 1 Johns. 446; [Leigh *v.* Hinde, 9 B. & C. 774.]

(*n*) See the last form. This will depend upon the agreement in the particular case.

(*o*) *Ante*, 136, note (*l*).

(*p*) See the last form. If the restriction was for a *limited* time allege the breach to have happened within such time.

(*q*) See other forms in the following cases: Hitchcock *v.* Coker, 6 Ad. & E. 438 (Chemist and Druggist); Archer *v.* Marsh, 6 Ad. & E. 595 (Carriers); Mallan *v.* May, 11 M. & W. 653; Rawlinson *v.* Clarke, 14 M. & W. 187 (Surgeons); Atkyns *v.* Kinnier, 4 Ex. 776; Reynolds *v.* Bridge, 6 El. & Bl. 528; Mercer *v.* Irving, El., Bl. & El. 563; Sainter *v.* Ferguson, 7 C. B. 716; Galsworthy *v.* Strutt, 1 Ex. 659 (Attorney); Green *v.* Price, 13 M. & W. 695 (Perfumer); Elves *v.* Crofts, 10 C. B. 241 (Butcher); Tallis *v.* Tallis, 1 El & Bl. 391 (Publishers).

OBS. It is necessary to declare *specially* on a guaranty or promise to pay or answer for the debt or default of a third person. The common count will not suffice; 1 Saund. 211 *a*, *b*; Mines *v.* Sculthorpe, 2 Camp. 215; but the declaration need not state that the contract was in writing or signed. 1 Saund. 276, note (1); Chalié *v.* Belshaw, 6 Bing. 529. The statute of frauds, 29 Car. 2, c. 3, s. 4, enacts "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the *debt, default, or miscarriage* of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in *writing* and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized." But the mercantile law amendment act, 1856, 19 & 20 Vict. c. 97, s. 3, provides "that no special promise to be made by any person after the passing of this act (29th July, 1856) to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action or suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by a necessary inference from a written document." [For the law in the American states on this point, see 1 Chitty Contr. (11th Am. ed.) 91, note (*a*), and cases cited.] Although the statute merely requires that the agreement shall be signed by *the party to be charged therewith*, the agreement must contain the names of both plaintiff and defendant; Williams *v.* Lake, 29 L. J. Q. B. 1; [2 El. & El. 349; Newell *v.* Radford, L. R. 3 C. P. 52; 1 Chitty Contr. (11th Am. ed.) 544, and cases in note (*r*);] a stamp may be necessary, though the consideration need not appear on the face of the agreement. Whitfield *v.* Moojen, 1 F. & F. 290; Glover *v.* Halkett, 2 H. & N. 487. The statute of frauds does not apply unless there were originally some credit given by the plaintiff to the third person; Hargreaves *v.* Parsons, 13 M. & W. 561; or there were some liability on the part of the third person to the plaintiff; Eastwood *v.* Kenyon, 11 Ad. & E. 438; Macrory *v.* Scott, 5 Ex. 907; Batson *v.* King, 4 H. & N. 739; [Mountstephen *v.* Lakeman, L. R. 5 Q. B. 613; Hodges *v.* Hall, 29 Vt. 209; Walker *v.* Norton, 29 Vt. 226; 1 Chitty Contr. (11th Am. ed.) 749–754, and notes, 759 and note (*u*); Flemm *v.* Whitmore, 23 Miss. 430; Colt *v.* Root, 17 Mass. 229; Alger *v.* Scoville, 1 Gray, 391; Barker *v.* Bucklin, 2 Denio, 45; Hardesty *v.* Jones, 10 Gill & J. 404; Pratt *v.* Humphrey, 22 Conn. 307; Fiske *v.* McGregor, 34 N. H. 418;] it is a question for the jury to whom the credit is given; Simpson *v.* Penton, 2 Cr. & M. 430; [1 Chitty Contr. (11th Am. ed.) 750, note (*g*);] it applies, however, if the defendant's engagement were collateral, and the slightest credit was given to, or any liability was to exist on the part of such third person as between him and the plaintiff. See the cases, [1 Chitty Contr. (11th Am. ed.) 750;] Green *v.* Cresswell, 10 Ad. & E. 453; Gull *v.* Lindsay, 4 Ex. 45; Thomas *v.* Thomas, 2 Q. B. 851.

A promise founded on a new consideration to pay the debt of a third person is not within the statute, where the effect of the new contract is to *extinguish* the old debt and discharge the liability of the third person. Ib.; Lane *v.* Brughart, 1 Q. B. 933; Goodman *v.* Chase, 1 B. & Ald. 297; Bird *v.* Gammon, 5 Scott, 213; 3 Bing. N. C. 883; [1 Chitty Contr. (11th Am. ed.) 757 *et seq.*; Alger *v.* Scoville, 1 Gray, 391; Wood *v.* Corcoran, 1 Allen, 405; Walker *v.* Penniman, 8 Gray, 233; Langdon *v.* Hughes, 107 Mass. 274, 275; Shaw C. J. in Curtis *v.* Brown, 5 Cush. 492; Butcher *v.* Stewart, 11 M. & W. 857; Watson *v.* Jacobs, 29 Vt. 169; Bason *v.* Hughart, 2 Texas, 477; Stanley *v.* Hendricks, 13 Ired. 86; Decker *v.* Shaffer, 3 Ind. 187; Furbish *v.* Goodnow, 98 Mass. 296; 2 Chitty Contr. (11th Am. ed.) 1381.] A guaranty to or for a firm ceases upon a change of firm, except the intention appear to be otherwise. Mercantile Law Amendment Act, *supra*, s. 4. [See Backhouse *v.* Hall, 34 L. J. Q. B. 141.]

1. *On a Guaranty for the Price of Goods to be supplied to a Third Person.*

For that in consideration that the plaintiff, would (*r*) [*add* "from time to time" *if in the memorandum* (*s*)] sell and deliver ["porter," *let this correspond with the guaranty; say* "goods," *if no particular description of goods be mentioned, or* "goods in the way of the plaintiff's business of a ——," *if the memorandum be so confined*] to one A. J. on credit (*t*) ["until the plaintiff should receive notice to the contrary from the defendant," *insert this or any other particular stipulation which may be contained in the memorandum*], the defendant guarantied and promised the plaintiff to be answerable to him for the due payment of the prices of the said ["porter," "to the extent of £100," *if in the memorandum*]; and the plaintiff did afterwards [*add* "and before the —— day of ——, A. D. ——," *if it were a continuing guaranty and acted upon accordingly*] sell and deliver to the said A. J. on credit [*or* "such credit as aforesaid," *if a particular credit were fixed by the guaranty*], certain ["porter" *or* "goods," *see supra*], the prices whereof amounted to £——, which the said A. J. had occasion for and required of the plaintiff, and that although [*here aver performance of conditions precedent, as ante*, 39, *between the* **], yet the said A. J. hath *not* (*u*) nor hath the defendant paid the same. [*Add account stated, as ante*, 35.]

[*On a guaranty for the due fulfilment of a charter-party.* Rein *v.* Lane, L. R. 2 Q. B. 144.

On a continuing guaranty for the running balance of an account. Bradbury *v.* Morgan, 1 H. & C. 249.]

(*r*) If the written memorandum contains a guaranty partly good under the statute of frauds and partly bad (see an instance, Wood *v.* Benson, 2 Cr. & J. 94, observed upon by Patteson J.; Williams *v.* Burgess, 19 Ad. & E. 501), and the bad part be *capable of separation* from the good, take care to omit the insufficient part (see Com. Dig. Action, Assumpsit, B. 13); otherwise, if the promise be laid as an entire one, the failure of part of the consideration will afford a defence. Thomas *v.* Williams, 10 B. & C. 664; Mechelen *v.* Wallace, 7 Ad. & E. 49; Head *v.* Baldrey, 6 Ad. & E. 459; Thomas *v.* Thomas, 2 Q. B. 851. See *post*, "Observations on the Plea of Non Assumpsit."

(*s*) Take care to ascertain whether, in reference to the cases on this subject, the guaranty can be considered a *continuing* guaranty for goods to be from time to time supplied, or for *one* transaction only. See cases, [1 Chitty Contr. (11th Am. ed.) 769, *et seq.* and notes;] Martin *v.* Wright, 6 Q. B. 917; Mayer *v.* Isaac, 6 M. & W. 605; Johnson *v.* Nicholls, 1 C. B. 251; Solvency Mutual Guarantee Society *v.* York, 27 L. J. Ex. 487; Hitchcock *v.* Humfrey, 5 M. & G. 559. See Broom *v.* Batchelor, 1 H. & N. 255; where the judges differed as to whether a guaranty was for past or future advances. [What is a continuing guaranty. Wood *v.* Priestner, L. R. 2 Ex. 66, 282.]

(*t*) If any particular or fixed credit be specified in the guaranty, this allegation must be conformable thereto. It is generally better to set out the guaranty in its own terms (see Morrison *v.* Trenchard, 4 M. & G. 709); because, though the legal effect, if correctly stated, would suffice, yet the judge might probably reserve the question of variance at the trial, which would occasion increased delay and expense. See an instance, Johnston *v.* Nicholls, 1 C. B. 251. If the guaranty was subject to any exception or condition, it should be so described. The *performance* of conditions precedent contained in the guaranty may be averred generally. C. L. P. Act, 1852, s. 57; *ante*, 39 between the **. Where a declaration set forth the circumstances under which a guaranty was given, and which explained that it was given in consideration of a future supply of goods, and then set forth the guaranty in words, and the defendant demurred, it was held that the statement of the circumstances might be looked at to explain the writing. Bainbridge *v.* Wade, 16 Q. B. 89.

(*u*) Request to and non-payment by the principal, and notice thereof to the defendant, appear not to be necessary averments. 1 Sid. 178; 2 Roll. 733, l. 15; Little *v.* Hewitt, 11 Price, 494; White *v.* Woodward, 5 C. B. 810; 17 L. J. C. P. 209. [1 Chitty Contr. (11th Am. ed.) 742, note (*b*[1]).]

2. *On a Guaranty for the Fidelity of a Clerk or Servant.*

For that in consideration that the plaintiff would employ A. B. (or allow A. B. to continue in his the plaintiff's employ) as "clerk" (*x*) to the plaintiff ["in his business of ——"], to collect and receive moneys for and on account of the plaintiff, (*y*) the defendant promised the plaintiff to be answerable to him ["to the extent of £——"] for the said A. B.'s paying over to the plaintiff all moneys which the said A. B. should so receive in the course of such employment ["during the space of one year then next following," *if the guaranty was so limited.* (*z*) And the plaintiff employed the said A. B. as such "clerk" in the capacity and on the terms aforesaid, and the said A. B., whilst he was in the plaintiff's employ as such "clerk" ["and during the said period of one year"] received for and on account of the plaintiff £——, which he has never paid over to the plaintiff, although all events have happened and conditions precedent have been performed and all periods of time have elapsed for his so doing, and to entitle the plaintiff to maintain this action. Yet the defendant has not paid the same to the plaintiff. And the plaintiff claims £——."

3. *On a Guaranty in Consideration that the Plaintiff would let a House to a Third Person, the Defendant would be answerable for the Rent.* (*a*)

For that in consideration that the plaintiff would let to one T. S. a messuage and premises, No. —— [*&c.*], to hold the same as tenant thereof to the plaintiff from Michaelmas Day, A. D. ——, at the yearly rent of £——, payable quarterly on the usual quarter days, commencing on the —— day of ——, A. D. ——, the defendant promised the plaintiff that if the said T. S. should not pay the said rent, he the defendant would pay the same to the plaintiff; and the plaintiff let the said tenements to the said T. S., who held the same as tenant to the plaintiff on the terms aforesaid, until the —— day of ——, A. D. ——, when £—— for —— quarters of the rent aforesaid became due from the said T. S. to the plaintiff; and although [*here aver performance of conditions precedent, as ante,* 39, *between the* **], yet the said T. S. has not, nor has the defendant, paid the said £—— to the plaintiff, and the same is in arrear and unpaid. [*Add account stated, as ante,* 35, Form 2.]

(*x*) The nature of the service should be described as "clerk," "agent," "traveller," "salesman," &c. See Lyall *v.* Higgins, 4 Q. B. 528; Norton *v.* Powell, 4 M. & G. 42; Stewart *v.* McKean, 10 Ex. 675–689. A change in the nature or terms of the employment, or the amount of salary paid to the principal, may discharge the defendant. Anderson *v.* Thornton, 3 Q. B. 271; Pybus *v.* Gibb, 6 El. & Bl. 902; North Western Ry. Co. *v.* Whinray, 10 Ex. 77; per Parke B. Stewart *v.* McKean, *ubi supra.* See the cases collected [1 Chitty Contr. (11th Am. ed.) 765, note (*o*), 766;] and *post,* "Pleas," "Guaranties;" and see Mayor of Berwick *v.* Oswald, 3 El. & Bl. 653; Eastern Union Ry. Co. *v.* Cochrane, 9 Ex. 197; Holland *v.* Lea, 9 Ex. 430; Pattison *v.* Belford Union, 1 H. & N. 523; [Grocer's Bank *v.* Kingman, 16 Gray, 473, 475 *et seq.*; Owen *v.* Homan, 3 Mac. & G. 400, cases in note (1).] As to a change in the plaintiff's firm, *supra,* Observation.

(*y*) See *ante,* 139, note (*x*).

(*z*) See Bamford *v.* Iles, 3 Ex. 380; Kitson *v.* Julian, 4 El. & Bl. 854; Mayor of Berwick *v.* Oswald, 5 H. L. Cas. 586, *supra.*

(*a*) See another form, Cabellero *v.* Slater, 14 C. B. 300; 23 L. J. C. P. 67.

4. *On a Promise to give a Bill for or pay a Debt in Consideration that Plaintiff would discharge his Debtor out of Custody.*

See forms and law, Butcher *v.* Steuart, 1 D. & L. 308; 11 M. & W. 857; Brown *v.* Dean, 5 B. & Ad. 848; Smith *v.* Monteith, 13 M. & W. 427; Atkinson *v.* Bayntun, 1 Scott, 404; Hasleham *v.* Young, 5 Q. B. 833; Lane *v.* Burghart, 3 M. & G. 597; Goodman *v.* Chase, 1 B. & Ald. 297; Bird *v.* Gammon, 5 Scott, 210, 213; 3 Bing. N. C. 883.

5. *By a Landlord on a Promise to pay him Arrears of Rent due from a Third Person and the Costs of a Distress, in Consideration that he would withdraw the Distress.* (*b*)

For that the plaintiff had lawfully distrained the goods [chattels and growing crops] of one R. C., then being upon certain premises, for £—— arrears of rent due from the said R. C. to the plaintiff, in respect of the said premises, and in consideration that the plaintiff would withdraw (*c*) the said distress, the defendant promised the plaintiff that he the defendant would pay him the plaintiff the said arrears of rent as well as the costs of the said distress, amounting together to the sum of £—— in one month from the —— day of ——, A. D. ——, in case the said R. C. should then make default in paying the same [*according to the terms of the defendant's contract*]. And the plaintiff says that he withdrew the distress, and delivered up possession of the said goods, and although [*&c.; here aver performance of conditions precedent as ante*, 39, *between the* **], yet neither the said R. C. nor the defendant has paid the plaintiff the said arrears of rent or the costs aforesaid. [*Add account stated, as ante*, 35, Form 2.]

6. *Upon a Guaranty to Bankers that a Third Person should pay his Account with them if they would open an Account with him.* (*d*)

For that the plaintiffs carried on the business of bankers in copartnership, and in consideration that the plaintiffs, at the request of the defendant, would open an account with and honor the checks of one H. B. on a certain account, to be called the "mill account," to be therefore opened by him the said H. B. with the plaintiffs as such bankers, the defendant promised the plaintiffs to be responsible to them for any balance which might thereafter be or become due

(*b*) This engagement, as it relates to rent actually due and is founded on the withdrawal of a distress or fund in plaintiff's hands, through the medium of which he might have paid himself, is not, according to the case of Thomas *v.* Williams, 10 B. & C. 664, within the statute of frauds; but that case seems qualified by the case of Green *v.* Cresswell, 10 Ad. & E. 453; and see Hargreaves *v.* Parsons, 13 M. & W. 561; and see Obs. *ante*, 136, 137. See a form, 138. In consideration that plaintiff would withdraw a distress made on the goods of a bankrupt defendant, his assignee promised that plaintiff should be paid the amount distrained for out of the produce of the sale of goods distrained on. Stephens *v.* Pell, 4 Tyr. 6.

(*c*) If the promise were in consideration that plaintiff would forbear to distrain, see Thomas *v.* Williams, 10 B. & C. 664.

(*d*) Howell *v.* Jones, 1 Cr., M. & R. 97; Davidson *v.* M'Gregor, 8 M. & W. 755, where the liability was limited by deed to a certain amount. See another similar form, where the guaranty was to secure past as well as future advances, Chapman *v.* Sutton, 2 C. B. 634; 3 D. & L. 646, S. C.; and see another form in Boyd *v.* Moyle, 2 C. B. 644. As to whether a clause in such a contract as to the *amount* of advances to be made operates as a *condition* to the defendant's liability, or merely a *limit* to such liability, see Gordon *v.* Rae, 8 El. & Bl. 1065.

from the said H. B. to the plaintiffs as such bankers upon such account and in respect of such checks [*set out the guaranty in its precise terms or according to its legal effect*]; and the plaintiffs say that they opened an account with the said H. B. [on the said mill account], and honored his checks on the said mill account, and paid and advanced money on account of the said checks, and otherwise on the said account, and that the said H. B. became and was indebted to the said plaintiffs in the sum of £—— upon the balance of the said account so opened and the said checks so honored and advances so made as aforesaid; and although [*aver performance of conditions precedent, as ante, 39, between the* **], yet the said H. B. has not nor has defendant paid to the plaintiff the said sum of money last mentioned, but the same is still due and unpaid to the plaintiffs. [*Add account stated, &c. ante*, 35, Form 2.]

7. *On a Promise to pay a larger Sum than the Debt, in Consideration of Plaintiff's forbearing to execute a Fi. Fa. against a Third Person.*

Smith *v.* Algar, 1 B. & Ad. 603; and see the cases referred to, Form 4, *ante*, 140.

8. *On Defendant's Promise to pay the Debt of a Third Person in Consideration that Plaintiff would not sue him.* (*e*)

For that one E. F. was indebted to the plaintiff in £—— (*f*), and in consideration that the plaintiff would forbear to sue, and would give time to the said E. F. for the payment of the said sum until the —— day of —— then next *as the case may be*], the defendant promised the plaintiff to be answerable to him for the payment of the said sum by the said E. F., and to pay him the same on the said —— day of —— then next, in case the said E. F. should make default in paying the same; (*g*) and the plaintiff did forbear and give time to the said E. F. for the payment of the said sum until the said —— day of ——, A. D. ——, but that the said E. F. hath not as yet paid the said sum of money, or any part thereof, to the plaintiff; and although [*here aver performance of conditions precedent, as ante, 39, between the* **], yet the defendant hath not paid to the plaintiff the said sum of £——, but the same is still due and unpaid to the plaintiff. [*Add account stated, as ante, 35*, Form 2.]

(*e*) The forbearing to press for immediate payment, means giving the debtor reasonable time, and a promise to give reasonable time for payment of a debt is a good consideration for a contract. Oldershaw *v.* King, H. & N. 517. As to the law, &c. see Obs. to, 131, 137. The form, No. 1, *ante*, 131, may readily be adapted to a declaration on a promise to pay the debt of another in consideration of forbearing a *pending suit*, taking care to aver the default of the third party, &c. See next form, and see Rolt *v.* Cozens, 1 C. B. 673; *ante*, 132, note (*d*).

(*f*) Not necessary to state subject-matter of debt. Barrett *v.* Trussell, 4 Taunt. 117. Matter not. Peake, 117. Amount not material. Bray *v.* Freeman, 8 Taunt. 197; and see Jones *v.* Ashburnham, 4 East, 455; Marshall *v.* Birkenhart, 1 N. R. 172; Com. Dig. Act. on Case, Assumpsit, F. 8, H. 3; Hob. 18.

(*g*) If there be any condition precedent before plaintiff was to be paid the money on the guaranty, such as sending a letter to inform defendant of the default of the third person, or a notice to pay, or a demand in writing, it should be averred, or there will be a fatal omission. Higgins *v.* Dixon, 3 D. & L. 124; Batson *v.* Spearman, 9 Ad. & E. 298. A promise, "in consideration of plaintiff *having agreed* to stay proceedings against B. I hereby undertake to pay, &c." held an executory contract. Tanner *v.* Moore, 9 Q. B. 1.

[8 *a*. *Form prescribed by the Massachusetts Practice Act, on a Promi to pay the Debt of Another.*

And the plaintiff says that one E. F. owed him the sum of —— ——, and the plaintiff was about to sue the said E. F. to recover the sam and in consideration that the plaintiff would forbear to sue said E. F., t defendant made an agreement to pay the same to the plaintiff, a copy where is hereto annexed; and the plaintiff did forbear to sue the said E. F., and t defendant owes him that sum.]

9. *By Husband and Wife, on Promise by Defendant as Bail for a Thi Person, in Consideration that Plaintiff would not sue out Executi against the Debtor to render him on a certain Day or pay the Debt.*

Nurse *v.* Wills, 4 B. & Ad. 739; 1 Ad. & E. 65; *post*, 149, in note.

10. *On a Promise to pay Debt and Costs in Consideration that Plai tiff would suspend Proceedings on a Cognovit against a Third Pe son.* (*h*)

For that one C. V. was indebted to the plaintiff in £——, for the recove of which the plaintiff had commenced an action against the said C. V. in t court of Q. B. at Westminster, and in which action the said C. V. had sign and given to the plaintiff a cognovit for the payment of the said debt, togeth with £—— for the costs of the action, at certain times therein mentioned, a now elapsed; and the said C. V. having made default in payment of the wh of the sum at the times specified in the said cognovit, the plaintiff was ab to take proceedings on the said cognovit, and thereupon, in consideration t the plaintiff would consent to suspend proceedings against the said C. V. the said cognovit until [*&c.*], he the defendant promised the plaintiff to answerable to the plaintiff for the payment to him of the sum of £—— account of the said debt, on the —— day of —— then next; and the plaint did suspend all further proceedings against the said C. V. on the said cogno until [*&c.*]; and although [*aver performance of conditions precedent, as a* 39, *between the* **], yet the said C. V. hath not paid the plaintiff the said s of £——, nor hath the defendant paid the same. [*Add account stated, as a* 35, Form 2.]

11. *On a Promise to pay the Debt of Another, in Consideration t Plaintiff would give up a Lien on Goods which he held as Security.* (*i*)

For that one E. F. deposited with the plaintiff certain goods, that is to s ["deeds,"] to be held by the plaintiff as a security for the repayment to h

(*h*) See Payne *v.* Wilson, 7 B. & C. 423; Read *v.* Nash, 1 Wils. 305; Bird *v.* Gammon, 3 Bing. N. C. 889; Twight *v.* Prescott, 2 Dowl. N. S. 4. A promise by a defendant to pay the costs of the plaintiff's attorney, in consideration of the suit being finished, is within the statute of frauds. Tomlinson *v.* Gell, 6 Ad. & E. 564; and see Green *v.* Cresswell, 10 Ad. & E. 453.

(*i*) As to the mode of pleading a lien, the notes and forms of pleas of "Lien," p See form, Clancy *v.* Piggott, 2 Ad. & E. As to the effect of the statute of frauds this contract, see Ib.; Fitzgerald *v.* Dres 5 Jur. N. S. 598, C. P.; [7 C. B. N. S. 392; 1 Chitty Contr. (11th Am. ed.) note (*g*), and cases cited.] Such a promis within the statute of frauds, unless by

by the said E. F. of £——, then advanced by the plaintiff to the said E. F., and the plaintiff had a lien on the said goods for the said sum of £——, (*i*) and thereupon, in consideration that the plaintiff would relinquish the possession of the said goods to ——, and give up his said lien thereon, the defendant promised the plaintiff to be answerable to him for the payment of the said sum of £—— on or before the —— day of ——, A. D. ——, and the plaintiff accordingly relinquished and gave up the possession of his lien on the said goods, and that all conditions have been performed and all events have happened and periods of time have elapsed to entitle the plaintiff to maintain this action; yet the said sum of £—— has not been paid to the plaintiff by the said E. F. or by the defendant, and is still unpaid. And the plaintiff claims £——.

12. *By a Receiver in Chancery upon a Promise to pay him a Debt due to the Estate from a Third Person, in Ceonsideration of Forbearance.*

Willatts *v.* Kennedy, 8 Bing. 3.

13. *On a Guaranty to make up any Deficiency arising upon the Sale of Mortgaged Property, if it failed to realize the Sum advanced, with Costs and Expenses.*

Moor *v.* Roberts, 3 C. B. N. S. 830.

14. *On a Bond guarantying Payment of Interest on a Debt, and Premiums on a Policy securing the same, and Costs and Expenses arising therefrom.*

Wodehouse *v.* Farebrother, 5 El. & Bl. 277. See "Bonds," *ante*, 87.

HEIRS AND DEVISEES.

1. *Against an Heir on the Bond of his Ancestor.*

A. B., by —— his attorney, sues C. D., heir (*k*) of E. F., deceased. For that the said E. F. by his bond acknowledged himself and his heirs (*l*) to be bound to the plaintiff in the sum of £——, to be paid to the plaintiff by the said E. F. or his heirs, (*m*) but the said E. F. in his lifetime did not pay nor hath the defendant paid the same. And the plaintiff claims £——.

terms of the contract the liability of the original defendant was to be discharged. See Obs. *ante*, 137; Thomas *v.* Williams, 10 B. & C. 664. See form of declaration on a promise, in consideration that plaintiff would release a ship detained by him on a claim for damages. Longridge *v.* Dorville, 5 B. & Ald. 517.

(*k*) The defendant must be described as heir, but it need not be shown how he became so; whether as son, grandson, cousin, &c. 2 Saund. 7, note (4); Com. Dig. Pleader, 2 E. 2; Vin. Abr. Heir, K. 2; Bunham *v.* Stephenson, 1 Salk. 1355. If the defendant be heir of an heir, he should be so described. Ib.; Cro. Car. 151. It need not be averred that the defendant had assets by descent. Dyer, 344 *b*.

(*l*) It must be shown that the heir was expressly bound. 2 Saund. 134, note (1), 136; Com. Dig. Pleader, 2 E. 2; otherwise the heir is not liable at *law* upon specialty debts of his ancestor; though these debts are now charged in equity upon the land of the ancestor after his decease by 3 & 4 W. 4, c. 104; specialty debts by which the heir is expressly bound taking priority.

(*m*) See the forms and Observations, *ante*, 87, "Bonds," as to when the condition should be set out and breaches assigned.

2. *On a Covenant against an Heir and Devisee.* (*n*)

Venue.] A. B., by —— his attorney, sues C. D., heir of G. H. deceased, [*and if the fact*, "which said G. H. in his lifetime was heir of X. Y. (*the obligor*) (*o*)], and E. F., devisee of the said G. H. of divers lands and tenements, which were of the said G. H. deceased, at the time of his death, by his last will and testament." For that the said G. H. by deed dated [*&c.*], for himself, *his heirs*, (*p*) executors, and administrators, covenanted [*&c.*], with the plaintiff, that he the said G. H., his heirs [*&c.; set out the covenant as usual*], would pay to the plaintiff the sum of £——, together with interest for the same from the day and year aforesaid, at the rate of £5 per centum per annum, on the —— day of ——, A. D. ——, which elapsed before the death of the said G. H. (*q*) But the said sum of £——, and £—— for interest thereon, are still unpaid. And the plaintiff claims £——.

HIRE.

1. *Against the Hirer of Goods for the Price of Hire thereof.*

Commencement as ante, 33.] For the hire of —— [*as the case may be*] (*r*) by the plaintiff let to hire to the defendant, and for [*add account stated as ante*, 34].

2. *Against the Hirer of Goods for Carelessness.* (*s*)

For that in consideration that the plaintiff, at the defendant's request, would

(*n*) At common law there was no remedy against the devisee of lands upon the specialty contracts of the testator, but by 11 Geo. 4 & 1 W. 4, c. 47, all wills and testamentary limitations, dispositions, or appointments, made of or concerning any lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person at the time of his decease shall be seized in fee in possession, reversion, or remainder, or have power to dispose of by will, shall be taken as against persons with whom the testator shall have entered into any bond, covenant, or other specialty *binding on his heirs*, to be fraudulent and void. By s. 3, every creditor by bond, covenant, or other specialty, may maintain any action of debt *or covenant* against *the heir and such devisees*, or the devisees of such first mentioned devisees, *jointly*; and such devisees shall be liable for a false plea in the same manner as the heir would be, or for not confessing the lands or tenements descended. By s. 4, if there is no heir-at-law, actions may be maintained against the devisee alone. Hunting *v.* Sheldrake, 9 M. & W. 256. By ss. 6 & 8, the heir and devisee are each made answerable for debts, although they may sell the estate before action brought, to the value of the lands sold. By 11 & 12 Vict. c. 87, the provisions in the above act as to payment of debts out of realty are extended to lands, &c. of a deceased debtor in cases where such lands shall by descent or otherwise than by devise, be vested in the heir or co-heirs of such deceased person, subject to an executory devise over in favor of a person or persons not existing, or not ascertained. The former stat. 3 & 4 W. & M. c. 14, did not extend to actions of *covenant*. Wilson *v.* Knubley, 7 East, 127. See the excellent note on this subject, and the pleadings connected therewith, 2 Saunders, 7; and Farley *v.* Briant, 3 Ad. & E. 839, cited *infra*; Hunting *v.* Sheldrake, 9 M. & W. 256; and see Morley *v.* Morley, 25 L. J. Ch. 4; Roddam *v.* Morley, Ib. 329; 26 L. J. Ch. 438. Action by heir on a lease, *post*, "Leases."

(*o*) This is necessary when the declaration seeks to charge the heir of the heir of the obligor. 2 Saund. 7; Cro. Car. 151; Vin. Abr. tit. Heir, K. 2, pl. 16.

(*p*) The *heir* is not liable, unless the covenantor *expressly* bound *his heirs*. 2 Saund. 134, note (1), 136.

(*q*) It was decided in Farley *v.* Briant, 3 Ad. & E. 839, upon the former statute of 3 & 4 W. & M. c. 14, that a devisee was not liable, unless the debt was due before the death of the testator; and *semble*, the same construction would be put on 11 Geo. 4 and 1 W. 4, c. 47.

(*r*) This is the form given by the Com. L. P. Act, 1852, sch. B, 12.

(*s*) See other forms against bailees of

let to hire and deliver to him ["a certain horse," *or* "certain goods"], to be used by the defendant in that behalf for reward to the plaintiff, he, the defendant, promised the plaintiff to use the same in a careful, moderate, and reasonable manner, whilst he had the same on hire; and the plaintiff says that he let to hire and delivered to the defendant, who received the said ["horse" *or* "goods"] on the terms and for the purpose aforesaid, yet the defendant did not use the said ["horse" *or* "goods"] in a careful, moderate, and reasonable manner, whilst he had the same on hire as aforesaid, whereby the same became damaged and deteriorated in value. And the plaintiff claims £——. [*If any hire be due, add an indebitatus count, as* Form 1, *with an account stated. If the defendant has converted the goods or refused to return them, a count for the conversion or detention may be added.*]

[2*a*. *Immoderate Driving.*

And the plaintiff says the defendant hired of him a horse to ride from B—— to C——, and from thence back to C——, in a proper manner, and the defendant drove said horse so immoderately that he became sick and lame, and was greatly injured in value.]

3. *Against an Omnibus Proprietor for refusing to receive on Hire Omnibuses built for him by the Plaintiff, to be let by him to Defendant, and for returning Others before the Time agreed upon.*

For that in consideration that the plaintiff, at the request of the defendant, would finish and complete three omnibuses for the defendant, and would let such omnibuses to hire to the defendant when the same should be finished and completed, for the purpose and in order that such omnibuses might be used by the defendant in performing certain journeys, for hire and reward to the plaintiff, the defendant promised the plaintiff to receive such omnibuses on hire when finished and completed, and to continue to keep the same on hire as aforesaid, until the expiration of one month's notice to be given by the defendant to the plaintiff of the defendant's intention to cease and discontinue to hire the same; and the plaintiff says, that he finished and completed the said three omnibuses for the purpose and upon the terms aforesaid, and delivered one of them to the defendant, and the defendant received the same, to be by him kept

goods for not taking care of and returning them. *Ante*, 69. A bailee of goods on hire is bound to use only an ordinary degree of care, and is not liable for loss by accidental fire. Jones on Bailm. 86; Cooper *v.* Barton, 3 Camp. 5, note; Longman *v.* Galsi, Abbott on Ship. 10th ed. 292, note; [1 Chitty Contr. (11th Am. ed.), 679, and notes (*j*) and (*k*).] The hirer of a horse is bound to discontinue the use of it if it becomes exhausted and refuse its food; Bray *v.* Mayne, Gow. 1; evidence that a horse was returned with broken knees, is not sufficient to support an action for negligence. Dean *v.* Keate, 3 Camp. 5; Cooper *v.* Barton, Ib. note. [See Logan *v.* Matthews, 6 Barr, 417; Harrington *v.* Snyder, 3 Barb. 380.] The hirer of a horse is not responsible for the wrongful treatment by a regular farrier whose attendance he requires; *aliter*, if he himself prescribes for the horse; Dean *v.* Keate, *supra*; if the hirer of a horse use it for a different purpose or on a different journey than that for which it was let, he will be responsible for any accident that may occur to it. [Mayor of Columbus *v.* Howard, 6 Geo. 213; Rotch *v.* Hawes, 12 Pick. 136; Duncan *v.* Railroad Co. 2 Rich. 613; Harrington *v.* Snyder, 3 Barb. 380. Generally, in a bailment of this kind, the burden of proof is on the bailor to show negligence. Story's Bailments, § 410; Clark *v.* Spence, 10 Watts, 335; Beekman *v.* Shouse, 5 Rawle, 179; Foote *v.* Storrs, 2 Barb. 326; Platt *v.* Hibbard, 7 Cowen, 500; Schmidt *v.* Blood, 9 Wend. 268; Runyan *v.* Caldwell, 7 Humph. 134.]

on hire as aforesaid, and the plaintiff was always ready and willing to deliver to the defendant the said two other omnibuses for the purpose and upon the terms aforesaid [*here aver performance of all conditions precedent, as ante*, 39]; yet the defendant refused to receive the said two other omnibuses, or either of them, on hire as aforesaid, and without giving the plaintiff any notice of his, the defendant's, intention to cease or discontinue to hire the omnibuses so received by him as aforesaid, refused any longer to retain the same on hire, and returned the same to the plaintiff, whereby the plaintiff hath lost the benefits, profits, and advantages which he otherwise would have derived from the performance by the defendant of his said promise, and hath uselessly incurred the expenses of building the said omnibuses, and the same are of little or no use or value to the plaintiff, and he is otherwise injured. [*Add a count for the hire if any be due, ante*, Form 1, *and account stated, and conclusion, as ante*, 35, Form 2.]

4. *For employing a Vessel let to Hire in an illegal Manner contrary to Contract implied by Law, whereby the Vessel was seized and detained.*

Bleaden *v.* Rapallo, 3 Scott N. R. 564; 3 M. & G. 116.

HORSE MEAT. (*t*)

Commencement as ante, 33.] For horse meat, stabling, care, and attendance by the plaintiff provided and bestowed in feeding and keeping horses and cattle for the defendant, at his request, and for [*add account stated, and conclusion as ante*, 34, Form 1].

HUSBAND AND WIFE. (*u*)

Obs. — *General rights and liabilities.* — A husband is liable to be sued *with* his wife upon all the contracts of his wife *before* coverture; but he cannot be sued *alone*, even on an express promise by himself, except upon some *new consideration*. Her death destroys his liability, unless he become her personal representative; if she survive him, she is solely liable upon her contracts before marriage.

A husband is also entitled to sue *with his wife* upon *choses in action* arising out of contracts entered into by her *dum sola*: but her *death* before he has reduced them into possession destroys his right of action, and they can only be enforced by *her* personal representative. If the wife survive the husband, before he has reduced her *chose in action* into possession, she is entitled to it, and *his* personal representative has no claim.

The husband is entitled to the benefit of, and *may* enforce in his own name, all contracts entered into by his wife *during* coverture; and as a general rule all property acquired by her vests in her husband; see Messenger *v.* Clarke, Ex. 388; Brooke *v.* Brooke, 25 Beav. 342; Barrack *v.* McKullock, 3 K. J. 110; but where she is the *meritorious cause of action*, as where the claim arises from the wife's personal skill or labor, or upon a bond, bill, or note made payable *to the* wife, the interest of the husband is not *absolute*, but upon his *death* survives to the wife unless he have previously reduced the *chose in action* into possession.

(*t*) See *ante*, 46, note (*f*).

(*u*) [See notes upon this subject, 1 Chitty Pl.; 1 Chitty Contr. (11th Am. ed.) 223 *et seq.* Remarks of Foster J. in Dutton *v.* R[illegible] 53 N. H. 496, 502.]

Obs. A married woman cannot contract so as to make herself liable at law (*aliter* in equity, as to her separate estate; Vansittart *v.* Vansittart, 2 De G. & J. 249); her coverture is a defence to her if sued on such a contract. *Post*, see "Coverture." [See 1 Chitty Pl. 465, notes.] A husband as a general rule is not liable upon the contracts of his *wife* entered into by her *during* coverture, unless she be proved by the plaintiff to be his *agent* to contract for him, which is a question for the jury upon all the facts of the case; Lane *v.* Ironmonger, 13 M. & W. 368; Freestone *v.* Butcher, 9 C. & P. 643; Jewsbury *v.* Newbold, 26 L. J. Ex. 247; such agency is revoked by the husband's death, but not by his lunacy. [1 Chitty Contr. (11th Am. ed.) 231 *et seq.* and notes.]

A *divorce*, declaring the marriage void *ab initio*, destroys the implied agency of the wife as to subsequent contracts.

During cohabitation there is a strong presumption that the husband assents to his wife's contracts, with reference to such matters as are usually under the control of a wife, as the supply of necessaries for his household or other goods which he permits her to receive at his house, and for the hiring of servants, &c. suitable to the station in life, which the husband or the wife, by his permission, assumes; Ruddock *v.* Marsh, 1 H. & N. 601; Jewsbury *v.* Newbold, 26 L. J. Ex. 247; Reid *v.* Teakle, 13 C. B. 627; [1 Chitty Contr. (11th Am. ed.) 234 *et seq.* and notes; Eames *v.* Sweetser, 101 Mass. 78;] and her agency is presumed *during* cohabitation, even though she have been guilty of adultery; but such presumption may be rebutted, as by proof that the husband disapproved of and repudiated her acts, or that credit was given to the *wife* and not to the husband; Jewsbury *v.* Newbold, *supra*, or that the husband gave *express* notice to the plaintiff not to trust his wife. [1 Chitty Contr. (11th Am. ed.) 235–239, and notes.]

But a husband is not liable upon a bill or note signed by his wife without his express authority, nor for *money lent* to her, though it be expended by her for *necessaries*, for the supply of which he would have been liable. Knox *v.* Bushell, 3 C. B. N. S. 334; [1 Chitty Contr. (11th Am. ed.) 240, and notes.]

A man who *cohabits* with a woman, and allows her to pass as his wife, incurs the same liabilities *during such cohabitation* as though he were her husband. Ryan *v.* Sams, 12 Q. B. 460; Gomme *v.* Franklin, 1 F. & F. 465.

After separation. — The *presumption* of agency ceases and the onus lies on the tradesman to show either an express or implied authority from the husband to the wife to pledge his credit. When a husband wrongfully *turns* his wife away, or compels her by his cruelty to leave his roof, and she has no means of her own, and is unable to maintain herself, she has authority *of necessity* to pledge his credit for *necessaries;* Johnston *v.* Sumner, 3 H. & N. 261; [1 Chitty Contr. (11th Am. ed.) 241 *et seq.* and cases in notes.]

If husband and wife part by mutual consent, and she has no means of her own, and the husband makes her no allowance, a jury may infer that her husband meant that his credit should be pledged; Ib.; Jenner *v.* Hill, 1 F. & F. 269; but no such authority can be implied where they part on terms negativing such authority and making some provision for her not shown by the plaintiff to be insufficient; Ib.; Mallalieu *v.* Lyon, 1 F. & F. 431; and the wife's obtaining an order for protection under the 20 & 21 Vict. c. 85, discharges the husband from liability for necessaries. Tempany *v.* Hakewill, 1 F. & F. 438.

But if a wife elope or be absent from her husband without his consent, or be expelled from his roof, on the ground of her adultery, or if whilst living apart from her husband under such circumstances as would render him liable for necessaries supplied to her she commits adultery, in neither of these cases is the husband liable. Hetherington *v.* Graham, 6 Bing. 135; 3 M. & P. 399; Manby *v.* Scott, 1 Sid. 109; Atkyns *v.* Pearce, 2 C. B. N. S. 763; Cooper *v.* Lloyd, 6 C. B. N. S. 519; [1 Chitty Contr. (11th Am. ed.) 348 *et seq.* and notes.]

Parties to actions as plaintiffs — when they may sue alone or jointly. — During coverture a woman cannot be sole plaintiff, even though her husband be an alien and has left the country; Stretton *v.* Busnack, 1 Bing. N. C. 139; Barden *v.* Keverberg, 2 M. & W. 61; or he be an alien enemy; De Wahl *v.* Braune, 1 H. & N. 178; or has absconded or become permanently resident abroad; Wil-

Obs. liamson *v.* Dawes, 9 Bing. 292; Boggett *v.* Frier, 11 East, 301; or they be living apart under a deed of separation; Marshall *v.* Rutton, 8 T. R. 545; or under a judicial separation. Lewis *v.* Lee, 3 B. & C. 291. But if the husband be *civiliter mortuus*, she can maintain an action alone for causes of action subsequent to the husband becoming so. Co. Litt. 133; and see Ex parte Franks, 9 Bing. 762; Carroll *v.* Blencow, 4 Esp. 27.

If the cause of action accrued to the wife *dum sola*, she *must* be joined, and the husband cannot sue alone. So, also, if she is executrix or administratrix, whether before or after marriage. Thomson *v.* Pinchell, 11 Mod. 177. See Ankerstein *v.* Clarke, 4 T. R. 616; Middlemore *v.* Goodall, Cro. Car. 505.

But there are cases in which, at the election of the husband, she *may* or *may not* be joined as co-plaintiff with him; as, where the cause of action commenced before marriage, but was not completed until after; Com. Dig. Baron and F. x.; as where a bill or note is given to her *dum sola*, but does not become due and payable until after marriage, even though the wife have not indorsed it; McNeilage *v.* Holloway, 1 B. & Ald. 218; and on a bond, bill, or promissory note given to her *after* marriage. Philliskirk *v.* Pluckwell, 2 M. & S. 393; Burrough *v.* Moss, 10 B. & C. 558; Mason *v.* Morgan, 2 Ad. & E. 30. So, if it appear by the declaration that she has an interest in the cause of action, an account stated to her and her husband may be declared on by both. Johnson *v.* Lucas, 1 El. & Bl. 659.

So a husband and wife *may* sue jointly to recover dividends arising from stock purchased with the wife's own earnings, and registered in her name. Dalton *v.* Midland Ry. Co. 13 C. B. 474.

The joinder or non-joinder frequently affects a right of set-off. Thus, if the wife be not joined the defendant may set off a debt due from the husband, and if the wife be joined a debt due from her *dum sola* may be set off. Burrough *v.* Moss, 10 B. & C. 558.

If the wife sue *alone* on a contract made with her during coverture for a cause of action in which she has an interest, the defendant can only object to the non-joinder of her husband by plea in abatement. Dalton *v.* The Midland Ry. Co. 13 C. B. 474; Bendix *v.* Wakeman, 12 M. & W. 97; Guyard *v.* Sutton, 3 C. B. 153; Morgan *v.* Cubitt, 3 Ex. 612.

If she is wrongfully joined with her husband the defendant may demur; Johnson *v.* Lucas, 1 El. & Bl. 659; or move in arrest of judgment; Abbott *v.* Blofield, Cro. Jac. 644; but see France *v.* White, 1 M. & G. 731; or take proceedings in error, Bidgood *v.* Way, 2 Bl. Rep. 1236, if the objection appear on the pleadings, or nonsuit the plaintiff if it do not, unless an amendment is allowed at the trial under the Com. Law Procedure Act.

So, also, if the husband sue alone when he should have joined his wife. Alebury *v.* Walby, 1 Str. 229; Abbott *v.* Blofield, Cro. Jac. 644.

If the husband become bankrupt it seems doubtful in whose name an action should be brought upon a promissory note made to the wife before marriage. Sherrington *v.* Yates, 12 M. & W. 855; Richards *v.* Richards, 2 B. & Ad. 447; *ante*, 84.

It would appear clear that the C. L. P. Act, 1852, s. 40, which authorizes a joinder of claims by husband and wife with claims in the husband's right only, does not apply to actions on contracts.

After the death of her husband the wife can sue upon all *choses in action*, upon which she might have sued jointly with him, which he has not reduced into possession. And after the death of the wife the husband can only sue as her administrator. Marriage *pendente lite* does not abate the action; C. L. P. Act, 1852, s. 141; as to the effect of death, see C. L. P. Act, 1852, s. 136.

Parties to actions as defendants. — During the coverture the husband must be joined in all actions brought upon the contract, or for the tort of the wife, for it is a principle of the common law that a woman shall never be put to answer without her husband; Read *v.* Jewson, cited in Caudell *v.* Shaw, 4 T. R. 362; Beard *v.* Webb, 2 B. & P. 93; and nothing but a dissolution or suspension of the marriage will enable the plaintiff to sue her alone; Lewis *v.* Lee, 3 B. & C. 291; Farrer *v.* Granard, 1 N. R. 80; Ellah *v.* Leigh, 5 T. R. 679; Marshall *v.* Rutton, 8 T. R. 545; except the husband has been attainted for treason or felony; Ex parte Franks, 9 Bing. 762; Carroll *v.* Blencow, 4

Obs. Esp. 27; or is an alien enemy; Deerley *v.* Duchess of Mazarine, 1 Salk. 116, 2 Salk. 646, and then only on her contracts subsequent to the attainder, or made during the continuance of transportation, or the husband becoming an alien enemy. So it would appear that if the husband is a foreigner, and has never resided with her in this country, and she has represented herself as a *feme sole*, she may be sued alone. Walford *v.* De Pienne, 2 Esp. 554; Franks *v.* De Pienne, Ib. 587; Kay *v.* De Pienne, Camp. 123; McNamara *v.* Fisher, 3 Esp. 18; Barden *v.* Keverberg, 2 M. & W. 61; Marsh *v.* Hutchinson, 2 B. & P. 226. And now by the 20 & 21 Vict. c. 85, ss. 25, 26, a married woman, whose property is protected under s. 21 of the same act, is to be considered as a *feme sole*, so far as her protected property, and her contracts, and wrongs, and injuries. after the order of protection, are concerned. In re Rainsdon, 28 L. J. Chan. 334, 5 Jur. N. S. 55; Tempany *v.* Hakewill, 1 F. & F. 438; Bathe *v.* Bank of England, 27 L. J. Ch. 630.

After the death of the husband her liability upon causes of action accrued before marriage revives, Woodman *v.* Chapman, 1 Camp. 189, unless barred by the statute of limitations. Morris *v.* Norfolk. 1 Taunt. 212, or unless the husband has been discharged from the debt by the insolvent court. Lockwood *v.* Salter, 5 B. & Ad. 303; Miles *v.* Williams, 1 P. Wms. 240. See Sherrington *v.* Yates, 12 M. & W. 855.

On the death of the wife the husband's liability for her debts or torts before marriage ceases. Roll. Abr. 351, O.; Com. Dig. Bar. & F. *q. c.* and note. But see Com. L. P. Act, 1852, s. 136.

Marriage *pendente lite* does not abate the suit. C. L. P. Act, 1852. s. 141.

As to when a married woman sued with her husband may be taken in execution. Ivens *v.* Butler, 7 El. & Bl. 159.

1. *By Husband and Wife for Goods sold, &c. by the Wife, and Account stated with her before Marriage.* (*x*)

Commencement, *ante*, 14, Form 27.] For money payable by the defendant to the said [Mary] (*y*) whilst she was sole and unmarried, for goods then sold and delivered by her to the defendant, and for money then lent by the said Mary to the defendant, and for money found to be due from the defendant to the said Mary, upon accounts before then stated between the said Mary and the defendant. And the plaintiffs claim £——.

(*x*) See, in general, 1 Chit. Plead. 7th ed. index, *in voc.*; Chit. jr. Contr. The wife must be joined in this case. Ib. A declaration by husband and wife stated that by agreement between the *plaintiffs* and the defendant, reciting that one J. L. had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail had been forfeited; and that J. L. had given a cognovit for the debt and costs; it was understood and agreed between the *plaintiffs* and defendant, and the defendant undertook and promised, in consideration that the *plaintiffs* would not enter up judgment or sue out execution against J. L. until a certain day, that he the defendant would render J. L. on that day, or in default pay the debt and costs. Averment, that the plaintiffs had not entered up judgment or sued out execution against J. L. before the day. Breach, that the defendant did not render J. L. on the day or pay the debt and costs. Held, on motion in arrest of judgment after verdict for the plaintiffs, *first*, that as the agreement was stated to be with the plaintiffs, the promise must be taken, *after verdict*, to have been made to them; *secondly*, that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of a cognovit by J. L. to all the plaintiffs was an admission by the defendant of such joint interest; *thirdly*, that though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment or sue out execution until a given day. Nurse *v.* Wills, 4 B. & Ad. 739; 1 Ad. & E. 65, S. C. in error.

(*y*) See France *v.* White, 1 M. & G. 731. It would seem proper to allege the money to be payable to the wife before marriage where the cause of action was complete before that event; as the words "money payable" are equivalent to and in substitution of the former mode of declaring alleging debt and promise to pay on request. When the credit had not expired at the time of the marriage, Form 2 is applicable. See *ante*, 53, note (*p*). Forms 1, 2, and 3 would be allowed together.

2. *Second Count for Money payable to the Plaintiffs on a Consideration moving from the Wife before Marriage.* (*z*)

For money payable by the defendant to the plaintiffs since their intermarriage, for goods sold and delivered by the said Mary whilst she was sole and unmarried to the defendant, and for money then lent by the said Mary to the defendant [*adding counts for any other debts; but it would seem informal in this count to allege an account stated with the* wife *alone, as upon an account stated a complete right of action would accrue immediately, and such claim would be embraced in* Form 1]. And the plaintiffs claim £——.

3. *Count upon Accounts stated by the Defendant with Husband and Wife respecting Moneys due to the Wife whilst Sole.* (*a*)

And for money payable by the defendant to the plaintiffs since their intermarriage, for money found to be due from the defendant to the plaintiffs upon accounts stated between the defendant and the plaintiffs since their intermarriage in respect of moneys due and payable by the defendant to the said Mary whilst she was sole and unmarried. And the plaintiffs claim £——.

4. *By Husband and Wife for the Personal Skill and Services of the Wife during Coverture.* (*b*)

For money payable by the defendant to the plaintiffs since their intermarriage, for the work and labor, care and skill of the plaintiff ("Mary") by her, since the plaintiff's intermarriage, done, performed, and bestowed as a midwife (*or* "as a nurse," *as the case may be*) for the defendant at his request.

5. *By Husband and Wife, Administratrix or Executrix.*

Commencement as ante, 7, Form 5.] For money payable by the defendant to the said A. B. and J. his wife, as administratrix [*or* executrix] as aforesaid, for goods sold and delivered by the said G. in his lifetime to the defendant [*proceed as in ordinary cases; conclude as ante*, 7, Form 5].

6. *By Husband and Wife on Bill drawn by and payable to Wife before Marriage against the Acceptor.*

Ante, 84, Form 28.

7. *Against Husband and Wife for Goods sold to her, &c. before Marriage.* (*c*)

Commencement, ante, 14, Form 28.] For money payable by the said [Mary]

(*z*) *Supra*, note (*y*); and see Com. Dig. Baron & Feme, x. Y.; Wills *v.* Nurse, 1 Ad. & E. 65; Philliskirk *v.* Pluckwell, 2 M. & S. 393; Hopkins *v.* Logan, 7 Dowl. 360; 2 N. R. 405; 3 B. & Ald. 680; France *v.* White, 1 M. & G. 731.

(*a*) This count is sustainable if it be shown that the wife had an interest in the cause of action, as that the account was stated concerning moneys payable to her before marriage. Johnson *v.* Lucas, 1 El. & Bl. 659.

(*b*) Where the wife is the meritorious cause of action she *may* be joined as plaintiff in an action on a contract made with her during her coverture, as for her personal skill and labor; but her interest in the debt or claim must distinctly appear. Bidgood *v.* Way, 2 Bl. R. 1236; *ante*, 148, Obs., and *ante*, 149, note (*x*).

(*c*) Presumptive evidence of the marriage sufficient. Tracey *v.* M'Arlton, 7 Dowl. 532; Chit. Plead.; Chit. jr. Contr. Bot *must* be sued in this case. A debt from

whilst she was sole and unmarried to the plaintiff, for goods sold and delivered by the plaintiff to the said [Mary], and for [*state any other debt, as ante*, 33, *substituting the name* "Mary" *for* "the defendant"]. And the plaintiff claims £——.

8. *Against Husband and Wife on a Bill accepted by her before Marriage.*

Ante, 85, Form 29.

9. *Against Husband and Wife on a Judgment obtained against the Wife.*

Dick *v.* Tolhausen, 4 H. & N. 695.

10. *Against Husband and Wife, Administratrix or Executrix.*

A count may easily be formed from the directions given as to Form 5.

INDEMNITY.

Obs. — As to contracts of indemnity, see, in general, Chit. Contr. index, "Guaranties." They are express or implied; when express, they are by parol, or by deed or bond, and in some cases must necessarily be in writing, in compliance with the statute of frauds. See Observations, *ante*, 137, "Guaranties;" Spark *v.* Heslop, 1 El. & Bl. 563; Batson *v.* King, 4 H. & N. 739; Thomas r. Cook, 8 B. & C. 728. [On the question whether a promise by a surety, or other person, to a third party to indemnify him if he will become surety for the principal, is within the statute, the authorities are divided. See Thomas *v.* Cook, 8 B. & C. 728; Batson *v.* King, 4 H. & N. 739; Jones r. Shorter, 1 Geo. 294; Chapin *v.* Merrill, 4 Wend. 659; Chapin *v.* Lapham, 20 Pick. 467; Bessig *v.* Britton, Sup. Ct. Missou. Feb. Term, 1875, 2 Central Law Journ. 296; Cripps *v.* Hartnoll, 2 B. & S. 679; S. C. 4 B. & S. 414; Smith r. Sayward, 5 Greenl. 504; Dunn *v.* West, 5 B. Monr. 382; Lucas *v.* Chamberlain, 8 B. Monr. 276; Jones *v.* Letcher, 13 B. Monr. 363; Holmes *v.* Knight, 10 N. H. 175; Draughan *v.* Buntin, 9 Ired. 10; Brown *v.* Adams, 1 Stew. 51; Green *v.* Cresswell, 10 Ad. & E. 453; Aldrich *v.* Ames, 9 Gray, 76; Wildes *v.* Dudlow, 23 W. R. 435; 2 Central Law Journ. 317.] Express contracts must be declared upon according to the nature of the particular instrument, and the terms of the contract. See an instance, Spark r. Heslop, *supra*. In many cases the law *implies* a promise of indemnity, as for instance, to an accommodation acceptor or indorser of a bill, or maker of a note; Reynolds *v.* Doyle, 2 Scott N. R. 45; 1 M. & G. 753; by a principal to his surety or bail; Toussaint *v.* Martinnant, 2 T. R. 100, 104; Jones *v.* Orchard, 16 C. B. 614; [Holmes *v.* Weed, 19 Barb. 128;] by one surety to his cosurety; Thomas *v.* Cook, 8 B. & C. 728; Davies *v.* Humphreys, 6 M. & W. 153, 168; Knight *v.* Hughes, 3 C. & P. 467; by a principal to his agent in the exercise of his authority to do lawful acts, or those not known to be or apparently unlawful; Westropp *v.* Solomon, 8 C. B. 345; Toplis *v.* Grane, 7 Scott, 620, 643; 5 Bing. N. C. 636; Betts *v.* Gibbins, 2 Ad. & E. 57; Collins *v.* Evans. 5 Q. B. 820; Preston *v.* Peeke, [El., Bl. & El. 336; Powell *v.* Newburgh, 19 John. 284; Hill *v.* Packard, 5 Wend. 375; Rogers *v.* Kneeland, 10 Wend. 219; Greene *v.* Goddard, 9 Met. 212; Stocking *v.* Sage, 1 Conn. 522; D'Arcy *v.* Lyle, 5 Binn. 441; Ramsay *v.* Gardner, 11 John. 439; Gowen *v.* Emery, 18 Maine, 79; Jacobs *v.* Pollard, 10 Cush. 287; Moore *v.* Appleton, 26 Ala. 633; Acheson *v.* Miller, 2 Ohio (N. S.), 203. It is otherwise as to an act known to be illegal or immoral. See Kneeland *v.* Rogers, 2 Hall, 579;

mise by husband and wife after mar- Taunt. 212; Pittam *v.* Forster, 1 B. & C.
ge cannot be laid. Morris *v.* Norfolk, 1 248.

Obs. Doty *v.* Wilson, 14 John. 381; Stone *v.* Hooker, 8 Cowen, 154; Hodsdon *v.* Wilkins, 7 Greenl. 113; Churchill *v.* Perkins, 5 Mass. 341; Ayer *v.* Hutchins, 4 Mass. 370; Atkins *v.* Johnson, 43 Vt. 78;] by a lessee to his under *tenant*: Griffinhoofe *v.* Daubuz, 5 El. & Bl. 746; against a distress by the superior landlord for rent due to him; Hancock *v.* Caffyn, 8 Bing. 358; Briant *v.* Pilcher, 16 C. B. 354; *aliter*. if the underlease is by deed; Schlencker *v.* Moxey, 3 B. & C. 789; by the assignee of a lease to his assignor against non-payment of rent, and non-performance of covenants running with the estate; Burnett *v.* Lynch, 5 B. & C. 589; Groom *v.* Bluck, 2 Scott N. R. 665; 2 M. & G. 567; Smith *v.* Peat, 9 Ex. 161; Humble *v.* Langston, 7 M. & W. 530; and see other instances of implied indemnities in the following forms and notes.

The common count for "money paid," *ante*, 28–33, is generally sufficient to recover the principal *debt* which the plaintiff has been *compelled* to pay; Driver *v.* Burton, 17 Q. B. 989; Sleigh *v.* Sleigh, 5 Ex. 514; but to recover consequential damages or costs, the declaration must be special. Seaver *v.* Seaver, 6 C. & P. 673. As to the right to recover such costs, see *post*, 152, notes (*e*), (*f*). As to the extent of liability, and how liability is discharged, *post*, Pleas, "Indemnity."

1. *By the Acceptor of an Accommodation Bill against the Party for whose Use he accepted it, for not indemnifying him.*

For that in consideration that the plaintiff would accept, for the defendant's accommodation, a bill of exchange, dated the —— day of ——, A. D. ——, drawn by the defendant on the plaintiff, and requiring the plaintiff, —— months after the date thereof, to pay to the order of the defendant the sum of £——, and would deliver the same, so accepted, to the defendant, in order that the defendant might negotiate the same for his own benefit, the defendant promised the plaintiff to indemnify and save harmless the plaintiff from any loss or damage by reason of his acceptance of the said bill as aforesaid; and the plaintiff accepted the said bill, and delivered the same, so accepted, to the defendant, for his accommodation and for the purpose aforesaid; and the said bill was negotiated by the defendant for the purpose aforesaid, yet the defendant did not indemnify or save harmless the plaintiff from any loss or damage by reason of his acceptance of the said bill, and the plaintiff, as acceptor of the said bill, was obliged to pay and *paid* (*d*) to one ——, the holder thereof, the amount of the said bill, together with certain interest thereon, and the costs of an action brought on the said bill by the said —— against the plaintiff, in the whole amounting to £——, and thereby also the plaintiff incurred expenses in defending and settling the said action; (*e*) and all conditions [*&c. as ante*, 39. *Add counts for money paid, and on accounts stated, as ante*, 33, 34].

[*A like count by the accommodation drawer of a bill.* Batson *v.* King, 4 H. & N. 739. *Count by one joint maker of a bill against the other on a covenant to pay the bill.* Loosemore *v.* Radford, 9 M. & W. 657.]

(*d*) As to this averment, see Collinge *v.* Heywood, 9 Ad. & E. 639. As to laying damage where plaintiff has *incurred* without having actually paid loss, Pricket *v.* Bovey, 1 Cr. & M. 28; Spark *v.* Heslop, 1 El. & El. 563; Randall *v.* Raper, El., Bl. & El. 84.

(*e*) Under an *implied* contract of indemnity, it is doubtful whether the plaintiff can recover the costs of the action against him, except perhaps the costs of the writ; Pierce *v.* Williams, 23 L. J. Ex. 322; but if the defence be undertaken at the request or with the sanction of the person for whose accommodation he contracted, the costs may be recovered as money paid to his use; Beech *v.* Jones, 5 C. B. 696; Garrard *v.* Cottrell, 10 Q. B. 679; Blyth *v.* Smith, 5 M. & G. 405.

For not indemnifying the Plaintiff as Defendant's Surety in a Maltster's Bond to the Crown, whereby Plaintiff's Goods were taken upon Crown Process, founded on a Judgment upon the Bond.

See form in the second edition of this work, p. 134, and see a form and law, a promise of indemnity to the plaintiff in consideration that the plaintiff ould join defendant as surety in a bond of indemnity to a third person against ebts of a late partnership. Thomas *v.* Cook, 8 B. & C. 728.

3. *On a Promise to Indemnify the Plaintiff against taking up a Bill and bringing an Action upon it.* (*f*)

That in consideration that the plaintiff would pay the amount of a bill of xchange indorsed by the defendant to the holder thereof, and take up the me, and bring an action in the name of the now plaintiff against G. H., the ceptor of the said bill for the amount due thereon, the defendant promised e plaintiff to indemnify and save harmless the plaintiff from all loss and costs hich he might incur by reason of such payment and of such action as afore-id; and the plaintiff accordingly paid the amount of the said bill to the said lder thereof, and took up the same, and brought such action as aforesaid in s own name against the said G. H. for the amount due thereon, and such oceedings were had in the said action that the said G. H. obtained a verdict erein against the plaintiff, whereby the plaintiff became liable to pay his own sts and the costs of the said G. H. in the said action; and all conditions ere fulfilled, and all things happened, and all times elapsed, necessary to able the plaintiff to maintain this action for the breach hereinafter alleged; t the defendant did not indemnify and save harmless the plaintiff from the s incurred by him by reason of the said payment or from the said costs.]

On a Promise to Indemnify the Plaintiff against all Costs and Expenses of an Action against A., if the Plaintiff would try such Action before another pending Action against B. for the same Debt.

See form and law, Wilson *v.* Bevan, 7 C. B. 673.

Upon a Promise to Indemnify the Plaintiff if he would defend an Action against him for Money (or Goods) in which the Defendant claimed an Interest. (*g*)

[That G. H. had brought an action against the plaintiff to recover a sum of oney in the hands of the plaintiff which was claimed by the defendant; and ereupon, in consideration that the plaintiff would defend the said action, the fendant promised the plaintiff to indemnify and save harmless the plaintiff

(*f*) See the form in Spark *v.* Heslop, 1 & El. 563. In Spark *v.* Heslop, the de-dant's express contract was to be "an-erable to the plaintiff for all costs, dam-es, and expenses which he might *sustain* trying the action," and it was held that plaintiff might recover as damages the ount of his own attorney's bill of costs, ough he had not actually paid it. See m of declaration on a bond of indemnity to a *nominal* plaintiff in case he should be unsuccessful, Hankin *v.* Bennett, 8 Ex. 107.

(*g*) Williamson *v.* Henley, 6 Bing. 299. Form on promise of indemnity if plaintiff would defend a vicar's equity suit for tithes; Adams *v.* Dansey, 6 Bing. 506. See Wilkinson *v.* Byers, 1 Ad. & E. 106. In consideration that plaintiff would refuse to deliver goods to a third person, Betts *v.* Gibbins, 2 Ad. & E. 57; 4 Nev. & M. 64.

from all loss and damage by reason of his defending the same; and the plain tiff accordingly defended the said action, and such proceedings were had therei that the said G. H. recovered judgment therein against the plaintiff for $—— and costs of suit; and all conditions were fulfilled, and all things happene and all times elapsed, necessary to entitle the plaintiff to maintain this actio for the breach hereinafter alleged; yet the defendant did not indemnify an save harmless the plaintiff from all loss and damage by reason of his defen ing the said action, and the plaintiff, being unable to pay the said $—— an costs, was taken in execution on a writ of *capias ad satisfaciendum* sued ou by the said G. H. on the said judgment, and was imprisoned until he paid th said $—— and costs and the expenses of the said execution, and the plaintif was then obliged to pay the same, and also incurred other costs and expenses (*h* in defending the said action.]

6. *On a Promise to idemnify Plaintiff from Personal Liability for Ex penses incurred in the Formation of a Company if Plaintiff woul take Shares in the Company and become one of the "Provisiona Committee."*

For that in consideration that the plaintiff would allow his name to b placed on the list of the provisional committee of a projected railway com pany, and hold himself out as one of the provisional committee of the sai company, and would take —— shares in the said company, and pay the de posits thereon, the defendant promised the plaintiff to indemnify him agains all personal responsibility, and hold him harmless against all costs, charge and expenses which had been or might be incurred in the formation of an carrying on the said company, *and against all actions and suits, and all loss, c damage, or costs he might sustain by reason of his becoming one of such com mittee*, (*i*) and the plaintiff accordingly allowed his name to be and the sam was inserted in the said list, and the plaintiff became and held himself out a one of such provisional committee of and took —— shares in the said com pany, and paid the deposits thereon; and that A. B. afterwards sued the plain tiff for and recovered by judgment against him a debt of £—— contracted b and on behalf of the said company with the said A. B. in the formation o the said company; and the plaintiff was compelled to and did pay to the sai A. B. the said debt of £——, and £—— for the said A. B.'s costs of the sai action; and the plaintiff also necessarily incurred expenses (*i*) in defendin and settling the said action; and although all conditions [*&c. as ante*, 39], ye the defendant hath not indemnified or saved the plaintiff harmless in this be half, or reimbursed to the plaintiff the said moneys so paid and the expense so incurred by him as aforesaid. And the plaintiff claims £——.

(*h*) As to when these expenses may be recovered, though not actually paid, see Spark *v.* Heslop, 1 El. & El. 563; *ante*, 148, 153, note (*f*).

(*i*) Upon a similar guaranty omitting the words in the above form in italics, where the plaintiff was sued *unsuccessfully* by a claim ant upon the company, it was held that th plaintiff's own extra costs incurred in defend ing the action were not recoverable. Lewi *v.* Smith, 9 C. B. 610.

. For not indemnifying a Surety in a Bond, in consequence of which the Surety paid the Bond to prevent a Suit.

For that the said plaintiff [the surety], at the request of the said D. [the rincipal and defendant] and for the said D.'s proper debt, together with the id D. and one A. A., by their bond duly executed, bound themselves jointly id severally to one B. B., his heirs &c. in the sum of $——, to be paid on before &c. and the said D. in consideration thereof, promised the plaintiff pay the said B. B. the said sum of $——, at the time aforesaid, and thereby demnify and save harmless the plaintiff against the bond aforesaid. Now e plaintiff says that, although the said time has long since passsed, yet the id D. has never paid the said B. B. the aforesaid sum of $——, nor has he any manner satisfied the said B. B. or his heirs &c. therefor. And the aintiff further says that after the said bond became due, and while it was ill unsatisfied, the plaintiff, to prevent his goods and estate from being at-ched, and his body from being arrested, was compelled to pay and satisfy e said bond, and to spend divers sums of money in and about the premises. nd so the plaintiff says that the said D., though often requested, has not in-emnified and saved harmless the plaintiff from the bond aforesaid, but has efused and still refuses so to do.]

. On Implied Contract to indemnify the Plaintiff as Vendor to Defendant of Mining Shares against Future Calls on such Shares.

Walker *v.* Bartlett, 17 C. B. 446; 18 C. B. 845, S. C. in error. Equity ill enforce a contract for indemnity in such a case. Cheale *v.* Kenward, 4 ur. N. S. 984; 3 De G. & J. 27.

. On an Implied Contract by a Landlord to indemnify his Under-tenant against payment of Ground-rent. (k)

For that the defendant held certain premises as tenant thereof to A. B., at e yearly rent of £——, payable by the defendant to the said A. B.; and in nsideration that the plaintiff would become under-tenant to the defendant of e said premises at a certain yearly rent of £——, the defendant promised e plaintiff during the continuance of the plaintiff's tenancy to indemnify and ve him harmless from and against the payment of the said rent payable by e defendant to the said A. B., and from and against any distress or action, sts, charges, or expenses by reason of the non-payment thereof; and the aintiff became and was tenant to the defendant of the said premises upon e terms aforesaid. And all conditions (*l*) [*&c. as ante*, 39], yet the defend-

(*k*) Where the underlease to the plaintiff by deed, the remedy is on the express covant for quiet enjoyment, or that implied the word "demise" (*post*, "Landlord and enant)," as there is no other *implied* conact of indemnity. Schlencker *v.* Moxey, 3 & C. 789. Assignees of a bankrupt un-r-tenant may maintain an action for breach an implied contract of indemnity for dam-e to bankrupt's estate. Hancock *v.* Caffyn, Bing. 358. See a form in Hodgson *v.* John-n, El., Bl. & El. 685, by an incoming against outgoing tenant on a contract for the transfer of tenancy and purchase of plant, &c. at a valuation: held to be a contract within the statute of frauds for an interest in land.

(*l*) The payment of the plaintiff's rent to the defendant is not a condition precedent. Briant *v.* Pilcher, 16 C. B. 354, where see a form of declaration and pleas; and see other forms and law, 2 Chit. Pl. 7th ed. 230; Bandy *v.* Cartwright, 8 Ex. 913; Ridley *v.* Plymouth Baking Company, 2 Ex. 711.

ant did not perform his said promise in this, that during the continuance of the respective tenancies a distress was lawfully made by the said A. B. on the goods of the plaintiff upon the said premises for £—— for arrears of the said rent due and payable by the defendant to the said A. B. And the plaintiff was compelled, in order to redeem his goods, to pay, and necessarily paid [*or* "And the said goods of the plaintiff were sold under the said distress to satisfy"], the said sum of £—— for rent and £—— for the costs and expenses of the said distress; and the plaintiff also suffered great trouble and inconvenience, and incurred expenses in getting rid of the said distress. [*Add a count for* "money paid" (*m*) *and on an account stated, as ante*, 35, Form 2.]

10. *For not indemnifying the Plaintiff, who assigned a Lease held by him to the Defendant, against the Covenants, and allowing the Plaintiff's Goods, left on the Premises, to be distrained.*

Groom *v.* Bluck, 2 M. & G. 567; *post*, "Landlord and Tenant."

11. *On an Indemnity to a distraining Broker if he would seize Goods supposed to be privileged, showing Damage by Actions brought at the Suit of the Owners.*

Toplis *v.* Grane, 5 Bing. N. C. 636; 7 Scott, 620; Preston *v.* Peeke, El. Bl. & El. 336; and see a form in *tort*. Rawlings *v.* Bell, 1 C. B. 951; Adamson *v.* Jarvis, 4 Bing. 66; and *post*, Tort, "Fraud."

12. *On an Indemnity to a distraining Broker, given by a Landlord on the Representation that Rent was due from his Tenant, showing Special Damage by Reason of the Tenant bringing an Action.*

Cox *v.* Bailey, 6 M. & G. 193; [Ibbett *v.* De Salle, 30 L. J. Ex. 44; 6 H. & N. 233.]

13. *On Covenants to Indemnify.*

The declaration should be framed on the covenant, showing that defendant by deed [*after reciting, &c. if the covenant requires explanation by the recital*] covenanted with the plaintiff that [*&c. stating shortly the terms of the covenant*] that the plaintiff was damnified, that all conditions have been performed, and that the defendant has not indemnified the plaintiff [*as in the preceding forms*].

See forms of declarations on covenants of indemnity. Saward *v.* Anstey, 2 Bing. 519; Amory *v.* Brodrick, 5 B. & Ald. 712; 2 Chit. R. 329, S. C. Fowle *v.* Welch, 1 B. & C. 29; Nash *v.* Palmer, 5 M. & S. 374; [Haddon *v.* Ayres, 1 El. & El. 118.] By administrator for not indemnifying intestate against annuity granted to third party. Carr *v.* Roberts, 5 B. & Ad. 78. For not indemnifying the plaintiff against liabilities incurred by him under a former deed. Gillett *v.* Abbott, 7 Ad. & El. 783. Against the vendor of an estate subject to a mortgage on his covenant to indemnify the plaintiff, the purchaser, against payment of the mortgage debt. Allard *v.* Kimberley, 1

(*m*) Where the plaintiff *redeems* his goods by payment to the ground landlord of defendant's rent, he can sue for money paid; Exall *v.* Partridge, 8 T. R. 308; *aliter*, where the goods are *sold* to satisfy the distress; Moore *v.* Pyrke, 11 East, 52; but see the case observed upon in Rodgers *v.* Maw, 1 M. & W. 444, 448. [See England *v.* Marden, L. R. 1 C. P. 529; S. C. 35 L. J. C. P. 259.]

M. & W. 410. On covenant of indemnity to trustees under a marriage settlement against consequences of committing a breach of trust. Lord Newborough *v.* Schröder, 7 C. B. 342. By assignor of lease against assignee. *Post*, "Landlord and Tenant."

14. *On Bonds of Indemnity.*

See forms and Obs. *ante*, tit. "Bond," and see other forms.

5. On Bond of Indemnity to Plaintiff on his Transferring his Share in a Ship to Defendant against all Actions, &c. in Respect of Debts and Claims on the Ship.

Atwooll *v.* Atwooll, 2 El. & Bl. 23.

6. On a Bond to Indemnify a Nominal Plaintiff suing for the Benefit of a Third Person against the Costs of the Action if Unsuccessful.

Hankin *v.* Bennett, 8 Ex. 107.

INSURANCE BROKER.

Against an Insurance Broker who had undertaken to effect an Insurance for Plaintiff, stating his Implied Duty to give the Plaintiff Notice in case he could not effect it.

Callender *v.* Oelrichs, 5 Bing. N. C. 58. Held in that case not necessary to prove any express promise to perform that duty. And see Brown *v.* Boorman, 11 Cl. & Fin. 1; 3 Q. B. 511. And see other forms against insurance brokers and agents for breaches of duty and negligence in effecting policies, *ante*, 41; Chapman *v.* Walton, 10 Bing. 57; Turpin *v.* Bilton, 5 M. & G. 55.

Indebitatus Count for Brokerage and for Premiums paid by Plaintiff for Underwriting. (n)

For money payable by the defendant to the plaintiff for work done by the plaintiff, as an insurance broker, at the defendant's request, in drawing and effecting policies of insurance of ships and goods; and for money advanced and paid by the plaintiff for the defendant, at his request, for premiums on insurances of the said ships and goods; and for commission payable by the defendant to the plaintiff in respect thereof. [*Add account stated, and conclude as ante*, 33, Form 1.]

(n) See a form and law, Power *v.* Butcher, B. & C. 239. This count is proper where the plaintiff as broker has got policies effected by third persons for the defendant, or has paid premiums or losses for him; but the common counts for work done and money paid would be sufficient. Where the action is at the suit of the underwriter to recover premiums, the form No. 22, *post*, 169, should be adopted. Supposed losses paid to be passed in account with the assured under a mistake of fact may be recovered back as money had and received; Edgar *v.* Bumstead, 1 Camp. 411; James *v.* Swainestone, 2 Camp. 546; insurance brokers have a lien for their general balance, even as against agents acting as principals; Mann *v.* Forrester, 4 Camp. 60; Maanss *v.* Henderson, 1 East, 335; insurance brokers cannot recover brokerage or premiums paid when policies not duly stamped. 5 & 6 Vict. c. 82, s. 28. [Usage at Lloyd's. Setting off losses against premiums as between broker and underwriter. Sweeting *v.* Pearce, 7 C. B. N. S. 449.]

INSURANCE, POLICY OF.

I. — ON SEA POLICIES, ON SHIPS, GOODS, &c.

Obs. — See, in general, Abbott on Shipping, by Serjt. Shee; Hughes on Insurance; Arnould on Insurance; Stark. Ev.; Roscoe Ev.; Hopkins on Average.

The action must be brought by the principal, or by the agent, in whose name the policy was effected; Sargent *v.* Morris, 3 B. & Ald. 277; Usparicha *v.* Noble, 13 East, 332; if several be interested, and one effect the policy, he alone may sue, averring the interest to be in all "or some or one of them." So if the policy be effected in the name of two, and one alone be interested, he should be plaintiff; Marsh *v.* Robinson, 4 Esp. 98; a person not named in the policy cannot be plaintiff unless he has an interest in the matter insured *and* in the policy. Crauford *v.* Hunter, 8 T. R. 19. [As to the persons who may be entitled to sue on a policy of insurance, see 1 Chitty Pl. 9, note (*n*), where the subject is fully discussed, and the cases cited.]

By 19 Geo. 2, c. 37, s. 1, it is enacted, "That no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his majesty, or any of his subjects, or any goods, merchandises, or effects laden or to be laden on board of any such ship or ships, 'interest or no interest,' or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes." But by section 2, it is enacted, "That assurance on private ships of war, fitted out by any of his majesty's subjects solely to cruise against his majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer, anything herein contained to the contrary thereof in any wise notwithstanding." And by section 3, it is also enacted, "That any merchandises or effects from any ports or places in Europe or America in the possession of the crowns of Spain or Portugal, may be assured in such way and manner as if that act had not been made."

The 28 Geo. 3, c. 56, enacts, "That it shall not be lawful for any person to make or effect any policy of insurance on any ship, goods, or other property, without first inserting the name or names or usual style and firm of one or more of the persons interested in such insurance, or of the consignor or consignors, consignee or consignees, of the property so insured, or of the person or persons residing in Great Britain, who shall receive the order for and effect such policy, or of the person or persons who shall give the order to the agent immediately employed to effect such policy." [See 1 Chitty Pl. 9, and note (*n*).]

Any person who has an interest in the subject-matter of insurance may be insured to that extent, but the interest must be such as the law can take notice of; [Hancox *v.* Fishing Ins. Co. 3 Sumner, 132, 140; Wiggin *v.* Mercantile Ins. Co. 7 Pick. 271; Buck *v.* Chesapeake Ins. Co. 1 Peters (U. S.), 151, 152, 158; 3 Kent, 262, 276; Eastern R. R. Co. *v.* Relief Fire Ins. Co. 98 Mass. 420; Ins. Co. *v.* Chase, 5 Wallace, 513; Wilson *v.* Jones, L. R. 2 Ex. 150, 151;] and therefore an interest in goods claimed under a contract void under the statute of frauds cannot be insured; Stockdale *v.* Dunlop, 6 M. & W. 224; but an equitable interest as in goods, Hill *v.* Secretan, 1 B. & P. 315, or in a ship as by a mortgagor, Hutchinson *v.* Wright, 25 Beav. 444; [Tyler *v.* Ætna Ins. Co. 12 Wend. 507; Locke *v.* North Amer. Ins. Co. 13 Mass. 61; Gordon *v.* Mass. F. & M. Ins. Co. 2 Pick. 249; Bartlett *v.* Walter, 13 Mass. 267; Lazarus *v.* Commonwealth Ins. Co. 19 Pick. 81; Borden *v.* Hingham M. F. Ins. Co. 18 Pick. 523; Jackson *v.* Mass. Mut. F. Ins. Co. 23 Pick. 22; Strong *v.* Manuf. Ins. Co. 10 Pick. 40; Curry *v.* Commonwealth Ins. Co. 10 Pick. 535; Traders Ins. Co. *v.* Roberts, 9 Wend. 404,] suffices. But see Stainbank *v.* Fenning, 11 C. B. 51; Stainbank *v.* Shepard, 13 C. B. 418. A carrier has such an interest in goods carried that he can insure the goods; Crowley *v.* Cohen, 3 B. & Ad. 478; Waters *v.* Monarch Ins. Co. 5 El. & Bl. 870; The London & North Western Ry. Co. *v.* Glyn, 1 El. & El. 652; [Eastern R. R. Co. *v.* Relief Fire Ins. Co. 98 Mass. 42;] so a lien on a cargo is an insurable interest; Briggs

Obs. *v.* Merchant Trader's Insurance Association, 13 Q. B. 167. [So is a mechanic's lien. Franklin Fire Ins. Co. *v.* Coates, 14 Md. 285; Carter *v.* Humbolt F. Ins. Co. 12 Iowa, 287; Stout *v.* City Fire Ins. Co. 12 Iowa, 371.] And a person purchasing goods after a *partial* loss of them without knowledge of the loss may insure them. Sutherland *v.* Pratt, 11 M. & W. 296; [Seagrave *v.* The Union Marine Ins. Co. L. R. 1 C. P. 304.]

By the pleading rules, T. T. 1853, r. 9, in actions on policies of assurance, the interest of the assured may be averred thus: That A, B, C, and D, or some or one of them, were or was interested, &c.; and it may also be averred "that the insurance was made for the use and benefit and on the account of the person or persons so interested." [As to the proper person to sue on the policy, see 1 Chitty Pl. 9, note (*n*).] Before the statute 19 Geo. 2, c. 37, some averment of interest was in general absolutely necessary, and such averment is necessary even in actions on policies upon *foreign* ships, unless the policy contain a clause denoting the proof of interest to be unnecessary, as "interest or no interest," "that in case of loss the said policy should be sufficient proof of interest," "without further proof of interest than the policy," or to the like effect. Cousins *v.* Nantes, 3 Taunt. 513.

If the interest in a policy be assigned after a loss, the assignor may sue as trustee for the assignee; but if the assignment be before loss, the assignor can only sue in cases where the policy has been handed over to the assignee, or it has been agreed that the policy shall be kept alive for his benefit. Powles *v.* Innes, 11 M. & W. 10; Sparkes *v.* Marshall, 2 Bing. N. C. 761; [Carroll *v.* Boston Marine Ins. Co. 8 Mass. 515; Lazarus *v.* Commonwealth Ins. Co. 5 Pick. 76, 81; Copeland *v.* Mercantile Ins. Co. 6 Pick. 198; Hancox *v.* Fishing Ins. Co. 3 Sumner, 142; 3 Kent, 261.] It seems that a party acquiring an interest after the policy was effected, cannot be the plaintiff, although an interest acquired during the risk suffices to sustain an action by the party effecting the policy. Hughes, 54; Rhind *v.* Wilkinson, 2 Taunt. 237; Abitbol *v.* Bristow, 6 Taunt. 464; Powles *v.* Innes, 11 M. & W. 10; Sutherland *v.* Pratt, Ib. 296; 12 Ib. 16; [Hancox *v.* Fishing Ins. Co. 3 Sumner, 142; Lane *v.* Maine Mut. Fire Ins. Co. 12 Maine, 44; Carroll *v.* Boston Mar. Ins. Co. 8 Mass. 515; Lazarus *v.* Commonwealth Ins. Co. 5 Pick. 76, 81; Rider *v.* Ocean Ins. Co. 20 Pick. 259; Stetson *v.* Mass. Mut. Fire Ins. Co. 4 Mass. 330, 336.]

Sea policies are generally subscribed by several underwriters, each of whom contracts a *separate* liability, and should be separately sued. "The Governor and Company of the London Assurance Company," and "The Governor and Company of the Royal Exchange Assurance," are sued by name; 2 Chit. Pl. 7th ed. 310; M'Swiney *v.* Royal Exchange Assurance, 14 Q. B. 634; the incorporated or associated companies must be sued by the names of the parties appointed to be sued, either by the policy, the deed of settlement, or the act of incorporation; the Alliance Marine Insurance Company, and the Neptune Insurance Company, are sued by their chairmen; Manning *v.* Irving, 1 C. B. 168; Irving *v.* Manning, 2 Ib. 784; 6 Ib. 391; Benson *v.* Chapman, 6 M. & G. 702; on policies effected with the Indemnity Mutual Insurance Company and the Marine Insurance Company, the directors signing the policies are usually made defendants. Milward *v.* Hibbert, 3 Q. B. 120; Phillips *v.* Nairne, 4 C. B. 343.

As to the remedies upon policies effected with insurance companies containing restrictive clauses making the stock and funds of the company alone liable, see Dawson *v.* Wrench, 3 Ex. 359 (The General Maritime Assurance Company); Reid *v.* Allan, 4 Ex. 326; Dowdall *v.* Hullatt, 18 Q. B. 2; Halkett *v.* Merchant Traders' Assurance, 13 Q. B. 960; Hassell *v.* Same, 4 Ex. 523; Ex parte Athenæum Life Assurance Co.; In re Prince of Wales Insurance Co. 4 Kay & J. 517; 27 L. J. Chan. 798; King *v.* Accumulative Life Fund, &c. Assurance Co. 3 C. B. N. S. 151; Solvency Guarantee Society *v.* York, 3 H. & N. 588; no action lies against the company for alienating their funds or discontinuing their business. Ib. An action by a member of a mutual insurance association must be brought against some *one* other individual member of the association. Lees *v.* Smith, 7 T. R. 338; Strong *v.* Harvey, 4 Bing. 304; Mead *v.* Davison, 3 Ad. & El. 309, in note; Thompson *v.* Hopper, 6 El. & Bl. 172 (The Equitable Marine Insurance Association).

Obs. If several actions be brought on the same policy against several underwriters, such actions may be consolidated at their instance upon the terms of their admitting the amounts of their several liabilities if their liability be established. Lewis *v.* Burkes, 4 C. B. N. S 330; Hollingsworth *v.* Brodrick, 4 Ad. & El. 646; McGregor *v.* Horsfall, 4 M. & W. 321.

The amount of damages recoverable depends upon the facts of the particular case, and whether there is a total or partial loss, as to which, see *post*, 163, note (*c*), 166, note (*m*). Although a policy is in the nature of an indemnity, parties may agree as to the value beforehand; therefore, on a valued policy, the assured may on a total loss recover the value declared, though it be more than the marketable value. Irving *v.* Manning, 6 C. B. 391.

In case of double insurance, the whole amount insured may be recovered from *either* set of underwriters but after recovery of part against one, the excess only can be recovered against another. Newby *v.* Reid, 1 W. Bl. 416; Bousfield *v.* Barnes; 4 Camp. 228; [Morgan *v.* Price, 4 Ex. 615; Bruce *v.* Jones, 1 H. & C. 769.] Interest may be given by the jury in the nature of damages; 3 & 4 W. 4, c. 42, s. 29; the damages are unliquidated, and an adjustment does not alter the character of the plaintiff's remedy so as to let in a set-off. Luckie *v.* Bushby, 13 C. B. 864.

1. *Upon a Policy of Insurance upon the Cargo of a Ship and Freight for a Total Loss.*

For that the plaintiff, by a certain policy of insurance, amongst other things, caused himself to be insured, "lost or not lost," at and from ——(*o*) to ——, upon any kind of goods and merchandise, (*p*) in the ship called ——, and on the freight (*q*) thereof, beginning the adventure upon the goods and merchandises from the loading thereof on board the said ship as above, until the said goods and merchandises should be safely discharged and landed, (*r*) valued at £——, "on freight and cargo, including deck load," against perils of the seas [*&c. as in the policy, but it is unnecessary to enumerate all the perils insured against; when the loss is plainly attributable to only one of them, that one only*

(*o*) When the insurance is on a voyage "*at and from*" a port, the risk commences at the port; when the insurance is "from" a port, the risk commences at the beginning of the voyage; Gibson *v.* Small, 16 Q. B. 156, 157; Palmer *v.* Marshall, 8 Bing. 79; [3 Kent, 280, 281; Millaudon *v.* Western Marine & Fire Ins. Co. 9 La. 27; Thurston *v.* Koch, 4 Dallas, 348; Lucas *v.* Jefferson Ins. Co. 6 Cowen, 635; Craig *v.* Murgatroyd, 4 Yeates, 161; Wiggin *v.* Suffolk Ins. Co. 18 Pick. 153; Kent *v.* Manuf. Ins. Co. 18 Pick. 21; Haughton *v.* Empire Marine Ins. Co. L. R. 1 Ex. 206]; in general, the risk on freight begins when the goods are on board, or the ship is at the port of lading in a condition to receive them; Tonge *v.* Watts, 2 Stra. 1251; Williamson *v.* Innes, 1 M. & Rob. 88; Flint *v.* Flemyng, 1 B. & Ad. 48; [Bowen *v.* Hope Ins. Co. 20 Pick. 275; Garrigues *v.* Coxe, 1 Binn. 592; Zacharie *v.* Orleans Ins. Co. 5 Martin N. S. 637; Ins. Co. *v.* Bossiere, 9 Gill & J. 121; Kemble *v.* Bowne, 1 Caines, 75; Patrick *v.* Ludlow, 3 John. Cas. 10; Bell *v.* Marine Ins. Co. 8 Serg. & R. 98; Steinback *v.* Rhinelander, 3 John. Cas. 269; Gordon *v.* American Ins. Co. 4 Denio, 362; Robinson *v.* Manufacturers' Ins. Co. 1 Met. 143; Potter *v.* Rankin, L. R. 5 C. P. 341; S. C. L. R. 3 C. P. 562; Beckett *v.* West of England Mut. Ins. Co. 25 L. T. N. S. 739, 742; Barber *v.* Fleming, L. R. 5 Q. B. 59, 67; Tobey *v.* United F. & M. Ins. Co. L. R. 5 C. P. 155]; there must, however, be goods ready for shipment or contracted for. Devaux *v.* I'Anson, 5 Bing. N. C. 519; [M'Gaw *v.* Ocean Ins. Co. 21 Pick. 409; Robinson *v.* Manufacturers' Ins. Co. 1 Met. 146; 3 Kent, 311; Riley *v.* Hartford Ins. Co. 2 Conn. 373; Adams *v.* Warren Ins. Co. 22 Pick. 163; Hart *v.* Delaware Ins. Co. 2 Wash. C. C. 346; Livingston *v.* Col. Ins. Co. 3 John. 49; Longuemere *v.* The Phœnix Ins. Co. 1 John. 127; Gordon *v.* American Ins. Co. 4 Denio, 362; 1 Arnould Ins. (2d Am. ed.) 470.] The risk upon "profits upon cargo" does not attach until the goods are put on board. Halkead *v.* Young, 6 El. & Bl. 312.

(*p*) If by the policy, or by any memorandum or declaration, the insurance is to be on particular goods, the fact should be stated here, as "upon —— bags of rice valued at £——, to be loaded."

(*q*) The profit of a ship-owner carrying his own goods may be described and insured as *freight*. Devaux *v.* I'Anson, 5 Bing. N. C. 519; [Robinson *v.* Manufacturers' Ins. Co. 1 Met. 145, 146.]

(*r*) Tierney *v.* Etherington, 1 Burr. 348; Harrison *v.* Ellis, 7 El. & Bl. 465.

eed be mentioned (Cotterill *v.* Cuff, 4 Taunt. 285)]; and by a certain memorandum thereunder written, corn, fish, salt, fruit, flour, and seed were warranted ree from average, unless general, or the ship should be stranded; sugar, obacco, hemp, flax, hides, and skins were warranted free from average under £5 per cent.; and all other goods, also the ship and freight, were warranted ree from average under £3 per cent. unless general, or the ship should be tranded; (*s*) [and by a certain other memorandum thereunder written, it vas declared that the said insurance was on goods] (*t*) [*any other express varranties as to the ship itself, or the time or mode of its sailing, should also e stated here*]; and the defendant, in consideration of certain premiums of nsurance paid (*or* agreed to be paid) by the plaintiff to the defendant, became n insurer to the said plaintiff, and duly subscribed [*or if by agent*, "by one G. H., his agent in that behalf duly subscribed"] the said policy, as such nsurer to the plaintiff for the sum of [£100], upon the said premises (*u*) in he said policy mentioned. And the said policy being made, goods (*x*) of great alue had been and were shipped and loaded at —— aforesaid, in and on oard of the said ship, to be carried therein as cargo on the said voyage for ertain freight, (*y*) and that the plaintiff was [*or if the policy were effected by im only as agent* "that one A." (*the principal*) "was," *or if there be any loubt as to the parties in whom the interest was vested, state* "and that A., B., C., and D.," *naming the parties probably interested*, "or some or one of them, vere or was" (*z*) then at the time of the commencement of the risk and from hence until and at the time of the loss hereinafter mentioned, interested in

(*s*) This is the common memorandum at he foot of the policy (see Park, 20, 21, 101; Marsh, 240), and protects the underwriter rom making good any partial loss whatever pon the class of articles first specified, and ny loss under £5 per cent. on the class econdly specified, unless in either case the oss were incurred in consequence of a general average, or the ship be *stranded* ("sunk r burnt"); but, according to the case of Wells *v.* Hopwood, 3 B. & Ad. 34, every verage or partial loss becomes a charge pon the underwriters where a stranding as taken place, whether the loss has been n reality occasioned by the stranding or not. As the memorandum is part of the policy, s contents may be so stated, without adopting the word "memorandum." As to what a stranding, see Magnus *v.* Buttermere, 11 Q. B. 876.

(*t*) The general terms of the insurance, n the printed part of the policy, are qualified by the insertion, either in the body or at he foot of the policy, of the words "on ship," r "on goods," or "on freight, &c." and hen inserted at the foot, such memorandum s generally described as in the above precedent; but in the form in the text, which tates the *effect* of the policy to be on goods, ot setting out the policy, the averment ithin brackets may be omitted. See *infra*, ote (*u*). In some policies on goods, &c. he particular goods insured are enumerated n the margin of the policy, or by a separate eclaration, in which case the averment of he insurance thereon may be as follows: "And the said insurance was on —— bags of rice marked ——, valued at £——, and —— bags of rice marked ——, valued at £——, in the margin of the said policy enumerated, and separately valued, and the total value of the said goods and merchandises was thereby declared to be £——." See an instance, Entwistle *v.* Ellis, 27 L. J. Ex. 105.

(*u*) Where a policy in the common printed form on ship and goods contains a written memorandum, declaring the insurance to be *on goods*, the effect is the same as if goods only were mentioned in the policy; Robertson *v.* French, 4 East, 141, per Lord Ellenborough; and a general averment that the defendant became an insurer on the *premises* in the policy mentioned is proper. Haughton *v.* Ewbank, 4 Camp. 89; but see Entwistle *v.* Ellis, 2 H. & N. 549; and see Form 9, *post*, 168, setting out the policy *verbatim*.

(*x*) If the policy is on particular goods, aver that such goods were put on board. De Symonds *v.* Johnston, 2 N. R. 77; De Symonds *v.* Sheddon, 2 B. & P. 153; and see Wilkinson *v.* Hyde, 27 L. J. C. P. 116.

(*y*) Where the policy is on freight, and the loss arises before the goods are actually shipped, but after they are contracted for, the declaration should be framed accordingly. See form, Devaux *v.* I'Anson, 5 Bing. N. C. 519.

(*z*) See Obs. *ante*, 159; Rules on Pleading, Trin. T. 1853, r. 9; *post*, Appendix; Pim *v.* Reid, 6 M. & G. 1.

the said cargo and freight [*or* "premises"] insured, to the value and amount of all the moneys by [him] ever insured thereon [*or in a valued policy* "to the value in the said policy mentioned;" *add, if the policy were made in the name of an agent,* "and that the said insurance was made for the use and benefit and on the account of the person or persons so interested" (*a*)], and the said ship, with the said goods on board thereof, departed and set sail from —— aforesaid, on her said voyage, and during such voyage, and before her "arrival" at —— aforesaid [*or,* "and during the continuance of the said risk," *if the risk was to continue after, or did not depend upon arrival*], the said ship and goods were by the perils and dangers of the seas (*b*) *wholly*

(*a*) See *ante*, 166, note (*e*).

(*b*) *Or* "by the perils insured against," if the declaration does not show *all* the risks insured against, but simply the risk which occasioned the loss. The *proximate*, and not the remote cause of loss should be stated. Thompson *v.* Hopper, 6 El. & Bl. 172, per Martin B.; Montoya *v.* London Assurance Company, 6 Ex. 451; if any doubt, state all the risks, and aver that the loss was by the perils insured against. The cause of loss is generally taken from the protest. See the descriptions of losses by different causes, 2 Chit. Pl. A ship not heard of within a reasonable time after sailing is presumed to have foundered at sea. Koster *v.* Reed, 6 B. & C. 19; [Paddock *v.* Franklin Ins. Co. 11 Pick. 227, 237; Gordon *v.* Bowne, 2 John. 150. As to the time when the loss is presumed to have occurred, Clifford *v.* Thomaston Mut. Ins. Co. (Maine) 4 Am. Law Reg. (N. S.) 594; Brown *v.* Neilson, 1 Caines, 525.] As to what are losses by perils of the sea, see, in general, Arnould on Insurance; Roscoe Ev.; they mean strictly loss by sea-damage, as by stress of weather, winds and waves, lightning and tempest, rocks, sands, &c. as a loss by being run down by another vessel, though through gross negligence; Smith *v.* Scott, 4 Taunt. 126; [Hale *v.* Wash. Ins. Co. 2 Story C. C. 176;] or through misfortune running foul of another vessel; Buller *v.* Fisher, 3 Esp. 67; but see De Vaux *v.* Salvador, 4 Ad. & E. 420; by the barratry of the master; Heyman *v.* Parish, 2 Camp. 149; [see Waters *v.* Merchants' Louisville Ins. Co. 11 Peters, 219, 220;] a loss by animals being killed by the rolling of a ship in a storm; Lawrence *v.* Aberdein, 5 B. & Ald. 107; Gabay *v.* Lloyd, 3 B. & C. 793; damage in a harbor or tideway by the vessels taking the ground and bilging on the tide falling, is not generally a loss by perils of the sea, unless occasioned by unusual swell. Thompson *v.* Whitmore, 3 Taunt. 227; Phillips *v.* Barber, 5 B. & Ald. 161; Fletcher *v.* Inglis, 2 B. & Ald. 315; Magnus *v.* Buttermere, 11 C. B. 876; [but see Ellery *v.* New Eng. Ins. Co. 8 Pick. 14.] There may be a loss by perils of the sea within the policy, though remotely caused by the negligence of the crew; Walker *v.* Maitland, 5 B. & Ald. 171; Bishop *v.* Pentland, 7 B. & C. 219; Shore *v.* Bental, Ib. 798, note, [3 Kent, 300, note (*a*); Dixon *v.* Sadler, 5 M. & W. 405, 414; S. C. 8 M. & W. 895; Biccard *v.* Shepherd, 14 Moore P. C. 471, 493; Nelson *v.* Suffolk Ins. Co. 8 Cush. 477, 496; Patapsco Ins. Co. *v.* Coulter, 3 Peters, 222; Columbia Ins. Co. *v.* Lawrence, 10 Peters, 507; Waters *v.* Merchants' Louisville Ins. Co. 11 Peters, 213; Copeland *v.* New England Marine Ins. Co. 2 Met. 432; Perrin *v.* Protection Ins. Co. 11 Ohio, 147; Henderson *v.* Western M. & F. Ins. Co. 10 Rob. La. 164; General Mut. Ins. Co. *v.* Sherwood, 14 Peters, 351; S. C. 1 Blatchf. 251; Hale *v.* Wash. Ins. Co. 2 Story, 176; Parkhurst *v.* Gloucester Mut. Fishing Ins. Co. 100 Mass. 301; [in which it was held that the usual marine risks include barratry of master;) Davidson *v.* Burnand, L. R. 4 C. P. 117; Street *v.* Augusta Ins. Co. 12 Rich. 13; American Ins. Co. *v.* Insley, 7 Penn. St. 223; Georgia Ins. & T. Co. *v.* Dawson, 2 Gill, 365; Hagar *v.* New Eng. M. M. Ins. Co. 59 Maine, 460; Mathews *v.* Howard Ins. Co. 1 Keenan, 9, 15; Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311; Potter *v.* Suffolk Ins. Co. 2 Sumner, 197; St. Louis Ins. Co. *v.* Glasgow and Missouri Ins. Co. *v.* Glasgow, 8 Missouri, 713, 725; 2 Arnould Ins. (2d Am. ed.) 767, *et seq.*;] or the *mistake* of the master, being of competent skill when the policy was effected; Phillips *v.* Headlam, 2 B. & Ad. 380; or by negligent loading. Redman *v.* Wilson, 14 M. & W. 476. It is not a loss by perils of the sea if a ship be worm or rat eaten; Robinson *v.* Parr, 1 Esp. 445; Hunter *v.* Potts, 4 Camp. 203; [Aymar *v.* Astor, 6 Cowen, 266; 2 Kent, 300, 301; Laveroni *v.* Drury, 8 Pick. 166; Hazard *v.* New England Mar. Ins. Co. 1 Sumner, 218, 228; S. C. 8 Peters, 557; Garrigues *v.* Coxe, 1 Binn. 592, is *contra*;] or be sunk by another English ship, mistaking her for an enemy and firing on her. Cullen *v.* Butler, 5 M. & S. 461. A sale of goods by the master for defraying the necessary repairs of damage by storm to the ship is not a *loss* of the goods. Sarquy *v.* Hudson, 2 B. & C. 7; 4 Bing. 131, S. C.; but see Parfitt *v.* Thompson, 13 M. & W. 392. As to what is a stranding, Magnus *v.* Buttermere, 11 C. B. 876; loss by seizure or capture, Kleinwort *v.* Shepard, 1 El. & El. 44; Powell *v.* Hyde, 5 El. & Bl. 607; Lozano *v.* Janson, 28 L. J. Q. B. 337; [2 El. & El. 10; loss by restraint of princes, Crow *v.* Falk, Q. B. 467.

st, (c) and did never arrive at —— aforesaid, whereby the plaintiff lost the eight of the said goods (d) [*or if the loss were by capture,* "were on the high eas, with force and arms and in an hostile manner, captured, seized, and taken y certain enemies of our lady the now queen"]. And although all conitions precedent have been performed, and all events have happened, and nings exist, and periods of time have elapsed to entitle the plaintiff to a perormance by the defendant of his contract, and to entitle the plaintiff to maiain this action, (e) yet the defendant has not paid the plaintiff the said sum

(c) As to this, see Hills *v.* London Assurnce Company, 5 M. & W. 569; Benson *v.* hapman, 7 Scott N. R. 625; Rosetto *v.* Gurey, 11 C. B. 176; Moss *v.* Smith, 9 C. B. 4; Ralli *v.* Janson, 6 El. & Bl. 422; Lano *v.* Janson, 28 L. J. Q. B. 337; Maning *v.* Irving, *supra;* Irving *v.* Manning, *upra.* A partial loss may be recovered on declaration claiming a total loss. Gardier *v.* Crocsdale, 1 W. Bl. 198; Benson *v.* hapman, 8 C. B. 950; [Watson *v.* Ins. Co. f N. Amer. 1 Binn. 47.] A loss may be otal or partial; a total loss may be actual r constructive; if the thing insured is either otally destroyed, or so damaged as to be vorthless, and the adventure thereby wholly rustrated, it is a total loss; so if the thing, hough existing in fact, is lost for all useful urposes, so as to justify the assured in abanoning all his interest in it to the insurer, his is a constructive total loss. And the act that possession may possibly be resumed y the owner will not reduce it to a partial oss; the subject of insurance must be in existence under such circumstances that the assured may, if he please, have possession, nd may reasonably be expected to take ossession of it; M'Iver *v.* Henderson, 4 M. S. 576; Holdsworth *v.* Wise, 7 B. & C. 98; Lozano *v.* Janson, 28 L. J. Q. B. 337; Kent Com. 318. [As to abandonment; y the English law, even although the facts vere such as to justify the assured in giving notice of abandonment at the time he did so, et he cannot insist on such notice, and recover as for a total loss, if the thing insured e restored, before he commences his action, n such a state that he may reasonably be xpected to take possession of it. 2 Arnould ns. (2d Am. ed.) 994. But by the law in he United States, an abandonment once ightfully made is conclusive, and the rights ollowing from it are not divested by any ubsequent events which may change the ituation of the property. 3 Kent, 324, 325; Bradlee *v.* Maryland Ins. Co. 12 Peters, 78; Peele *v.* Merchants' Ins. Co. 3 Mason, 7; Lovering *v.* Mercantile Ins. Co. 12 Pick. 348; 2 Arnould Ins. (2d Am. ed.) 993, 994, and cases in note (1). It is a general ule in the United States, that if the ship or goods insured be damaged to the extent of more than half the value, by any peril inured against, the insured may abandon and recover for a total loss; for if the ship or cargo be damaged so as to diminish their value above half, they are said to be constructively lost. "The rule," says Mr. Chancellor Kent, "came from the French law, and is to be found in the treatise of Le Guidon, where it is applied to the case of goods, and in respect to both ship and cargo, the rule has been incorporated into American jurisprudence." 3 Kent, 329; 2 Arnould Ins. (2d Am. ed.) 1052, note (1) and cases cited; Kettell *v.* Alliance Ins. Co. 10 Gray, 144, 154. See Wallerstein *v.* Columbia Ins. Co. 44 N. Y. 204, 217; Lockwood *v.* Sangamo Ins. Co. 46 Missou. 71.] Any destruction or injury arising to *part* of a cargo of goods *all of the same species,* as a cargo of linseed, does not amount to a total loss of part, but a *partial* loss of the whole; but this is not so where the insurance is upon any kind of goods, and several distinct parcels of goods of *different species* are shipped, or where there are several parcels of goods, and each is the subject-matter of a separate insurance. Entwistle *v.* Ellis, 2 H. & N. 549; Duff *v.* Mackenzie, 3 C. B. N. S. 16; Wilkinson *v.* Hyde, 3 C. B. N. S. 30; [Newlin *v.* Ins. Co. 20 Penn. St. 312; Ralli *v.* Janson, 6 El. & Bl. 422, 446; Kettell *v.* Alliance Ins. Co. 10 Gray, 144, 154; Hernandez *v.* Sun M. Ins. Co. 6 Blatchf. 317; Silloway *v.* Neptune Ins. Co. 12 Gray, 73, 85; Wallerstein *v.* Columbia Ins. Co. 44 N. Y. 204, 216;] as to what amounts to a total loss of freight; Moss *v.* Smith, 9 C. B. 94; Michael *v.* Gillespy, 2 C. B. N. S. 627; [Philpott *v.* Swann, 11 C. B. N. S. 270, 282; Allen *v.* Mercantile M. Ins. Co. 44 N. Y. 437, 441; Lord *v.* Neptune Ins. Co. 10 Gray, 109; Parsons *v.* Manuf. Ins. Co. 16 Gray, 463, 468; Potter *v.* Rankin, L. R. 5 C. P. 341, 374, 379.] Upon an insurance on profits of a cargo against perils of the sea, no liability attaches upon the underwriters unless the *profits themselves* are lost by a peril insured against, and therefore not in a case where the carrying ship is lost, but the cargo is safely delivered by another vessel, or where the vessel is lost before any goods are put on board. Halkead *v.* Young, 6 El. & Bl. 312; [Abbott *v.* Sebor, 3 John. Cas. 39; Smith *v.* Reynolds, 1 H. & N. 221; Chope *v.* Reynolds, 5 C. B. N. S. 642; Wilson *v.* Jones, L. R. 2 Ex. 139, 146; 3 Kent, 273.]

(d) As to what is a total loss of freight, Chope *v.* Reynolds, 5 C. B. N. S. 642; Michael *v.* Gillespy, 2 C. B. N. S. 627; 26 L. J. C. P. 306.

(e) As to the general averment of performance of conditions precedent, Bamberger *v.* Commercial Credit Mutual Assurance Society, 15 C. B. 676; *ante,* 39.

of £——. [*A second count upon the policy cannot be added; but a count for money had and received, to recover back the premium upon a contract implied by law, is allowed. See Pleading Rules*, T. T. 1853, r. 1; *post, Appendix. If, therefore, there be any ground for claiming a return of the premium,* (*f*) *add the common count for money had and received, and on an account stated, as ante*, 35, Form 2.] (*g*)

[*Count on a policy insuring against damage payable by the ship-owner for collisions.* Thompson *v.* Reynolds, 7 El. & Bl. 172; Taylor *v.* Dewar, 5 B. & S. 58.

On a policy insuring against seizure and detention, for a total loss caused by an embargo. Fowler *v.* Scottish Marine Ins. Co. 18 C. B. N. S. 818.]

2. *Upon a Policy of Insurance upon Goods, to Recover a Particular Average.* (*h*)

For that the plaintiff by a policy of insurance [*&c. as in preceding form, showing the terms of the policy, that the defendant subscribed the policy, the loading and sailing of the ship with the goods on board, and the plaintiff's interest in the goods, and then aver the loss as follows:*] "And that afterwards, and whilst the said ship was proceeding on her said voyage, and before her arrival at —— aforesaid, and during the said risk, the said goods being then on board thereof, were by the perils of the seas, and other the perils insured against, wetted, damaged, wasted, and spoiled, whereby the plaintiff sustained an average damage or loss on the said goods to a larger amount than £5 per cent. on all the money insured thereon, to wit, to the amount of £—— by the hundred for each £100 insured thereon as aforesaid, whereby the defendant became liable to pay to the plaintiff £——, being the defendant's proportion of the said average loss upon and in respect of the said sum of £—— by the defendant so insured." And the plaintiff says that all conditions [*&c. as ante*, 163], yet the defendant hath not paid the said sum of £—— to the plaintiff.

(*f*) The assured is entitled to a return of premium when the policy is avoided, *ab initio*, on the ground of misrepresentation or concealment of a material fact by the assured without fraud; so where there was no insurable interest, or an interest less than that insured, the premium or part of it may be recovered back. If there are two insurances, at different times, together exceeding the amount of the interest, the excess is to be recovered from the last insurer; if both are effected at the same time before the risk commenced, the return must be ratable; so if the risk has never commenced, the premium may be recovered back; but if the risk has once commenced, or the policy is void on the ground of *illegality* or *fraud*, there can be no return. See, in general, 3 Kent, 341; Fish *v.* Masterman, 8 M. & W. 165; Stevenson *v.* Snow, 3 Burr. 1237; Dalzell *v.* Mair, 1 Camp. 532; Anderson *v.* Thornton, 8 Ex. 425, 428, per Parke B. The action may be brought in the name of the broker in whose name the policy was effected, or in that of the principal for whose benefit the policy was effected. Martin *v.* Sitwell, 1 Show. 156, [1 Chitty Pl. 9, note (*n*),] as to who should sue where the policy has been assigned and the assured has become bankrupt. Boddington *v.* Castelli, 1 El. & Bl. 879. [As to concealment of material fact by plaintiff, see Bates *v.* Hewitt, L. R. 2 Q. B. 595.]

(*g*) [See forms in Benson *v.* Chapman, 8 C. B. 950; Sutherland *v.* Pratt, 11 M. & W. 296; Cunard *v.* Hyde, El., Bl. & El. 670; Lozano *v.* Janson, 28 L. J. Q. B. 337. Policy on goods warranted free from capture and all consequences of hostilities, &c.; Ionides *v.* Universal Marine Ass. 14 C. B. N. S. 259; policy on deck goods against loss by jettison only; Watson *v.* Swann, 11 C. B. N. S. 756; policy on a cargo with liberty to barter; Harrison *v.* Ellis, 7 El. & Bl. 465; policy on advance made on account of freight; Ellis *v.* Lafone, 9 Ex. 546; Wilson *v.* Martin, 11 Ex. 684; De Cuadra *v.* Swann, 16 C. B. N. S. 772.]

(*h*) Upon a policy on goods free from particular average, no damage short of the absolute destruction of the thing insured will amount to a total loss. Navone *v.* Haddon, 9 C. B. 30. [As to the meaning of "particular average," see the great Indian Peninsula Ry. Co. *v.* Saunders, 1 B. & S. 41; Oppenheim *v.* Fry, 5 B. & S. 348; Kingston *v.* The Empire Marine Ins. Co. Limited, L. R. 1 C. P. 535; 2 Ib. 357.]

3. *For a Total Loss of Part of the Goods, where the Policy contains a Memorandum against Particular Average.*

Janson *v.* Ralli, 6 El. & Bl. 422; and see Entwistle *v.* Ellis, 2 H. & N. 549.

4. *On a Policy of Insurance upon Goods, to recover for a General Average Loss.*

For that the plaintiff by a certain policy of insurance caused himself to be insured, lost or not lost, at and from —— to ——, upon certain goods in the ship ——, beginning the adventure upon the said goods from the loading thereof on board the said ship as above, until the said goods should be safely discharged and landed, valued [*&c.*] at £——, against the perils of the seas [*&c. as in the policy*], and the said goods were warranted free from average unless general, or the ship should be stranded, and the defendant in consideration of certain premiums [*&c. as in* Form 1, *showing that the defendant subscribed the policy, the shipment of the goods, the interest therein, and the sailing of the ship with the goods on board, as in* Form 1, *and then proceed as follows:*] And that during the said voyage and the continuance of the said risk, the said ship, with the said goods on board the same, was by perils of the seas, and the perils insured against, brought into great distress and in danger of being lost, wherefore the master and crew of the said ship, for the general safety and preservation of the said ship and the goods and merchandise on board thereof during the said voyage, were necessarily obliged to cut away and did cut away and cast into the sea, masts, yards, sails, cables, anchors, ropes, and buoys of and belonging to the said ship, whereby they were lost; (*i*) by reason whereof the plaintiff, in respect of his interest in the said goods so insured, became liable to bear and pay a proportionable part of the value of the said masts, yards, sails, cables, anchors, ropes, and buoys, so lost as aforesaid, and thereby sustained a general average loss, amounting to a large sum of money, to wit, the sum of £70 by the hundred for each and every £100 so by him insured as aforesaid, whereby the defendant became liable to pay to the plaintiff the sum of £70, for and in respect of the said sum of £100 so by him insured as aforesaid. And all conditions have been performed [*&c. as in* Form 1, *to the conclusion*].

5. *Upon a Voyage Policy on a Ship for a Total Loss.*

[For that on the —— day of —— A. D. ——, the plaintiff was the owner of the ship John, then lying in the harbor of ——; and the said company [the defendants], in consideration of a premium therefor paid to them by the plaintiff, made a policy of insurance on the said ship, for a voyage from the said —— to Cadiz, in Spain, and at and from said Cadiz to her port of discharge in the United States, (*k*) and thereby promised to insure for the plaintiff ten thousand dollars upon the said ship, for the said voyage, against the perils of the seas, and other perils, in said policy mentioned; and the plaintiff

(*i*) See several forms of averments of average losses, 2 Chit. Pl. 148; and see the cases referred to, *ante*, 133, note (*f*).

(*k*) As to when a ship has *arrived*, see Lindsay *v.* Janson, 4 H. & N. 699; [Whitwell *v.* Harrison, 2 Ex. 127; Meigs *v.* Mut. Mar. Ins. Co. 2 Cush. 439; Bramhall *v.* Sun Mut. Ins. Co. 104 Mass. 510.]

avers that the said ship did on the —— day of ——, A. D. ——, sail (*l*) from said —— on the voyage described in said policy, and whilst proceeding therein, was, by the perils of the seas, wrecked and totally lost; (*m*) of which the defendants, the said insurance company, on the —— day of ——, A. D. ——, had notice, and were bound to pay the same on demand [or in sixty days]; yet they have never paid said sum of ten thousand dollars, though requested (or though sixty days have elapsed).

5*a*. *Forms prescribed by Massachusetts Practice Act:* 1*st*. *On a Ship for a Total Loss.*

And the plaintiff says the defendants made to him a policy of insurance, a copy of which is hereunto annexed, for the sum of ten thousand dollars, on the ship John, against the perils of the seas, and other perils therein mentioned, in a voyage from Boston to Cadiz, in Spain, and at and from Cadiz to her port of discharge in the United States; and while proceeding on said voyage, the ship was wrecked and totally lost by the perils of the seas; and the defendants had notice of said loss on the —— day of ——, and were bound to pay the amount of said loss to the plaintiff, within sixty days after said notice; and the defendants owe the plaintiffs therefor the said sum of ten thousand dollars.

2*d*. *For a Partial Loss and Contribution to General Average.*

[State, as in the last count, to the description of the voyage inclusive.]

And in said policy the defendants agreed that in case of any loss or misfortune to said ship, it should be lawful for the plaintiff and his agents to labor for and in the defence and recovery of said ship, and that the defendants would contribute to the charges thereof in proportion as the sum assured by them should be to the whole sum at risk.

And while proceeding on said voyage said ship was, by perils of the seas, dismasted, and otherwise damaged in her hull, rigging, and appurtenances, and it was necessary, for the preservation of said ship and her cargo, to throw over a part of her cargo, and the same was thrown over for that purpose, and the plaintiff was obliged to expend the sum of two thousand dollars for repairing said ship at Cadiz, and the sum of five hundred dollars as a contribution for the loss occasioned by throwing over a part of said cargo; and the ship suffered much other damage that was not repaired at Cadiz; and the defendants had notice of said loss and charges, on the —— day of ——, and were bound by the terms of said policy to pay the same within sixty days after such notice, and the defendants owe the plaintiff therefor the sum of —— dollars.]

(*l*) As the words "lost or not lost" are inserted in almost all policies, it is not necessary to aver that the ship sailed after the making of the policy. Peppin *v.* Solomons, 5 T. R. 496; Abitbol *v.* Bristow, 6 Taunt. 465; Lucena *v.* Craufurd, 2 New R. 308. If the ship was lost at her moorings before sailing, the averment should be to that effect. Abitbol *v.* Bristow, 2 March Rep. 157.

(*m*) As to what amounts to a total loss, see Roux *v.* Salvador, 3 Bing. N. C. 286, per Abinger C. B.; Holdsworth *v.* Wise, 7 B. & C. 799; Lozano *v.* Janson, 28 L. J. Q. B. 337; [2 El. & El. 160;] *ante*, 163, note (*c*); Manning *v.* Irving, 1 C. B. 168; Irving *v.* Manning, 2 Ib. 784; 6 Ib. 391; [1 H. L. Cas. 287;] Moss *v.* Smith, 9 C. B. 94; [Farnworth *v.* Hyde, 18 C. B. N. S. 835;] as to loss by abandonment, Knight *v.* Faith, L. R. Q, B. 649; as to amount of damage recoverable when vessel injured and repaired, see Manning *v.* Irving, and Irving *v.* Manning *supra*. [As to what expenses may be taken into account, Farnworth *v.* Hyde, L. R. 1 C. P. 204.]

6. *Upon a "Time" Policy of Insurance of a Ship.*

Michael *v.* Tredwin, 17 C. B. 551; Gibson *v.* Small, 16 Q. B. 128; 4 H. L. Cas. 353; Milward *v.* Hibbert, 3 Q. B. 120; Fawcus *v.* Sarsfield, 6 El. & Bl. 192; Thompson *v.* Hopper, Ib. 172; Michael *v.* Gillespy, 2 C. B. N. S. 627; [Hollingsworth *v.* Brodrick, 7 Ad. & El. 40; Russell *v.* Thornton, 4 H. & N. 788; Tobin *v.* Harford, 13 C. B. N. S. 791.]

7. *Upon a Policy of Insurance of a Ship against Fire.*

Baines *v.* Woodfall, 28 L. J. C. P. 338. As to what is a loss by fire for which underwriter is liable, see Gordon *v.* Rimington, 1 Camp. 123; Busk *v.* Royal Exchange Assurance Company, 2 B. & Ald. 72; Boyd *v.* Dubois, 3 Camp. 133.

[7a. *Form prescribed by Massachusetts Practice Act. — For a Total Loss of Cargo by Fire.*

And the plaintiff says the defendants made to him a policy of insurance for the sum of ten thousand dollars, on the cargo of the brigantine William, against the perils of fire and other perils therein mentioned, at and from Boston, and in a voyage from thence to Hamburg, or any other port or ports in the north of Europe; and while said brigantine was proceeding on said voyage the cargo was totally destroyed by fire; and the defendants had notice of said loss on the —— day of ——, and were bound by the terms of said policy to pay the plaintiff the amount of said loss, and the defendants owe the plaintiff therefor the sum of ten thousand dollars.]

8. *Upon a Voyage Policy upon a Ship, to recover a General Average Loss paid by Ship-owner to Owner of Goods thrown overboard.*

Milward *v.* Hibbert, 3 Q. B. 120; [Miller *v.* Titherington, 6 H. & N. 278.]

For that [*state the making of the policy on the ship, defendant's subscription thereof, the plaintiff's interest, &c. as ante*, 165]. And that the said ship (after the making of the said policy, and) during the said risk, departed and set sail on her said voyage with divers goods on board thereof to be carried therein on freight upon the said voyage; and that during the said voyage the said ship, having the said goods on board, by the perils of the seas, became leaky, strained, and distressed, whereby it became necessary, for the preservation of the said ship and cargo, and for the benefit of all concerned therein, to lighten the said ship, and throw part of her cargo overboard, whereupon the master of the said ship, for the purpose aforesaid, cast and threw overboard part of the said cargo, to wit, ——, of the value of £——, which was thereby lost. By reason whereof the plaintiff, in respect of his interest in the premises insured, became liable to bear and pay, and necessarily paid a proportionable part of the value of the said goods so lost as aforesaid, and thereby sustained a general average loss of £—— upon the premises insured by the said policy so valued as aforesaid, at £—— [*or*, "being of the value of £——"]; and in consequence thereof the defendant became liable to pay to the plaintiff £——, being the defendant's proportion of the said average loss in respect of the said sum of £—— by him assured as aforesaid. And all conditions precedent have been

performed, and all events have happened and exist, and all periods of time have elapsed to entitle the plaintiff to a performance of the defendant's contract, and to enable him to maintain this action. Yet the defendant hath not paid to the plaintiff the said sum of £——.

9. *Upon a Policy of Insurance upon a Ship and Goods, setting out the Policy verbatim.* (*n*)

For that the plaintiff [*or if the policy were effected in the name of a third person as the plaintiff's agent, add,* "by one E. F., the plaintiff's agent in that behalf," *or if the policy were effected in the name of a third person as agent for the plaintiff and other persons interested, say,* "that one E. F. as agent, as hereinafter mentioned], on the —— day of ——, A. D. ——, caused to be made a certain policy of insurance with certain memoranda written thereon and thereunder, in the words and figures following, that is to say [*here set out the policy verbatim, with all its blanks, and with the memoranda, marks, and figures upon it; and it may be useful in some cases to set out the policy as printed with its blanks, written in black ink, and the memoranda, marks, &c. in red ink, with an averment as follows:* "and that the words of the said policy copied above in red ink are written in the original policy, and the rest of the policy is printed." See Halkead *v.* Young, 6 El. & Bl. 312–315.] And the defendant, in consideration of certain premiums of insurance paid to him by the plaintiff, became an insurer to the plaintiff, and duly subscribed [*or* "by one ——, his agent in that behalf, duly subscribed"] the said policy, as such insurer to the plaintiff for the sum of £——, upon the premises in the said policy mentioned. And the plaintiff says that divers goods (*o*) were shipped and loaded on board the said ship at —— aforesaid, to be carried therein upon the said voyage. [*Here aver the interest in the premises insured, and that the policy was effected for the person interested, and the sailing and loss of the ship and cargo, and averment of performance of conditions precedent, and breach of contract, as ante,* 161, 162, Form 1.]

10. *Upon a Policy of Insurance upon Money expended for Provisions and Stores for the Use of Emigrants, and Money advanced on Freight.*

Kleinwort *v.* Shepard, 1 El. & El. 447; Wilson *v.* Martin, 11 Ex. 684.

11. *Upon a Policy of Insurance upon Advances for Repairs and Disbursements.*

Stainbank *v.* Fenning, 11 C. B. 51; Stainbank *v.* Shepard, 13 C. B. 418; held not an insurable interest, the advance having been made under an invalid hypothecation bond.

12. *Upon a Policy of Insurance upon Freight due under a Charter-party.*

Horncastle *v.* Stuart, 7 East, 400.

(*n*) If the policy was under seal it must be so described. See forms in the cases referred to in the Obs. *ante,* 159, as to the mode of suing public insurance companies.

(*o*) *Ante,* 161, note (*x*), 163, note (*c*).

13. *Upon a Policy of Insurance upon Freight due under an Agreement.*

Truscott *v.* Christie, 2 B. & B. 320.

14. *Upon a Policy of Insurance upon Advances made on Account of Freight.*

Wilson *v.* Martin, 11 Ex. 684; Kleinwort *v.* Shepard, 1 El. & El. 447.

15. *Upon a Policy of Insurance upon Passage Money.*

Willis *v.* Cooke, 5 El. & Bl. 641; Gibson *v.* Bradford, 4 Ib. 586.

16. *Upon a Policy of Insurance upon Bounty to be allowed by the French Government to a Whaler.*

De Vaux *v.* Steel, 6 Bing. N. C. 358.

[16*a*. *Upon a Policy of Insurance Dependent on the Laying of a Submarine Cable.*

Wilson *v.* Jones, L. R. 1 Ex. 193; L. R. 2 Ex. 139.]

17. *Upon a Policy of Insurance upon Profits to arise upon Goods carried as Cargo, as upon Profits of Palm Oil.*

Chope *v.* Reynolds, 5 C. B. N. S. 642; Smith *v.* Reynolds, 1 H. & N. 221.

18. *Upon a Policy of Insurance upon Profits on Rice.*

Halhead *v.* Young, 6 El. & Bl. 312: M'Swiney *v.* Royal Exchange Assurance Company, 14 Q. B. 634; and see Stockdale *v.* Dunlop, 6 M. & W. 224.

19. *Upon a Policy of Insurance upon Money lent, on Respondentia on Ship and Goods.*

Glover *v.* Black, 2 Burr. 1394; 1 Went. 431; 2 Chit. Pl. 138.

20. *Upon a Policy of Insurance on a Bottomry Bond.*

Simonds *v.* Hodgson, 3 B. & Ad. 50.

21. *Upon a Policy of Insurance upon Goods and Canal Boats against Canal Risks and Navigation.*

Crowley *v.* Cohen, 3 B. & Ad. 478.

22. *For Premiums of Insurance on Ships and Goods.* (*p*)

Commencement as ante, 33.] For premiums of insurance due and payable by

(*p*) As to this count, see Jonk *v.* Pinsacke, 2 Lev. 153; 2 Chit. Pl. 7th ed. 60; Dalzell *v.* Mair, 1 Camp. 534, note (*a*); and see Beckwith *v.* Bullen, 8 El. & Bl. 633. In case of the death of the underwriter there is no right, either at law or in equity, in an action by his executors against a broker for premiums, to deduct a loss on a policy underwritten by the testator with such broker; although, had it been a case of bankruptcy, the circumstances would have supported a plea of mutual credit; Ib.; nor is there, it should seem, any custom at Lloyd's that in case of the death of an underwriter, premiums payable to him should be retained until all his risks had run off. Ib.

the defendant to the plaintiff for and in respect of the plaintiff's having, at the defendant's request, underwritten and subscribed, for and on account of the defendant, policies of insurance for large sums of money on ships, goods, and merchandise, by the plaintiff insured for the defendant [*add counts for money paid, and on accounts stated*].

II. ON POLICIES OF INSURANCE AGAINST FIRE.

1. *Upon a Policy of Insurance upon a Dwelling-house and Furniture, &c. against an Insurance Company.*

Commencement as ante, 5.] For that by a policy of insurance, dated the —— day of ——, A. D. ——, sealed with the common seal of the defendants, after reciting that the plaintiff in the said policy described as —— of —— had paid the sum of £—— to the defendants, and had agreed to pay to the defendants the sum of £—— on the —— day of ——, A. D. ——, and the like sum of £—— yearly on [*&c.*], during the continuance of the said policy, for insuring against loss or damage by fire the sum of £—— on his the plaintiff's dwelling-house, which was and is, as in the said policy described, brick built [*&c. as in policy*], and £—— on household goods, and linen, wearing apparel, and printed books, and plate, in such dwelling-house [*here describe the nature of the property insured, and the premises in which it was, as in the policy, with any express warranties as to the nature of the house or goods* (*q*)], it was declared that from the date of the said policy until the —— day of ——, A. D. ——, and so long afterwards as the said plaintiff should pay, and the directors of the said company should be willing to accept the said sum of £—— yearly at the time aforesaid, the stock and funds of the said company should be subject and liable to pay or make good to the said plaintiff (*r*) all such damage and loss as he should suffer by fire happening to the said premises insured, not exceeding the sum of £—— in the whole or respectively as aforesaid, but subject nevertheless to the conditions indorsed on the said policy, which were, amongst other things, as follows: [*here set out verbatim such of the conditions as constituted warranties on the part of the plaintiff, or conditions precedent* (*s*)]. And the plaintiff says that at the time of the making of the said policy, and during the said risk, and at the time of the loss hereinafter mentioned, he, the plaintiff, was interested in the premises so insured as aforesaid, to the full amounts so insured thereon; (*t*) and that after

(*q*) As to what misdescription of the premises insured will avoid a policy, see Sillem *v.* Thornton, 3 El. & Bl. 868; Glen *v.* Lewis, 8 Ex. 607; Baxendale *v.* Harding, 4 H. & N. 445; and *post*, Pleas, "Insurance." [As to words of description, how far a warranty against change in the condition of the building, &c. see Houghton *v.* Manuf. Mut. Ins. Co. 8 Met. 114, 122; Jones Manuf. Co. *v.* Manuf. M. Ins. Co. 8 Cush. 82; Crocker *v.* People's M. Ins. Co. 8 Cush. 79. Descriptive words are usually confined to the time when the policy was issued. Smith *v.* Mechanics' & Traders' Ins. Co. 32 N. Y. 399; Aurora Fire Ins. Co. *v.* Eddy, 55 Ill. 213; Schmidt *v.* Peoria Ins. Co. 41 Ill. 295; Blood *v.* Howard Ins. Co. 12 Cush. 472, 474; Joyce *v.* Maine Ins. Co. 45 Maine, 168; May *v.* Buckeye Mut. Ins. Co. 25 Wisc. 291, 306; Gilliat *v.* Pawtucket Mut. Ins. Co. 8 R. I. 282; Stokes *v.* Cox, 1 H. & N. 533.]

(*r*) Or "that the plaintiff should be paid out of the capital stock and funds of the said company," according to the terms of the policy; as to the effect of this clause, see the cases referred to in the Obs. *ante*, 158, as to the mode of enforcing policies restricting the liability to payment out of the stock and funds of the company.

(*s*) As to the law on this subject, see *post*, Pleas, "Insurance."

(*t*) See Obs. *ante*, 158. It is necessary to

the making of the said policy, and during the said risk, and whilst the said policy was in force, the premises insured were destroyed by fire (*u*) ["which did not happen by invasion, foreign enemy, nor tumult, civil commotion, or any military or usurped power," *according to the exceptions in the policy*], whereby the plaintiff sustained damage and loss on the said premises insured, to the amount [*or* "the several amounts"] insured thereon as aforesaid. And although all conditions have been performed and fulfilled, and all events and things existed and happened, and all periods of time have elapsed, to entitle the plaintiff to a performance by the defendants of their said contract, and to enable the plaintiff to maintain, and nothing existed or has occurred to prevent the plaintiff from maintaining this action, (*v*) yet the plaintiff hath not out of the stock and funds of the said company, or in any other manner, been paid or made good the said damage and loss so sustained by him as aforesaid [*if the policy gives an election to the defendants to reinstate, that clause must be set out in the declaration, and the following breach added here:*] nor have the defendants reinstated the premises so insured and destroyed as aforesaid. And the plaintiff claims £——. (*w*)

2. *Upon a Policy of Insurance against Fire, giving the Insurers an Option of Reinstatement in Preference to the Payment of Claims, for not properly reinstating as they elected to do.*

Brown *v.* The Royal Insurance Co. 28 L. J. Q. B. 275.

show an interest in the subject-matter insured; 14 Geo. 3, c. 48; such interest need not be the absolute property. An insolvent may insure the house in which he lives, though his assignees are entitled to it; Marks *v.* Hamilton, 7 Ex. 323; and an insolvent retains an insurable interest in goods concealed from his creditors. Goulstone *v.* Royal Insurance Co. 1 F. & F. 276. Warehousemen; Waters *v.* Monarch, 5 El. & Bl. 870; [Eastern R. R. Co. *v.* Relief Fire Ins. Co. 98 Mass. 423;] and carriers; London & North Western Ry. Co. *v.* Glyn, 1 El. & El. 652; [Eastern R. R. Co. *v.* Relief Fire Ins. Co. *supra*;] may insure goods in their possession as such, and recover the whole value under a policy on "goods held in trust or on commission." So a husband may insure goods settled to the separate use of his wife, but of which he has the joint use with her. Goulstone *v.* Royal Ins. Co. 1 F. & F. 276.

(*u*) *Or, if the insurance were on buildings partly damaged by fire,* "were partly destroyed by fire, &c. and the residue of the insured premises was rendered unsafe and dangerous, and were necessarily pulled down." If during a fire goods be feloniously pillaged, insurers of the goods are liable to make good the loss. Levy *v.* Baillie, 7 Bing. 349. A valued policy is considered an open one if the loss be not total. Damages and expenses incurred in the removal of articles insured are covered by the policy. 3 Kent, 375. The policy covers a loss by fire occasioned by negligence, if without fraud. Shaw *v.* Robberds, 6 Ad. & E. 75; Goulstone *v.* Royal Ins. Co. 1 F. & F. 276.

(*v*) As to this general averment of performance of conditions precedent, see *ante*, 163, note (*e*). As to the effect of a clause that, in case of disputes touching any loss or damage, the matter shall be referred to arbitration, and that until the arbitrators have determined, no action shall be brought; Scott *v.* Avery, 5 H. L. Cas. 811; [Elliott *v.* Corporation of Royal Exchange Assurance, L. R. 2 Ex. 237;] Roper *v.* Lendon, 1 El. & El. 825; Worsley *v.* Wood, 7 T. R. 710; [Hurst *v.* Litchfield, 39 N. Y. 377; Rowe *v.* Williams, 97 Mass. 163; Elliott *v.* Royal Exchange Ass. Co. L. R. 2 Ex. 237; Smith *v.* Boston, C. & M. R. R. 36 N. H. 458, 487;] and see *post*, Pleas, "Insurance," as to the non-performance of other conditions precedent.

(*w*) [For like counts, see Roper *v.* Lendon, 28 L. J. Q. B. 260; Pim *v.* Reid, 6 M. & G. 1; Sillem *v.* Thornton, 3 El. & Bl. 868; Stokes *v.* Cox, 1 H. & N. 320; Glen *v.* Lewis, 8 Ex. 607; Mason *v.* Harvey, 8 Ex. 819; Baxendale *v.* Harvey, 4 H. & N. 445.]

III. ON LIFE POLICIES.

1. *Against an Insurance Office, on a Policy upon the Life of a Third Person.*

For that by a certain policy of insurance bearing date the —— day of ——, A. D. ——, made and entered into by and between the defendant and the plaintiff, [*or* "by a policy of insurance [*&c.*] made [*&c.*] and sealed with the common seal of the defendants," (*x*)] after reciting that the said plaintiff, (*y*) having an interest in the life of T. B. of [*&c.*], had proposed to effect an insurance thereon with the said defendants, and for that purpose had deposited with the said defendants a declaration signed by himself, bearing date [*&c.*], stating, among other circumstances, the age and state of health of the said T. B., and had paid to the said company the sum of £—— as a consideration for the insurance of the sum therein mentioned on the life of the said T. B. for one year from [*&c.*], and had agreed to pay the like sum, whether the assured should be in health or not, on the —— day of —— in each succeeding year during the life of the said T. B., (*z*) it was and is thereby declared that if the said T. B. should depart this life at any time within the said term of one year, or at any time within the years that should follow, provided such payments as aforesaid should have been duly made, the capital stock and funds of the said company should stand charged and be liable to pay to the plaintiff, or to his executors, administrators, or assigns, within three calendar months after the decease of the said T. B. should have been duly notified to the directors of the said company by declaration on oath, by the certificate of burial, or by such other documents as might reasonably be required, the full sum of £—— of lawful money of Great Britain: provided always, and it was and is thereby agreed and declared that the capital stock and funds of the said company should alone be answerable to the demand thereupon under the said policy: provided, furthermore, that the insurance thereby granted should be valid only in case the declaration above referred to contained a true and faithful representation of the facts, and in case the several letters, testimonials, or other documents, addressed or deposited with the company, should be found authentic in themselves, without fraud or collusion in the matters therein contained, and fully explanatory of every requisite the directors should be apprised of in granting such insurance; and that the policy should become void

(*x*) This will depend upon the mode in which the particular policy is executed; a policy sealed with the common seal of an insurance company, affixed by the proper officers, *bonâ fide* effected by the insurer, and otherwise in accordance with the deed of settlement, is not void as against the company for want of an order by three directors to affix the seal, which order was required by the deed of settlement. Prince of Wales Assurance Co. *v.* Harding, 1 El., Bl. & El. 183. A general form of declaring against the two public incorporated insurance companies is provided by 6 Geo. 1, c. 18, s. 4; 11 Geo. 1, c. 30, s. 43. See Hughes on Insurance.

(*y*) See a form where the policy was effected by the plaintiff as agent, and statement of interest partly in him and partly in his principals. Pritchard *v.* The Merchants' & Tradesmen's Mutual Life Ins. Society, 27 L. J. C. P. 170; 3 C. B. N. S. 622.

(*z*) See a form where, by the policy, the annual premium was payable by quarterly instalments; Sheridan *v.* The Phœnix Life Assurance Co. 27 L. J. Q. B. 227; [31 L. J. Q. B. 91;] such a policy is not a policy from quarter to quarter, but a policy for a year, and the insurers are liable though a quarterly instalment is in arrear at the time of death. When days of grace are given for payment of premium the payment must be made during the life assured in order to bind the insurers. Pritchard *v.* Merchants' & Tradesmen's Mutual Life Ins. Society, 3 C. B. N. S. 622.

if the said T. B. should, without the consent of the directors for the time being, engage in the actual service of the army or navy, or go beyond the limits of Europe, (z^1) or upon the seas, unless in passing from one part of the British isles to another; (z^2) and the plaintiff says that he the plaintiff, at the time of

(z^1) See Notman *v.* Anchor Ins. Co. 27 L. J. C. P. 275. See a form against a party for making void an insurance on his life by going beyond the limits covered by the policy, Vyse *v.* Wakefield, 6 M. & W. 422; 8 Dowl. 377; S. C. in error, 7 M. & W. 126. [See, also, Hawkins *v.* Coulthurst, 5 B. & S. 343.]

(z^2) By the conditions indorsed upon policies it is usually provided that the policy will be void if the life assured die by his own hands (or by suicide), or by the hands of justice, or by duelling; but if any third party have acquired a *bonâ fide* interest therein by assignment or by legal or equitable lien for a valuable consideration, the assurance to the extent of such interest shall nevertheless be valid. [See Moore *v.* Woolsey, 4 El. & Bl. 243, 255.] Where a person who had insured his life became bankrupt and committed suicide, it was held his assignees in bankruptcy were not such third persons as were contemplated by such a condition, and that they could not sue upon the policy; Jackson *v.* Foster, 28 L. J. Q. B. 166; S. C. in error, 29 Ib. 8; [1 El. & El. 463, 470;] but an equitable charge to a creditor by a mere letter or by deposit is an assignment within the exception, and the insurance company are liable, even without notice of the change. Jones *v.* Consolidation Investment Assurance Co. 26 Beav. 256; Dufaur *v.* Professional Life Assurance Co. 25 Beav. 599. Suicide includes all voluntary self-destruction, though not felonious, and therefore the unsoundness of the party's mind is immaterial. Clift *v.* Schwabe, 3 C. B. 437; Dormay *v.* Borradaile, 5 Ib. 380; but see Dufaur *v.* Professional Life Assurance Co. *supra*. [In Borradaile *v.* Hunter, 5 M. & G. 639, the words of the proviso in the policy were, "if the assured should die by his own hand." He drowned himself in the River Thames; and the jury found that he did it voluntarily, but that he was not capable of judging between right and wrong. It was held that the proviso was not limited to acts of felonious suicide, and that the policy was void. Tindal C. J. dissented. But the jury were instructed that it must appear that the assured was conscious of the probable consequences of his act, and did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind and will to destroy his own life. See Hartman *v.* Keystone Ins. Co. 21 Penn. St. 466; St. Louis Life Ins. Co. *v.* Graves, 6 Bush, 268. In Clift *v.* Schwabe, 3 C. B. 437, the words of the proviso were, "Should commit suicide." The assured swallowed a quantity of sulphuric acid, sufficient to cause death, for the purpose of killing himself, and died the next day in consequence of it. It was held by Parke, Rolfe, Alderson BB. and Patteson J. to be immaterial whether he was a responsible agent. Pollock C. B. and Wightman J. dissented. But Alderson B. says the words do not apply to cases in which the will is not exercised at all, as when death results from an accident or delirium; but when the destruction is voluntary, though the will may be perverted. Gay *v.* Union &c. Ins. Co. 9 Blatchf. 142. In Dean *v.* American Ins. Co. 4 Allen, 96, the words were like those in Borradaile *v.* Hunter, 5 M. & G. 639, "Shall die by his own hand." The assured cut his throat with a razor. The plaintiff, however, alleged and offered to prove that the act by which the death was caused, was the direct offspring of insanity; that the insanity was what is called suicidal depression, impelling him to take his life, and that suicide is the necessary and direct result of such insanity or disease; but it was held that this avoided the policy. But Bigelow C. J. in giving the opinion of the court, says that if the death is caused in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will and intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act, it would not be within the proviso of the policy. See Borradaile *v.* Hunter, 5 M. & G. 639; Breasted *v.* Farmers' L. & T. Co. 4 Hill N. Y. 73; 4 Selden, 299; Gay *v.* Union &c. Ins. Co. 9 Blatchf. 142. This subject was thoroughly discussed by Appleton C. J., delivering the opinion of the court, in Eastabrook *v.* The Union Mut. Life Ins. Co. 54 Maine, 224. The words of the proviso in this case were, "shall die by his own hand." The jury found that the self-destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. It was held that this did not avoid the policy; and the learned chief justice declares the decision to be in entire conformity with the law as stated in Dean *v.* American Mut. Life Ins. Co. referring to the limitation stated above. Kent J. dissented. See Gay *v.* Union Mut. Life Ins. Co. U. S. C. C. Conn. 1871; 2 Bigelow, 4, 9 Blatchf 142; Tenny *v.* Life Ins. Co. 1 Dillon, 403; S. C 15 Wallace, 580; St. Louis Mut. Life Ins. Co. *v.* Graves, 6 Bush, 268; 2 Central L. Journ. 651. The effect of like words: "Should die by his own hand," in the proviso of a policy of life insurance, was the subject of decision in Breasted *v.* Farmers' Loan & Trust Co. 4 Selden, 299; S. C. 4 Hill (N. Y.), 74. The majority of the court of appeals, three of the justices dissenting, held in that case, that if the insured was insane, and incapable of discerning between right and wrong, his suicide did not avoid the policy. This decision is at variance with the interpretation given to the same words in Dean *v.* Ameri-

tions and regulations indorsed upon the said policy were observed and performed, and all conditions have been fulfilled, and all events have happened and existed, and all periods of time have elapsed, to entitle the plaintiffs, as executors as aforesaid, to have the said sum of £—— paid to them as executors as aforesaid; yet the said plaintiffs have not been paid the said sum of £—— according to the said policy, and the same still remains wholly due and unpaid to them. And the plaintiffs, as executors as aforesaid, claim £——.

[See Fowkes *v.* Manchester & London Life Assurance Ass. 3 B. & S. 917.]

4. *By the Assignees of a Bankrupt upon a Policy effected by him upon his own Life.*

Cazenove *v.* The British Equitable Assurance Co. 6 C. B. N. S. 437; Jackson *v.* Forster, 1 El. & El. 463; *ante*, 173, note (z^2).

IV. ON POLICIES OF INSURANCE AGAINST DEATH OR INJURY BY ACCIDENT.

Obs. — See forms of declarations and law in the following cases: Hooper *v.* The Accidental Death Insurance Company, 29 L. J. Ex. 340; [5 H. & N. 546;] Trew *v.* The Railway Passengers' Assurance Company, 5 H. & N. 211; 29 L. J. Ex. 218; as to what is accidental death, Shilling *v.* The Accidental Death Insurance Company, 2 H. & N. 42; 27 L. J. Ex. 16; Theobald *v.* The Railway Passengers' Assurance Co. 10 Ex. 45; Simpson *v.* The Accidental Death Insurance Co. 2 C. B. N. S. 257. [As to what is an accident, see Sinclair *v.* Maritime &c. Co. 30 L. J. Q. B. 77.] An insurance against the death of a third person by accident is within the 14 Geo. 3, c. 48, s. 2, as to interest. Shilling *v.* The Accidental Death Insurance Co. 1 F. & F. 116, and *supra*.

V. ON POLICIES OF INSURANCE AGAINST COMMERCIAL LOSSES.

Bamberger *v.* The Commercial Credit Mutual Assurance Society, 15 C. B. 676; Solvency Mutual Guarantee Society *v.* York, 3 H. & N. 588.

ON JUDGMENTS.

Obs. — An action of contract is maintainable upon judgments, although the transaction in its origin was wholly unconnected with any contract, the law implying, from the legal obligation, a contract or promise on defendant's part, to pay the sum recovered; 3 Bl. Com. 163; [1 Chitty Contr. (11th Am. ed.) 87, 88;] Russell *v.* Smyth, 9 M. & W. 810, 818; as upon judgments of the superior courts, or the inferior courts of record in this country; Read *v.* Pope, 1 Cr., M. & R. 302; Williams *v.* Jones, 13 M. & W. 628; 2 D. & L. 680; but an action is not maintainable in the *superior* courts on judgments of the modern county courts; Austin *v.* Mills, 9 Ex. 288; Berkley *v.* Elderkin, 1 El. & Bl. 805; or in such county courts on the judgments of the superior courts. 19 & 20 Vict. c. 108, s. 27.

So an action lies upon the judgment of a foreign court; Walker *v.* Witter, Dougl. 1; Hall *v.* Odber, 11 East, 118; Smith *v.* Nicholls, 5 B. & C. 208; 7 Dowl. 283, S. C.; Meeus *v.* Thellusson, 8 Ex. 638; Reynolds *v.* Fenton, 3 C. B. 187; [1 Chitty Contr. (11th Am. ed.) 87, and note (*y*);] unless it be contrary to natural justice, or to the law of the country in which the judgment was given, or the country where the original contract was made; Becquet *v.* McCarthy, 2 B. & Ad. 951; Novelli *v.* Rossi, 2 B. & Ad. 737; Rei-

Obs. mers *v.* Druce, 23 Beav. 145; Barber *v.* Lamb, 8 C. B. N. S. 95; 29 L. J. C. P. 234; Sheehy *v.* Professional Life Assurance Co. 3 C. B. N. S. 397; Cammell *v.* Sewell, 3 H. & N. 670; [Messina *v.* Petrococchino, L. R. 4 P. C. 144;] as upon an Irish judgment; Harris *v.* Saunders, 4 B. & C. 411; Sheehy *v.* Professional Life Assurance Co. *supra;* upon a Scotch decree for costs; Douglass *v.* Forrest, 4 Bing. 686; 1 M. & P. 663; Russell *v.* Smyth, 9 M. & W. 810; Cowan *v.* Braidwood, 1 M. & G. 882; Patrick *v.* Shedden, 2 El. & Bl. 14; Robertson *v.* Struth, 5 Q. B. 951; a colonial judgment or decree finding a sum certain due to the plaintiff as a balance on partnership accounts, and ordering payment thereof to the plaintiff; Henderson *v.* Henderson, 6 Q. B. 288; 2 Chit. Pl. 7th ed. 305; Henly *v.* Soper, 8 B. & C. 16; on the judgment of a court baron; Dawson *v.* Gregory, 14 L. J. Q. B 286; on a decree of the high court of chancery for payment of a specific sum founded on equitable considerations only. Henderson *v.* Henderson, *supra;* Carpenter *v.* Thornton, 3 B. & Ald. 52; Henly *v.* Soper, 8 B. & C. 20. [It has, however, recently been held that it is no bar to an action on a judgment of a foreign court, *in personam*, that it appears on the face thereof, that the foreign tribunal has put a construction on an English contract, which was erroneous according to English law. Godard *v.* Gray, L. R. 6 Q. B. 139. See Houlditch *v.* Donegall, 2 Cl. & Fin. (Am. ed.) 470, note (2) and cases cited; Don *v.* Lippmann, 5 Cl. & Fin. (Am. ed.) 1, and note (4); 1 Chitty Contr. (11th Am. ed.) 87, note (*y*).]

An action is not generally maintainable on mere *interlocutory* orders or decrees of courts of law or equity; Carpenter *v.* Thornton, *supra;* Fry *v.* Malcolm, 4 Taunt. 705; Patrick *v.* Shedden, *supra;* Sheehy *v.* Professional Life Assurance Company, 2 C. B. N. S. 211, and *supra;* or upon a rule of court or upon a judge's order; Dent *v.* Basham, 9 Ex. 469; even though made by consent, and containing an undertaking on defendant's part to do some act; Hookpayton *v.* Bussell, 10 Ex. 24; The Thames Iron Works &c. Co. *v.* Patent Derrick Co. [1 Johns. & H. 93;] 29 L. J. Chanc. 714; but an action lies on the final order of the privy council for payment of the costs of an appeal. Hutchinson *v.* Gillespie, 11 Ex. 798.

In an action on a judgment debt, the writ may be specially indorsed under Com. L. P. Act, 1852. s. 25, and final judgment signed if the defendant does not appear. Hodsoll *v.* Baxter, 28 L. J. Q. B. 61, Ex. Ch. [Verdict for plaintiff in action for personal injuries. Judgment signed after his death is regular. Common Law Procedure Act, 1852, s. 39. Kramer *v.* Waymark, L. R. 1 Ex. 241.]

Costs. — In an action upon a judgment recovered in any court in England or Ireland, the plaintiff is not entitled to costs, "unless the court in which such action on the judgment shall be brought, or some judge of the same court shall otherwise order." 43 Geo. 3, c. 46, s. 4. This does not apply to actions on judgments of nonsuit, &c. recovered by defendants. Bennet *v.* Neale, 14 East, 343. The plaintiff will not in general be allowed his costs if he might have issued execution or realized his judgment by other means. Wood *v.* Silleto, 1 Chit. Rep. 473; Hanmer *v.* White, 12 M. & W. 519; Mason *v.* Nicholls, 14 M. & W. 118. *Aliter* where defendant has acted vexatiously by pleading a false plea; Samuel *v.* Barker, 5 Taunt. 264; or the defendant has no goods, and the original judgment debt was under £20, so that the defendant could not be taken in execution.

The application for an order for costs cannot be made at nisi prius; Jones *v.* Lake, 8 C. & P. 395; but must be made in the *first instance* to a *judge at chambers*, not to the court; Claridge *v.* Wilson, 26 L. J. Ex. 246; by *summons*, or rule *nisi*, supported by affidavit; Revell *v.* Wetherell, 3 C. B. 321; it ought not to be granted *ex parte*. Lomax *v.* Berry, 2 H. & N. 127. As to proceedings upon judgments by writ of revivor, see C. L. P. Act, 1852, s. 131, 132; *post*, Appendix.

On a Judgment of either of the Superior Courts at Westminster.

Commencement as ante, 5. *The venue must be laid in Middlesex.* (*c*)] For

(*c*) In actions on judgments of courts of the *venue* is local and must be laid the county where the record is; in actions on foreign judgments the *venue* may be laid in any county.

that the plaintiff, on the —— day of ——, A. D. ——, in the court of Q. B. [*or* "C. P." *or* "Ex. of Pleas"] at Westminster, by the consideration and judgment of the said court, recovered against the defendant the sum of £——, and £—— (*d*) for his costs of suit, whereof the defendant was convicted, (*e*) which judgment still remains in force unreversed and unsatisfied, and upon which the plaintiff hath not obtained any execution or satisfaction. And the plaintiff claims £——. (*f*)

2. *On Judgments, &c. of Foreign or Colonial Courts, or Inferior Courts of Record.*

See forms of declarations in the several cases referred to in the Obs. *supra*.

[3. *Count on a Judgment of a French Court.*

That on the —— day of ——, A. D. ——, in the Empire of France, in a suit depending between the now plaintiff and defendant in the court of ——, being a court of the said empire duly holden, and having jurisdiction in that behalf, the plaintiff recovered against the defendant by the judgment of the said court, and according to the laws of said empire, the sum of —— francs, which is equivalent in money of the United States to $——, and which the now defendant was by the said court adjudged and ordered to pay to the now plaintiff; and the said judgment is still in force and unsatisfied.

Like counts. Vallée *v.* Dumergue, 4 Ex. 290; De Cossé Brissac *v.* Rathbone, 6 H. & N. 301.

Count on a judgment obtained in a French tribunal of commerce by the representative of the deceased drawer of a bill against the acceptor. Vanquelin *v.* Bouard, 15 C. B. N. S. 341.

Count on a decree of the tribunal of commerce at Brussels. Reynolds *v.* Fenton, 3 C. B. 187; Meeus *v.* Thellusson, 8 Ex. 638.

Count on a judgment of the supreme court of New York. Munroe *v.* Pilkinton, 2 B. & S. 11.

4. *Count on a Scotch Decree.*

That on the —— day of ——, A. D. ——, in the sheriff's court of the county of ——, in Scotland, in an action then depending in the said court at the suit of the now plaintiff against the now defendant, the plaintiff, by the judgment of the said court, then having lawful jurisdiction and authority in that behalf, recovered against the defendant the sum of £——, for the debt due from the defendant to the plaintiff, for goods sold and delivered by the plaintiff to the defendant, with legal interest thereon at —— per cent. per annum, from the —— day of —— then last, until payment, and the sum of £—— for costs of suit, which sums of money and interest the defendant was by the said court adjudged and ordered to pay to the plaintiff; and the said judgment is still in force and unsatisfied.

(*d*) See Com. L. P. Act, 1852, s. 95. In an action on the judgment of an inferior court the declaration should allege that the cause of action arose within the jurisdiction of such court. Read *v.* Pope, 1 Cr., M. & R. 302; Williams *v.* Jones, 13 M. & W. 628.

(*e*) An allegation of *pro ut patet per recordam* is not necessary.

(*f*) [A declaration, setting forth the recovery by the plaintiff against the defendant of a judgment for a certain sum as damages and another certain sum as costs, which judgment remains in full force and not impaired, annulled, or satisfied, whereby a action hath accrued to the plaintiff to have and recover of the defendant the *balance* due thereon and interest, is sufficient on demurrer. O'Neal *v.* Kittredge, 3 Allen, 476

Like counts. Douglas *v.* Forrest, 4 Bing. 686; Cowan *v.* Braidwood, 1 M. & G. 882; Patrick *v.* Shedden, 2 El. & Bl. 14.

Count for costs awarded by a decreet of the court of session in Scotland in a suit for divorce. Russell *v.* Smyth, 9 M. & W. 810.

Count on a judgment of the court of queen's bench in Ireland. Sheehy *v.* Professional Life Assurance Co. 13 C. B. 787.

Count on a colonial judgment. Robertson *v.* Struth, 5 Q. B. 941. *On a decree of a colonial court of equity.* Henderson *v.* Henderson, 6 Q. B. 288.]

LANDLORD AND TENANT.

Obs. — At common law a demise, except of incorporeal hereditaments, such as of a right to shoot, Bird *v.* Higginson, 6 Ad. & E. 824, or fish, Jones *v.* Reynolds, 4 Ad. & E. 805, or a demise of tithes, Gardiner *v.* Williamson, 2 B. & Ad. 336, need not have been in writing. But by the statute of frauds (29 Car. 2, c. 3, s. 1), all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, at law or in equity, have any greater effect, notwithstanding any consideration for making such parol leases or estates. As to the sufficiency of a memorandum under this section, see Bayley *v.* Fitzmaurice, 8 El. & Bl. 664; 27 L. J. Q. B. 143, Ex. Ch.; affirmed in House of Lords, 8 W. R. 750. Section 2 excepts "all leases *not exceeding* the term of three years from the *making* thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least, of the full improved value of the thing demised."

By the 8 & 9 Vict. c. 106, s. 3, it is enacted, "that every lease, required by law to be in writing, of any tenements or hereditaments, made after the 1st day of October, 1845, shall be void at law unless made by *deed*." But an instrument, though void *as a lease*, governs the terms of the holding; and at the end of the term the tenant is bound to quit without notice. Tress *v.* Savage, 4 El. & Bl. 36; Lee *v.* Smith, 9 Ex. 662, 665, per Martin B.; Parker *v.* Taswell, 2 De G. & J. 559; Tooker *v.* Smith, 1 H. & N. 732; [Bond *v.* Rosling, 1 B. & S. 371; Tidy *v.* Mollett, 16 C. B. N. S. 298.] No action lies against a lessee under a parol demise for not entering. Edge *v.* Strafford, 1 C. & J. 391.

Until the passing of the Com. L. P. Act, 1852, which dispensed with the necessity for mentioning the form of action in the writ, there were nice distinctions as to the proper form of action to be adopted. Where the contract was not under seal, either assumpsit or debt was the remedy. Thus, when the action was for *rent* due on a lease executed by the lessee, either debt or covenant might be maintained by the lessor or his assignees, or representatives against the lessee or his assignees, or representatives; with this exception, that where the landlord had accepted rent from the assignee, and had thus recognized the assignment, he could not sue the lessee in debt. 1 Saund. 241; 2 Saund. 297; 1 Chit. Pl. 7th ed. 126. Where the claim upon a lease was not for rent, an action thereon by the lessor or lessee, or by or against either of their personal representatives, must have been in covenant.

Though these technical forms of action are now abolished, where the contract is *under seal*, it must be declared upon according to its terms and legal effect. See an exception, Form 3, *post*, 184. But counts on the *contract* may be joined with any other claim a landlord may have against his tenant, as in *tort* for waste, &c. See Marker *v.* Kenrick, 13 C. B. 198.

The *venue* is *transitory* in actions on leases founded on the privity of contract between the parties, as by the lessor or his personal representatives against the lessee, or by the lessee against the lessor; by the assignee of the reversion against the lessee, or by the lessee against the assignee of the rever-

Obs. sion. But the venue is *local* where the cause of action arises out of the privity of estate, and not by reason of the privity of contract, as by the assignee or devisee of the lessor against the lessee; by the lessor or his personal representatives, or the assignee of the reversion against the assignee of the lessee; against the executor of the lessee where the executor is charged as assignee; and by the assignee of the lessee against the lessor. 1 Saund. 241 *b*, *c*, *d*, note (6); 1 Chit. Pl. 7th ed. 284. See, as to the statement of venue and the consequences of misstating it, *ante*, 2, Obs. (D). In Boyes v. Hewitson, 2 Bing. N. C. 575; 7 C. & P. 127, S. C.; in a local action of covenant on a lease, the plaintiff laid the venue in a *wrong* county, but as the locality of the premises did not appear on the declaration and no issue was raised thereon, it was decided that the defendant was not entitled to a nonsuit; the defendant ought, it seems, to have *pleaded* that the venue was wrongly laid. Richards *v.* Easto, 3 D. & L. 515. If the objection appears upon the record it seems that defendant may demur. Simmons *v.* Lillystone. 8 Ex. 431; Mayor of Berwick upon Tweed *v.* Shanks, 3 Bing. 459; 16 & 17 Car. 2, c. 8. The 3 & 4 W. 4, c. 42, s. 22, gives a power to the court to direct local actions to be tried in any county. In Tremeere v. Morrison, 1 Bing. N. C. 89, in a local action of covenant, the declaration stated the county in the margin, and charged that the defendant entered and became possessed of the premises, "to wit, in the county aforesaid," and it was held, on demurrer, that this amounted to a sufficient allegation that the premises were situate in the county mentioned in the margin.

In general a party suing upon a lease must show his *title* in the declaration. Where the lessor is the plaintiff, his title is not made the subject of any special allegation, because the lease operates as an estoppel against the lessee and his assigns, and the title is admitted; Beckett *v.* Bradley, 7 M. & G. 994; *post*, Pleas, "Eviction;" where the lessor has only an equitable interest, that fact may be stated in the declaration, in which case the covenants to pay the rent, &c. will be considered as covenants in gross, so as to estop the defendant from pleading that the plaintiff had no reversion in the premises. Pargeter *v.* Harris, 7 Q. B. 708. But when the lessor's title begins by the estoppel which the lease creates between the lessor and the lessee, such estoppel runs with the land into whosoever hands it comes, whether heir, or assignee, or devisee. 2 Wms. Saund. 418 *a*, (1); Cuthbertson *v.* Irving, 4 H. & N. 742; 28 L. J. Ex. 306; affirmed in error, 8 W. R. 704; [4 H. & N. 742; 6 H. & N. 135;] and this whether the demise was by lease under seal or by parol. Hickman *v.* Machin, 28 L. J. Ex. 310; [4 H. & N. 716. As to the rule that the tenant is estopped to dispute his landlord's title, see 1 Chitty Contr. (11th Am. ed.) 462, and note (*t*) and cases cited; and the exceptions to it, see 1 Chitty Contr. (11th Am. ed.) 464–466, and notes, 6, note (*b*), 79, note (*m*); Swatman *v.* Ambler, 8 Ex. 72. Where the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title. Gray J. in Hilbourn *v.* Fogg, 99 Mass. 12; Gillett *v.* Mathews, 45 Missou. 307; Dunshee *v.* Grundy, 15 Gray, 317; Bergman *v.* Roberts, 61 Penn. St. 497. See, further, for exceptions to the estoppel, 1 Chitty Contr. (11th Am. ed.) 462, note (*t*).]

It was formerly necessary, in actions brought by the assignee or representatives of the lessor, specially to deduce the plaintiff's title on the face of the declaration, and to show what the lessor's title was, and how it passed. But in an action by the assignee of the reversion, it would seem to be sufficient to allege that the lessor by deed assigned the reversion to the plaintiff, without showing what the lessor's title was, though a departure from the accustomed forms is to be deprecated. See Cuthbertson *v.* Irving, *supra*. If the above mode of alleging the plaintiff's title be adopted, it would seem that an application might be made under the C. L. P. Act, 1852, s. 52, to compel the plaintiff to deduce his title specially, on the ground that the general statement in the declaration tended to embarrass the defendant. Per Martin B. in Cuthbertson *v.* Irving, *supra*. If there have been several mesne assignments under which the plaintiff is entitled, in strictness they should all be stated; 1 Saund. 112 *b*, note (1); Ib. 234; though since the Com. L. P. Act, 1852, probably a general averment that the reversion was assigned to the plaintiff might suffice, subject to an application to the court as above; and

Obs. to this disadvantage, that on a traverse of such averment the plaintiff would be compelled to be prepared at the trial with evidence of the whole title; whereas, if he deduced the title step by step, the proof might be narrowed by a part only of the title being put in issue by the defendant. See *post*, 198, note (*h*). As to the mode of describing the estate and quantity of interest, and showing the derivation of title, see Steph. 4th ed. 334, 342; 1 Chit. Pl. 7th ed. Index, Title Pleaded. In deducing a title it is the established rule, that conveyances are to be pleaded as they operate. Per Parke B. Price *v.* Williams, 1 M. & W. 14; Moore *v.* Earl of Plymouth, 5 B. & Ald. 70. Thus, if a deed operate in law as a surrender, it should be pleaded as such, though it purport to be a conveyance. 1 Saund. 235 *b*, note (9).

Use and Occupation. — As to this count, see, generally, [1 Chitty Contr. (11th Am. ed.) 510 *et seq.*;] Woodfall's Landlord and Tenant; Rosc. Evidence. At common law an action of debt was maintainable for use and occupation, even though there was an actual demise, if *not* under *seal*; Gibson *v.* Kirk, 1 Q. B. 850; and by 11 Geo. 2, c. 19, s. 14, it is enacted, "that it shall be lawful for a landlord, where the agreement is *not by deed*, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant in an action on the *case* (*i. e. assumpsit*), for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement (not being by deed), whereon a certain rent is reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." See per Holroyd J. Hall *v.* Burgess, 5 B. & C. 333. [Assumpsit for use and occupation of land, by permission and assent of the plaintiff, on an express promise to pay a certain sum, or in general to pay to the plaintiff's satisfaction for such use, lies at common law independently of this statute. Eppes *v.* Cole, 4 Hen. & M. 171. It also lies on an implied promise. See 1 Chitty Contr. (11th Am. ed.) 511, note (x^1) and cases cited.] This count may be used though there be an express written demise not being by *deed*. But the plaintiff can only recover according to the terms of the express contract. Collett *v.* Curling, 10 Q. B. 785; Watson *v.* King, 3 C. B. 603; but see Smith *v.* Eldridge, 13 C. B. 236. If there be a demise under seal, the plaintiff must declare for rent on a demise, as *post*, Form 3, or on the covenant for payment of rent, as *post*, Form 4; [Warren *v.* Ferdinand, 9 Allen, 357; Richards *v.* Killam, 10 Mass. 243; Codman *v.* Jenkins, 14 Mass. 93;] but a lease under seal executed, but never *delivered* so as to operate as a lease, will not defeat the action for "use and occupation." Gudgen *v.* Bessett, 6 El. & Bl. 986. Where there is a written agreement or demise, it must be produced by the plaintiff duly stamped, and parol evidence of the tenancy is not admissible; and if it appear on his own showing, or on cross-examination of his witnesses, that there was such writing in reference to the claim in question, and plaintiff did not produce and prove it, duly stamped, he will be nonsuited (if never indebted has been pleaded). See Brewer *v.* Palmer, 3 Esp. R. 213; Ramsbottom *v.* Tunbridge, 2 M. & S. 434; Hodges *v.* Drakeford, 1 New R. 273; Fenn *v.* Griffiths, 6 Bing. 533. If, however, the plaintiff can get through his case without disclosing that fact, it is no ground of nonsuit if it afterwards appears that there is such a written agreement; Fry *v.* Chapman. 5 Dowl. 265; and the defendant cannot then put in such written agreement without producing it stamped. Fielder *v.* Ray, 6 Bing. 332; Rex *v.* Inhabitants of Padstow, 4 B. & Ad. 208. This count may be used whether a specific rent were agreed upon, or the rent is claimed on a *quantum meruit*. Collett *v.* Curling, *ubi supra*.

The action is one of *contract*, and is founded on the relation of landlord and tenant, and it requires evidence of an occupation by the *permission* of the plaintiff, and under a contract *with him*. Churchward *v.* Ford, 2 H. & N. 446; 26 L. J. Ex. 354; Sloper *v.* Saunders, 29 L. J. Ex. 275; [5 H. & N. 964; Boston *v.* Binney, 11 Pick. 1; Featherstonhaugh *v.* Bradshaw, 1 Wend. 134; Smith *v.* Stewart, 6 John. 46; O'Conner *v.* Tyves, 3 Rich. 276; Ward *v.* Ball, 1 Branch, 271; Stoddert *v.* Newman, 7 Harr. & J. 252; Vandenheuvel *v.* Storrs, 3 Conn. 203; Bancroft *v.* Wardwell, 13 John. 489; Levi *v.* Lewis, 9 C. B. N. S. 872, 876; Tew *v.* Jones, 13 M. & W. 12; 1 Chitty Contr. (11th Am. ed. 515.] This contract may be *implied* in favor of a person who has a

Obs. *legal* title to the premises held by the defendant, although there was no demise by the *plaintiff* to the *defendant*, and the title of the former accrued from the defendant's landlord pending the defendant's tenancy, and the defendant has not attorned; as in the case of a mortgagee, or a trustee, &c. Standen *v.* Christmas, 10 Q. B. 135; Turner *v.* Cameron's Coal Co. 5 Ex. 932; Moss *v.* Gallimore, Dougl. 279; Rennie *v.* Robinson, 1 Bing. 147; Burrough *v.* Graden, 1 D. & L. 218. But in such case the plaintiff must prove a legal title to the premises; Stephens *v.* Lynn, 8 C. & P. 389; Cornish *v.* Searell, 8 B. & C. 471; a contract will not be *implied* in favor of a person who has a mere *equitable* title, but where there is an *express* demise the tenant will be *estopped* from disputing the title of his lessor or his lessor's assignees. Hickman *v.* Machin, 28 L. J. Ex. 310; [4 H. & N. 716; *ante*, 180; 1 Chitty Contr. (11th Am. ed.) 462, and note (*t*), 464–466; Towne *v.* Butterfield, 97 Mass. 105; Galloway *v.* Ogle, 2 Binn. 268; George *v.* Putney, 4 Cush. 351.] As by the assignee of a mortgagor who had subsequently to the mortgage let the defendant into possession as his tenant; Hickman *v.* Machin, 28 L. J. Ex. 310; [4 H. & N. 716;] and this count may be maintained by the assignees of the reversion, though the demise to the defendant was by *parol*. Standen *v.* Christmas, *ubi supra;* or against the assignees of the tenant. How *v.* Kennett, 3 Ad. & E. 659; Hellier *v.* Silcox, 19 L. J. Q. B. 295. And where a tenant held over after his own term and that of his landlord, having applied to the superior landlord for a fresh term, and be referred to his landlord as being still tenant, and the latter subsequently paid rent to the superior landlord; held, that this was evidence from which a jury might infer a contract by the tenant to pay his landlord for the occupation. Levy *v.* Lewis, [6 C. B. N. S. 760; S. C. 9 C. B. N. S. 872.]

This is not a proper form of action to try a title in the absence of the relation of landlord and tenant; [Boston *v.* Binney, 11 Pick. 1; Binney *v* Chapman, 5 Pick. 127; Codman *v.* Jenkins, 14 Mass. 96; Williams *v.* Mayor, 6 Harr. & J. 350; Wyman *v.* Hook, 2 Greenl. 338;] and the presumption in favor of a *contract* arising from ownership on the one hand, and occupation on the other, or even from payment of rent, Knight *v.* Cox, 18 C. B. 645; Harden *v.* Hesketh, 4 H. & N. 175, may be destroyed by any evidence negativing a contract, as that the defendant entered under a contract with a third person; Marquis Camden *v.* Batterbury, 28 L. J. C. P. 335; [see Buell *v.* Cook, 4 Cowen, 238;] or as a trespasser; Turner *v.* Cameron's Coal Co. 5 Ex. 932; or *adversely* to the plaintiff; Tew *v.* Jones, 13 M. & W. 12; [Boston *v.* Binney, 11 Pick. 1; Featherstonhaugh *v.* Bradshaw, 1 Wend. 134; Smith *v.* Stewart, 6 John. 46; O'Conner *v.* Tyves, 3 Rich. 276; Ward *v.* Ball, 1 Branch, 271; Stoddert *v.* Newman, 7 Harr. & J. 252;] so an intended purchaser or intended lessee who has entered under an agreement for sale or for a lease to him, and has occupied *beneficially*, until the contract has gone off for want of title, is not on these grounds alone liable in this form for the period of his occupation up to the time of the contract going off; Winterbottom *v.* Ingham, 7 Q. B. 611; [Greenup *v.* Vernon, 16 Ill. 26; 1 Sugden V. & P. (8th Am. ed.) 179, 180; Hough *v.* Birge, 11 Vt. 190; Little *v.* Pearson, 7 Pick. 301; Carson *v.* Baker, 4 Dev. 220; Jones *v.* Jones, 2 Rich. 542; Brewer *v.* Craig, 3 Harr. 214; Doe *v.* Cochran, 1 Scam. 209; Jones *v.* Tifton, 2 Dana, 295; Bell *v.* Ellis, 1 Stew. & P. 296; Smith *v.* Stewart, 6 John. 46; Coffman *v.* Huck, 19 Miss. 435; Bancroft *v.* Wardell, 13 John. 459; McNair *v.* Schwartz, 16 Ill. 24; Rogers *v.* Wiggs, 12 B. Mon. 504;] but if he continues in possession after the contract goes off, he may be liable for his subsequent occupation. Howard *v.* Shaw, 8 M. & W. 118; [Dwight *v.* Cutler, 3 Mich. 566. If the contract fails by accident, as, by reason of the destruction of the premises by fire, before the conveyance, but while the vendee is in possession; or goes off by consent, the tenant is liable for the use and occupation of the premises, so far as beneficial; Gould *v.* Thompson, 4 Met. 224; or, at least, for the time he occupied, after the termination of the contract. Howard *v.* Shaw, and Dwight *v.* Cutler, *ubi supra*. If the contract fails of performance by the fault of the vendee, who has taken possession, he is liable for an occupation rent. Smith *v.* Stewart, 6 John. 46; Bancroft *v.* Wardell, 13 John. 489; Vandenheuvel *v.* Storrs, 3 Conn. 203; Clough *v.* Hosford, 6 N. H. 234; Alton *v.* Pickering, 9 N. H. 495, 498; Ayer *v.* Hawkes, 11 N. H. 148; Seabury *v.* Stewart, 22 Ala. 207; Davidson *v.* Ernest, 7 Ala. 817;

Obs. Smith *v.* Wooding, 20 Ala. 324; Patterson *v.* Stoddard, 47 Maine, 355; Hough *v.* Birge, 11 Vt. 109; Johnson *v.* Beauchamp, 9 Dana, 124; Towne *v.* Butterfield, 97 Mass. 106; Dunham *v.* Townsend, 110 Mass. 440. This action does not lie against the vendor who remains in possession after a sale. Greenup *v.* Vernon, 16 Ill. 26.]

Where there has been an actual demise this count cannot be maintained when no action would lie on the demise, as where the tenant has been evicted before rent has become due; Hall *v.* Burgess, 5 B. & C. 332; Morrison *v.* Chadwick, 7 C. B. 266, 283; but see Smith *v.* Eldridge, 15 C. B. 236; and where there is a demise of premises by a mortgagor in possession, mere notice to the tenant by the mortgagee to pay rent to him will not make the occupier tenant to the mortgagee. Hickman *v.* Machin, 28 L. J. Ex. 310; [4 H. & N. 716;] Cuthbertson *v.* Irving, [4 H. & N. 742; 6 H. & N. 135,] and *supra*.

It suffices to establish a holding or tenancy, without showing actual occupation by the defendant: his *constructive* possession is enough to support this count; Pinero *v.* Judson, 6 Bing. 206; How *v.* Kennett, 3 Ad. & E. 663; Wooley *v.* Watling, 7 C. & P. 610; but not unless there has been an actual entry by him; Lowe *v.* Ross, 5 Ex. 553; Towne *v.* D'Heinrich, 13 C. B. 892; *aliter* where defendant is assignee. How *v.* Kennett, *supra*. Where two persons enter into an agreement for a lease to them, an entry by *one* upon the premises may operate so as to render them both liable for use and occupation. Glen *v.* Dungey, 4 Ex. 61. But occupation by one of two executors, of premises held by the testator, will not make both liable. Nation *v.* Tozer, 1 Cr., M. & R. 172. One joint tenant holding over after expiration of term, will not make both liable in this form. Tancred *v.* Christy, 12 M. & W. 316; Draper *v.* Crofts, 15 M. & W. 166. One co-tenant of a house or a farm, who occupies the entirety, and takes all the profits, but without excluding his co-tenant, is not impliedly liable to his co-tenant for use and occupation. Henderson *v.* Eason, 12 Q. B. 986; [Gowen *v.* Shaw, 40 Maine, 56. But when one tenant in common has received more than his share of the rents of the estate owned by them in common, in money, or as bailiff of the other, the latter may maintain an action for his share. Sargeant *v.* Parsons, 12 Mass 148; Sturdivant *v.* Smith, 29 Maine, 387; Munroe *v.* Luke, 1 Met. 453; Buck *v.* Spofford, 31 Maine, 34; Stinton *v.* Richardson, 13 M. & W. 17.] A husband cannot be sued in use and occupation to recover half a year's rent of premises occupied by his wife partly before and partly after marriage. Richardson *v.* Hall, 1 B. & B. 50. It lies though defendant underlet; Bull *v.* Sibley, 8 T. R. 327; Bertie *v.* Beaumont, 16 East, 33; or the premises were burnt, defendant being bound to repair, &c. Izon *v.* Gorton, 3 Bing. N. C. 501; Ibbs *v.* Richardson, 9 Ad. & E. 849; 1 P. & D. 618; Packer *v.* Gibbins, 12 Q. B. 421; Bennett *v.* Ireland, 28 L. J. Q. B. 48; [Baker *v.* Holtzapffel, 4 Taunt. 45; Davis *v.* Alden, 2 Gray, 313; Kramer *v.* Cook, 7 Gray, 550; Foster *v.* Peyster, 9 Cush. 247; Fowler *v.* Bott, 6 Mass. 63; Leavitt *v.* Fletcher, 10 Allen, 119, 121; Beach *v.* Gray, 2 Denio, 84; Pollard *v.* Shaaffer, 1 Dall. 210; Neidelt *v.* Wales, 16 Missou. 214; Wagner *v.* White, 4 Harr. & J. 564;] or the premises have become unfit for occupation, or for the purpose for which they were let; Hart *v.* Windsor, 12 M. & W. 68; Sutton *v.* Temple, Ib. 52; [Libbey *v.* Tolford, 48 Maine, 317; Foster *v.* Peyster, 9 Cush. 242, 247; Welles *v.* Castles, 3 Gray, 323, 326; Cleves *v.* Willoughby, 7 Hill, 83; Dutton *v.* Gerrish, 9 Cush. 94; Leavitt *v.* Fletcher, 10 Allen, 119, 121; Arden *v.* Pullen, 10 M. & W. 321; Moffatt *v.* Smith, 4 Comst. 126; Royce *v.* Guggenheim, 106 Mass. 201, 202;] *aliter* perhaps in the case of furnished apartments infested with bugs. Ib.; Smith *v.* Marrable, 11 M. & W. 5. [See Howard *v.* Doolittle, 3 Duer, 464; Dutton *v.* Gerrish, 9 Cush. 89, 94. In Royce *v.* Guggenheim, 106 Mass. 202, 203, Gray J. said: "The English authorities, ancient and modern, are conclusive, that even where the landlord is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable, or unfit for the purposes for which they were leased, the tenant has no right to quit the premises, or to refuse to pay rent according to his covenant, but his only remedy is by action for damages;" and he there cites the ancient and modern authorities relied upon.] So it lies against a corporation for actual occupation by them, though there be no contract under their seal. Finlay *v.* Bristol & Exeter Ry. Co. 7 Ex. 409; Lowe *v.* London & North Western Ry. Co. 18 Q. B. 632.

Obs. Where there has been an actual enjoyment, the common count is maintainable in respect of the rent of incorporeal hereditaments; Mayor of Carmarthen v. Lewis, 6 C. & P. 608; and even for a right of working mines; Jones v. Reynolds, 4 Ad. & E. 805; Bird v. Higginson, 2 Ad. & E. 696; or a mere personal right, as a right to fish. Holford v. Pritchard, 3 Ex. 793; *ante*, 130, note (*y*).

1. *The Common Count for Use and Occupation.* (*g*)

Commencement as ante, 33.] For the defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff [*or* "of a fishery of the plaintiff," *&c. as the case may be*].

[1*a*. *Another Form.*

For the use and occupation of a certain tenement hired of the plaintiff by the defendant.]

2. *For the Rent of Furnished or Unfurnished Lodgings.* (*h*)

For money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of rooms and apartments being part of a messuage of the plaintiff, with certain furniture, and effects, and chattels of the plaintiff therein, and for [*add account stated and conclusion*, *ante*, 34, Form 1].

3. *Upon a Lease for Rent.* (*i*)

For that the plaintiff let to the defendant a house, No. 401 Piccadilly, for seven years, to hold from the —— day of ——, A. D. ——, at £—— a year, payable quarterly, (*j*) of which rent —— quarters are due and unpaid. And the plaintiff claims £——.

4. *By a Lessor against his Lessee on his Covenant for Non-payment of Rent.* (*k*)

For that the plaintiff, by deed, (*l*) let (*m*) to the defendant a house, land,

(*g*) This form is given by the Com. L. P. Act, 1852, sch. B, 9, 10. The local situation of the premises need not be stated; King v. Frazer, 6 East, 348; Egler v. Marsden, 3 Taunt. 128; Davis v. Edwards, 3 M. & Sel. 380; the *venue* is transitory; Kirtland v. Pounsett, 2 Taunt. 145; Egler v. Marsden, 5 Taunt. 28; and see Mortimer v. Preedy, 3 M. & W. 604.

(*h*) For board and lodging, *ante*, 87. A contract for board and lodging is not a contract for an interest in land within the statute of frauds. Wright v. Stavart, 29 L. J. Q. B. 161. There is no duty on the part of a lodging-house keeper to take care of his lodger's goods. Houlder v. Soulby, 29 L. J. C. P. 246.

(*i*) This form is given by the Com. L. P. Act, 1852, sch. B, 28. See *supra*, Observations. This is an anomalous form; but it is frequently preferable to use and occupation, as the defendant cannot change the *venue* when it is adopted. Herring v. Watts, 8 Scott N. R. 755; 2 D. & L. 609. It applies to a lease under seal, except in a case of a demise of *incorporeal* hereditaments; it will be observed the lease is not set out; see 1 Saund. 276, note (1), 202, 325, note (4); 2 Ib. 297, note (1); Atty v. Parish, 1 New R. 104, 109; the lease may yet be given in evidence to support the demand at the trial, if the demise be denied by the plea. A lease, even though *cancelled*, if cancelled by consent of the parties after the rent accrued due, may be given in evidence. Ward v. Lumley, 5 H. & N. 87.

(*j*) Rent is payable yearly unless otherwise reserved. Gray v. Chamberlain, 4 C. & P. 260; Com. Dig. Rent, B. 8.

(*k*) The lessee is liable at all times upon his express covenants contained in the lease, notwithstanding he has assigned the term, and he may be sued in the above form; but not in the preceding form on the mere reservation of rent, where the lessor has adopted the assignee as his tenant by receiving rent from him. *Ante*, Obs.; 1 Saund. 240; Wadham v. Marlowe, 1 H. Bl. 437, note; 8 East, 314, note.

(*l*) The word "indenture" would import

(*m*) The legal effect may be stated. Wilson v. Bramhall, 1 Y. & J. 2; [1 Chitty Pl. 312, and note.] As to mode of describing leases under powers to lease, see Portmore v. Bunn, 1 B. & C. 694; Isherwood v. Oldknow, 3 M. & S. 382; Yellowly v. Gower, 11 Ex. 274; Morris v. The Rhydydefed Colliery Co. 8 H. & N. 885, Ex. Ch.; 19 & 20 Vict. c. 120.

and premises, (*n*) situate in the county aforesaid, (*o*) to hold to the defendant from the —— day of ——, A. D. ——, for —— years, (*p*) at £—— per year, payable quarterly, that is to say, on [*&c. stating the days of payment* (*q*)]; and the defendant thereby covenanted with the plaintiff to pay him the said rent as aforesaid; (*r*) yet two quarters of the said rent are in arrear and unpaid. And the plaintiff claims £——.

5. *By Lessor against Lessee upon a Covenant to Repair.* (*s*)

For that the plaintiff, by deed, let to the defendant a house, No. 401 Piccadilly, to hold for seven years from the —— day of ——, A. D. ——, and the defendant, by the said deed, covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*]; (*t*)

an instrument in writing under seal; Aveline *v.* Whi-son, 4 M. & G. 801; *ante*, 50, note (*l*); it is not necessary to state the date of the lease; Hall *v.* Cazenove, 4 East, 477; it is generally unnecessary to state the parties to the deed, but it may be so in some cases where title has to be deduced from the lessor, or where the covenant is not with the lessor. If they be described, see Mayelston *v.* Palmerston, 2 C. & P. 474; M. & M. 6; Arnold *v.* Revoult, 1 B. & B. 433, as to the mode of description. No profert of the deed is necessary. Com. L. P. Act, 1852, s. 55.

(*n*) It is unnecessary to describe the premises fully. 1 Saund. 233, note (2); 2 Saund. 366, note (1); [1 Chitty Pl. 311.] A variance would be amendable at the trial.

(*o*) As to the statement of the local description, &c. see *supra*, Obs. When the *venue* is transitory, it need not be stated in the declaration where the premises are situate.

(*p*) The term for which the premises are demised should be stated. Turner *v.* Lamb, 14 M. & W. 412; 2 D. & L. 871. Sometimes the *habendum* runs, "determinable nevertheless as hereinafter mentioned," and the lease subsequently contains a clause for determining the lease by written notice at the end of seven or fourteen years. In this case add the words, "determinable," &c. and set forth the clause alluded to in the declaration, and after showing the lessee's entry, if the lease has been determined by the notice, show the fact as follows: "And the plaintiff avers that afterwards and during the said term of twenty-one years, to wit, at the expiration of the first seven years of the said term, that is to say, on [*&c.*] the said term was ended and determined by virtue of a certain notice in writing, given by the *defendant* to the *plaintiff* six calendar months before the expiration of the first seven years of the said term of twenty-one years, to wit, on [*&c.*] of his the defendant's intention to quit the said premises, and desire to determine the said term at the expiration of the said first seven years of the said term of twenty-one years." But where the *habendum* is for twenty-one years absolutely, a power to determine, contained in a separate clause, not before referred to, need not be noticed. Hill *v.* Sanders, 1 C. & P. 80; *infra*, note (*i*). Demise for seven years, with a proviso that, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants from year to year until notice to determine it. Held to be a continuing demise, after the seven years, until determined by notice, and that the covenants were binding. Brown *v.* Trumper, 26 Beav. 11.

(*q*) The common form of reddendum in a lease is to the above effect. If there be any *exception* in the reddendum it should be stated. As to the construction of the words "free of all outgoings," see Parish *v.* Sleeman, 29 L. J. Ch. 96; "damage by fire excepted," Bennett *v.* Ireland, 28 L. J. Q. B. 48. In Vavasour *v.* Ormrod, 6 B. & C. 430, the reservation was "except as hereinafter mentioned," referring to a subsequent proviso, by which a deduction was to be made in a certain event, which had not happened. Held, a variance to state the reservation as absolute. But where a lease contained a distinct *proviso* that if a certain event should happen after the execution of the lease, the rent reserved should be reduced, it was held that the covenant to pay rent might be declared on as an absolute covenant. Grogan *v.* Magan, 1 Alcock & Napier, 366 (*Irish*); and see Thibault *v.* Gibson, 12 M. & W. 88.

(*r*) An averment of the lessee's entry, and of his becoming possessed of the term, is not necessary. 1 Saund. 203, note (1).

(*s*) This form is given by the C. L. P. Act, 1852, sch. B, 24. [See Coward *v.* Gregory, L. R. 2 C. P. 152.]

(*t*) If there be any qualification or proviso in the covenant that the landlord shall, in the first instance, put the premises in good repair, Neale *v.* Ratcliffe, 15 Q. B. 916, or shall provide timber or materials for repairs, it must be stated; and there must be an allegation that the landlord has performed all conditions precedent. Thomas *v.* Cadwallader, Willes R. 496; Lewis *v.* Wells, 7 C. & P. 222; Campbell *v.* Jones, 6 T. R. 571; Levy *v.* Herbert, 7 Taunt. 314; Bristol, Dean and the Chapter of, *v.*

yet the said house was, during the said term, out of good and substantial repair. (*u*) And the plaintiff claims £——.

Jones or Nugent, 28 L. J. Q. B. 201; 5 Jur. N. S. 956; Martyn *v.* Clue, 18 Q. B. 661; [1 Chitty, Pl. 329.] See form of averment of performance of conditions precedent, *ante*, 39. It is also necessary to state any exceptions in the covenant, such as "reasonable use and wear," "casualty by accidental fire," or "tempest;" Brown *v.* Knill, 2 B. & B. 395; Tempany *v.* Burnand, 4 Camp. 20; 1 Chit. Pl. 7th ed. 311; Wright *v.* Goddard, 8 Ad. & E. 148; the breach will in such latter cases be, "Yet the said house, &c. was during the said term out of good and substantial repair, besides reasonable use and wear thereof, and although no casualty happened thereto by fire or tempest." See the next form. So if the covenant be to repair after notice *in writing*, it must be so described in the declaration. Although there be a covenant to repair *after notice*, yet if there be a *general* covenant to repair, the action may be grounded on the latter covenant, which is independent. Doe *v.* Meux, 4 B. & C. 606; Wood *v.* Day, 7 Taunt. 646; Baylis *v.* Le Gros, 4 C. B. N. S. 537; 4 Jur. N. S. 513. Evidence, &c.; Mantz *v.* Goring, 4 Bing. N. C. 454; if breaches are assigned on each of the covenants, the damages from each should be separately stated. Wright *v.* Goddard, 8 Ad. & E. 144, 148.

(*u*) A covenant to *keep* in repair is broken by non-repair during the term, though the term be not ended; Luxmore *v.* Robson, 1 B. & Ald. 584; and the landlord, in an action brought *during* the term, is entitled to more than nominal damages; Bell *v.* Hayden, 9 Ir. C. L. Rep. 301, Q. B.; the measure of damages is in general the amount required to put the premises in repair; in some cases the amount to which the reversion is injured at the time of action brought by the premises being out of repair. Doe *v.* Rowlands, 9 C. & P. 734; Smith *v.* Peat, 9 Ex. 161, observed upon in Davies *v.* Underwood, 2 H. & N. 570. As to the measure of damages where the premises have been destroyed by fire, and have to be rebuilt, Yates *v.* Dunster, 11 Ex. 15. In actions of this kind the age and condition of the premises at the time when the tenancy commenced must be considered. Mantz *v.* Goring, 4 Bing. N. C. 451; Stanley *v.* Towgood, 3 Ib. 4; Burdett *v.* Withers, 7 Ad. & E. 136; Hart *v.* Windsor, 12 M. & W. 77, per Parke B.; Payne *v.* Haine, 16 M. & W. 541. [Where there is an express and unconditional agreement to repair and keep in repair, the tenant is bound to do so, although the premises be destroyed by fire, or other accident. Paradine *v.* Jane, Aleyn, 27; Bullock *v.* Dommett, 6 T. R. 650; Digby *v.* Atkinson, 4 Camp. 275; rule recognized in Spence *v.* Chadwick, 10 Q. B. 517, 530. "It has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger." Gray J. in Leavitt *v.* Fletcher, 10 Allen, 121; Wells *v.* Calnan, 107 Mass. 517, 518; Fowler *v.* Bott, 6 Mass. 63; Kramer *v.* Cook, 7 Gray, 550; Warren *v.* Hitchins, 5 Barb. 66; Proctor *v.* Keith, 12 B. Mon. 252; Jaques *v.* Gould, 4 Cush. 384, 388; Wilde J. in Bigelow *v.* Collamore, 5 Cush. 226, 231; Allen *v.* Culver, 3 Denio, 294; Dermott *v.* Jones, 2 Wallace, 7, 8; 3 Kent, 468; Tilden *v.* Tilden, 13 Gray, 103, 109; Graves *v.* Berdan, 26 N. Y. 498; S. C. 29 Barb. 100; Womack *v.* McQuarry, 28 Ind. 103. But where A. agreed with B. to give him the use of a music hall on certain specified days, for the purpose of holding concerts, with no express stipulation for the event of the destruction of the music hall by fire, it was held that, upon the occurrence of such event, both parties were excused from performance of the contract. Taylor *v.* Caldwell, 3 B. & S. 826. The principle of the distinction is stated in this case by Blackburn J. See, also, Appleby *v.* Myers, L. R. 2 C. P. 651; Ford *v.* Cotesworth, L. R. 5 Q. B. 544, 548; Lovering *v.* Buck M. Coal Co. 54 Penn. St. 291; Kerr *v.* Merchants' Exchange Co. 3 Edw. Ch. 315; Winton *v.* Cornish, 5 Ohio, 477; Stockwell *v.* Hunter, 11 Met. 448; Buerger *v.* Boyd, 25 Ark. 441; Ainsworth *v.* Ritt, 38 Cal. 89; McMillan *v.* Solomon, 42 Ala. 356.] There is a distinction between a covenant to *keep* in repair and a covenant to *put* in repair; in either case the tenant is not bound to substitute *new* for *old* premises; Soward *v.* Leggatt, 7 C. & P. 613; Belcher *v.* McIntosh, 3 M. & Rob. 186; Maltyn *v.* Clue, 18 Q. B. 661, 674; but a tenant under a covenant "well and substantially to repair and keep in good substantial repair, and so well and substantially repaired to give up at the end of the term," is bound to give up the premises in as good a state as when he took them, and it will be inferred that they were then in a tenantable state. Brown *v.* Trumper, 26 Beav. 11. A covenant to keep in repair, does not extend to repair of damage done before the lease was executed, though after the date fixed for the commencement of the term Shaw *v.* Kay, 1 Ex. 412. As to the meaning of the term "habitable repair," Belcher *v.* McIntosh, 8 C. & P. 720. Breach in non-repair of *external* walls, &c. Green *v.* Eales, 2 Q. B. 225.

[6. *Lessor against Lessee upon a Covenant to repair, subject to certain Exceptions.*

That the plaintiff by deed let to the defendant a house, to hold for —— years from the —— day of —— A. D. ——, and the defendant by the said deed covenanted with the plaintiff to keep the said house in good and substantial repair (*x*) during the term, casualties by fire or tempest &c. [*according to the covenant*] excepted; yet the said house during the said term was not in good and substantial repair, although no casualty by fire or tempest &c. [*according to the covenant*], happened thereto. [*The covenant should be stated accurately, with all the exceptions contained in it, as,* casualties by fire &c.; Browne *v.* Knill, 2 B. & B. 395; reasonable wear and tear; Wright *v.* Goddard, 8 Ad. & El. 144; and *the breach must follow the terms of the covenant in this respect.*]

6*a*. *For not delivering up the Premises in good Repair.*

That the defendant became and was tenant to the plaintiff of a messuage and premises of the plaintiff for a term of —— years from the —— day of ——, A. D. ——, upon the terms, amongst other things, that the defendant should, at the expiration of the said term, deliver up to the plaintiff the said messuage and premises, with all fixtures thereon, in the same state and condition as they were in at the time of the defendant becoming such tenant as aforesaid, reasonable wear and tear only excepted; and the said term expired, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to a performance by the defendant of the said terms; yet the defendant did not, at the expiration of the said term, deliver up to the plaintiff the said messuage and premises with all the fixtures thereon, in the same state and condition as they were in at the time of the defendant becoming such tenant as aforesaid, reasonable wear and tear only excepted.]

7. *By Landlord, on an Agreement for renting Apartments against the Tenant for not paying his Proportion of Rates and Taxes as agreed.*

Hooper *v.* Woolmer, 10 C. B. 870. Declaration for not paying taxes. Tremeere *v.* Morrison, 1 Bing. N. C. 89; Hurst *v.* Hurst, 4 Ex. 571.

8. *Against a Tenant for not keeping the Premises in Tenantable Repair, contrary to his express Agreement not under Seal.* (*y*)

For that the plaintiff let to the defendant a messuage and premises, with the appurtenances, of the plaintiff, to hold for one year from the —— day of ——,

(*x*) A covenant in a lease to repair all buildings then standing or to be erected during the term, extends to buildings erected by the tenant during the term, partly on the demised land and partly on the waste land adjoining. Newbury *in re* White *v.* Wakley, 28 L. J. Chan. 77. An assignee, though not named, is liable to repair buildings erected during the term. Minshull *v.* Oakes, 2 H. & N. 793. A covenant to repair and amend does not include a covenant to paint. Darlington *v.* Hamilton, 24 L. J. 33, V. C. W.

(*y*) The *venue* is transitory. Buckworth *v.* Simpson, 1 Cr., M. & R. 834. See form, &c. Richardson *v.* Gifford, 1 Ad. & E. 52. It was there held to be applicable where the defendant took the premises for three years and a quarter, and engaged to keep them in good

A. D. —— [and so on from year to year so long as they should respectively please], *upon the terms* that the defendant should during his tenancy [put and] keep the said premises in *good and tenantable* repair [*according to the agreement* (*z*)]; yet the defendant did not during such tenancy [put and] keep the said demised premises in good or tenantable repair, and the same were during such tenancy out of good and tenantable repair [*this will depend upon the extent of defendant's contract*], and still are in bad and untenantable repair. (*a*) [*See next form, which may be added as a second count.*]

9. *For not using the Premises in a Tenant-like Manner.* (*b*)

For that the defendant became and was tenant to the plaintiff of a messuage and premises of the plaintiff, upon the terms that he should use the same in a tenant-like and proper manner during the said tenancy; yet the defendant, during the said tenancy, used the said messuage and premises in an untenantlike and improper manner. (*c*)

10. *Against a Tenant for not Repairing, &c. who held over at an increased Rent, but on the same Terms in other Respects as those contained in an old Lease granted by Plaintiff's Predecessor.*

Walliss *v.* Broadbent, 4 Ad. & E. 877.

OBS. — The declaration may allege that the defendant became and was tenant to the plaintiff of a messuage or farm and lands, &c. upon the terms that (stating those terms of the holding which have been broken by the defend-

repair; but the agreement being unsigned, was void under the statute of frauds as regarded the duration of the term. See another form, Dietrichsen *v.* Giubelei, 14 M. & W. 845. If there be a *lease* or written agreement as to repairs, the declaration should be grounded thereon. See forms 5 and 6. Where the demise is not under seal, the lessor may sue the tenant on his contract to repair, although the lessor has assigned the reversion. Bickford *v.* Parson, 5 C. B. 920. As to the liability of a tenant to repair, in the absence of an express covenant or agreement, see Co. Litt. 57 *a*; 2 Saund. 352, note (7); [1 Chitty Contr. (11th Am. ed.), 466 *et seq.*;] per Bayley J. in Wise *v.* Metcalfe, 10 B. & C. 312; Anworth *v.* Johnson, 5 C. & P. 239. [See Mumford *v.* Brown, 6 Cowen, 475; Long *v.* Fitzsimmons, 1 Watts & S. 530; Libbey *v.* Tolford, 48 Maine, 318.] A yearly tenant, or tenant not under agreement to repair, is only bound impliedly to keep the premises in *tenantable* repair, *i. e.* to keep the premises wind and water tight, repair broken windows, tiles, &c. to *prevent* injury; Torriano *v.* Young, 6 C. & P. 8; Harnett *v.* Maitland, 16 M. & W. 257; and the state of the premises at the time of the demise is material. Burdett *v.* Withers, 7 Ad. & E. 136; *post*, Declarations in Tort, "Landlord and Tenant." There is also an implied promise to use the premises in a tenant-like manner (see next form), which should in general be added as a second count in cases where *damage* has been wantonly done. In Brown *v.* Crump, 6 Taunt. 300, the declaration stated, that in consideration that the defendant *had become* and was tenant to the plaintiff of a certain messuage (*not adding* "upon the terms," &c. *as above*), he promised to keep it in tenantable repair, and to *uphold* and *support*, and to *leave the premises in the state he found them*. This was held bad (*after verdict*), such a promise not resulting, or being implied by law, from the relation of landlord and yearly tenant. See other similar instances. Granger *v.* Collins, 6 M. & W. 458; and Jackson *v.* Cobbin, 8 M. & W. 790.

(*z*) If there be any condition or exception to the defendant's agreement it should be stated, *ante*, 185, note (*s*).

(*a*) Damages for not being able to re-let may be laid and recovered. Woods *v.* Pope, 6 C. & P. 782; 1 Bing. N. C. 467.

(*b*) This form is founded on the promise implied by law; see *supra*, note (*y*); where there is no express contract as to repairs. Standen *v.* Christmas, 10 Q. B. 135; Colley *v.* Streeton, 2 B. & C. 273; White *v.* Reeve, 4 M. & G. 95. The plaintiff would not be allowed to recover on the last count as well as on this. Holford *v.* Dunnett, 7 M. & W. 348; *ante*, 5, note (*a*); Dare *v.* Ivey, 3 G. & D. 470.

(*c*) This amounts to an allegation of *voluntary*, and does not include *permissive* waste. Martin *v.* Gilham, 7 Ad. & E. 540; post, Declarations in Tort, tit. "Landlord," &c. and see Marker *v.* Kenrick, 13 C. B. 98.

Obs. ant, and assigning a breach, as in the preceding forms). In such case both the fact of defendant's continuing to hold over *as tenant*, and also *on what terms* he held over, are for the jury. Johnson *v.* Churchwardens of St. Peter, 4 Ad. & E. 526, per Lord Denman; and Jones *v.* Shears, Ib. 437; Elgar *v.* Watson, 1 Car. & M. 494; Drury Lane Company *v.* Chapman, 1 Car. & K. 14. In the absence of evidence to the contrary, a tenant under a lease holding over becomes tenant from year to year, subject to such covenants in the lease as are applicable to and not inconsistent with that species of estate. Doe *v.* Amey, 12 Ad. & E. 476; Thomas *v.* Packer, 1 H. & N. 669; Tooker *v.* Smith, 1 H. & N. 732; Clarke *v.* Smarridge, 7 Q. B. 957; Hyatt *v.* Griffiths, 17 Q. B. 505; [Oakley *v.* Monck, 3 H. & C. 706; S. C. L. R. 1 Ex. 159;] Mayor of Thetford *v.* Tyler, 8 Q. B. 95; Finch *v.* Miller, 5 C. B. 428. And if the breach happened during the term created by a lease under seal, the tenant could not be sued on the new implied promise to repair the premises that were in the very condition when he became tenant, in which he is supposed by the implied promise to have undertaken they should never fall into. Johnson *v.* The Churchwardens of St. Peter, Hereford, 4 Ad. & E. 526. A new tenancy is not necessarily created by an increase or decrease of rent. Doe *v.* Geekie, 1 Car. & K. 307; 5 Q. B. 841, S. C.; Digby *v.* Atkinson, 4 Camp. 275; Clarke *v.* Moore, 1 Jones & Lat. 723 (Irish). One joint tenant cannot bind the other by himself holding over. Christie *v.* Tancred, 9 M. & W. 438; 12 M. & W. 316, S. C.; Draper *v.* Crofts, 15 M. & W. 166.

11. *Similar Form against a New Tenant who came in on the Terms of the Old Holding.*

Arden *v.* Sullivan, 14 Q. B. 832; Buckworth *v.* Simpson, 1 Cr., M. & R. 834.

Obs. — *Semble*, forms 8 and 9 would suffice both for this and the last case. See a form on an agreement to farm land in the same way that an outgoing tenant had farmed it. Lord Hood *v.* Kendall, 17 C. B. 260. As to charging the assignee of a termor, see How *v.* Kennett, 3 Ad. & E. 659. Assignees of a bankrupt, Thomas *v.* Pemberton, 7 Taunt. 206; Hanson *v.* Stevenson, 1 B. & Ald. 303; Clarke *v.* Hume, Ry. & Moo. 207; a tenancy from year to year is a *term* that may vest in them by the statute, per Littledale J. in How *v.* Kennett, *supra*. And see Naish *v.* Tatlock, 2 H. Bl. 319. So a tenancy under a parol agreement. Slack *v.* Sharp, 8 Ad. & El. 366; 3 N. & P. 390; and see Lambert *v.* Norris, 2 M. & W. 333.

12. *Against a Tenant, for not cultivating a Farm according to the Custom of the Country.* (*d*)

For that the defendant became and was tenant to the plaintiff of a farm, lands, and premises, situate in the county aforesaid, [*or*, "county of ——,"] upon the terms that he the defendant should manage, use, and cultivate the said farm, lands, and premises in a good and husbandlike manner, and according to the custom of the country where the said farm, lands, and premises were situate; (*e*) yet the defendant did not during the said tenancy manage, use, or

(*d*) See forms, &c. Earl of Falmouth *v.* Thomas, 1 Cr. & M. 19; Angerstein *v.* Handson, 1 Cr., M. & R. 789. This form is founded on the implied promise of the tenant of a farm. See Ib.; Powley *v.* Walker, 5 T. R. 373; Horsefall *v.* Mather, Holt N. P. R. 7, 8; [1 Chitty Contr. (11th Am. ed.) 471, 472; Lewis *v.* Jones, 17 Penn. St. 262; Bell J. in Moulton *v.* Robinson, 27 N. H. 561; Nesmith J. in Perry *v.* Carr, 44 N. H. 120.] Where there is a lease or particular agreement on the subject of cultivation, the custom — and consequently this form — does not apply; see Webb *v.* Plummer, 2 B. & Ald. 746; Holding *v.* Piggott, 7 Bing. 465; Roberts *v.* Barker, 1 Cr. & M. 808; unless the lease be not inconsistent with the custom. Hutton *v.* Warren, 1 M. & W. 466; Clarke *v.* Royston, 13 M. & W. 752; Muncey *v.* Dennis, 1 H. & N. 216.

(*e*) Evidence is not admissible of the custom of a particular estate, or the property of a particular person, however extensive it may be, it not being shown that the tenant was aware of it. Womersley *v.* Dally, 26 L. J. Ex. 219.

cultivate the said farm, lands, and premises in a good and husbandlike manner, and according to the said custom.* (*f*)

13. *A Similar Form, but alleging Specific Breaches.*

As in the preceding form to the asterisk, and then as follows:] In this, that the defendant, during the said tenancy, had more than one half of the said demised arable land in corn. And that the defendant omitted and neglected to have one fourth or any part whatever of the said arable land in seed eaten by cattle. And that the defendant suffered and permitted a small portion and much less than one fourth of the said arable land, to be in fallow or turnips [*alleging any other breaches of the customary mode of farming*], whereby the said farm and lands became exhausted, unproductive, and diminished in value.

14. *On a Written Demise (not under Seal) for not fallowing or manuring; for removing Manure, and yielding up the Lands in a Deteriorated State, &c.* (*g*)

For that by agreement made by and between the plaintiff and defendant the plaintiff agreed to let and the defendant agreed to take certain arable and other lands and tenements, to hold the same to the said defendant from the [*&c.*], for the term of [three] years (*h*) thence next ensuing, at the yearly rent [*&c.*]; and the defendant thereby agreed with the plaintiff that he the defendant would, during the said tenancy, after every crop of wheat that should be grown on any part of the said arable land, let such land remain in fallow and out of tillage for one year at least, or sow the same either with clover, tares, pease, or beans, and if of either of the two latter description of crops should and would drill and keep the same perfectly clear; and also would in a husbandlike manner spend and employ in and upon the said lands thereby let, all the manure arising from the hay and straw that should grow and be made

(*f*) Where a declaration had this allegation, it was held that evidence that the agreement was to farm the land in a husbandlike manner, "to be kept constantly in grass," could not be received. Saunderson *v.* Griffiths, 2 B. & C. 909. The declaration should have been framed on such particular stipulation. An amendment at the trial may now be allowed. The breach as laid in the text applies to *bad* cultivation. If defendant has not cultivated the land at all, the breach should be to that effect. The breach as laid is proved by showing a breach of the *prevalent* course in the *neighborhood;* as by tilling half, no other farmer tilling more than a third, though some tilled only a fourth. Legh *v.* Hewett, 4 East, 154; Dalby *v.* Hirst, 1 B. & B. 224. In the Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89, 110, 111, it seems to have been considered doubtful whether a general breach in this form, not showing what was the custom of the country, or in what particular it has been violated, was sufficient on *special* demurrer; and *semble*, it is prudent in cases where there is no difficulty as to the facts to set out the custom, &c. but, if stated, and traversed by the defendant (see Pleas, *post*), it must be proved as laid. See Angerstein *v.* Handson, 1 Cr. M. & R. 789. In Harris *v.* Mantle, 3 T. R. 307, the declaration charged that the defendant had not used the farm in a husbandlike manner, "but on the contrary thereof had committed waste;" and it was held that it was not sufficient for him to prove merely that defendant had used the farm in an unhusbandlike manner, but that the form of allegation bound the plaintiff to prove that defendant had committed waste: and see Edge *v.* Pemberton, 12 M. & W. 187; 1 D. & L. 467.

(*g*) See other forms on farming leases, Hammond *v.* Colls, 1 C. B. 916; 3 D. & L. 164; Hindle *v.* Pollett, 6 M. & W. 529; Lowndes *v.* Fountain, 11 Ex. 487; 25 L. J. Ex. 49; Tooker *v.* Smith, 1 H. & N. 732; Fuller *v.* Fenwick, 3 C. B. 705; Lord Hood *v.* Kendall, 17 C. B. 260.

(*h*) A demise for more than three years from the making thereof must be under seal *Ante*, 179, Obs.

thereon during the continuance of the said agreement, or in case any part of such hay and straw should be sold, then would expend so much of the money arising from such sale in purchasing as much good dung and manure as the said hay and straw would have produced if the same had been used and consumed on the said lands thereby let; and also would, from time to time and at all times during that agreement, immediately after every crop of potatoes on any part of the said lands thereby let, lay out, expend, and spread in a husbandlike manner, on each and every acre of such land, as much good lime or dung as should at such time or times be of the value of £3 at the least for each acre of potatoes as therein aforesaid; and also should and would, at the expiration of the term, peaceably and quietly leave, surrender, and yield up to the plaintiff the lands, hereditaments, and premises thereby let, in the same or the like good state and condition as the same then were. And the defendant entered upon and held the said premises and was tenant thereof to the plaintiff upon the terms aforesaid for and during the said term, and although the plaintiff hath performed [*general averment of all conditions precedent, as ante*, 39]; yet the defendant disregarded the said agreement in this, that although a crop of wheat was, during the first year of the said term and tenancy, grown on part of the said demised arable land, he the defendant did not, after such crop of wheat, let such land remain at fallow and out of tillage for one year at least or otherwise, or sow the same either with clover, tares, pease, or beans; and although the defendant did, during the said term, sow a certain other part of the said arable lands with a crop of beans, a crop of wheat having immediately before that time and during the said term been grown on the said last-mentioned part of the said arable lands, yet the defendant did not drill the said last-mentioned part of the said arable land and keep the same perfectly clear; and although divers, to wit, 500 cart-loads of manure, from time to time during the said term, arose from the hay and straw that were during that time grown and made on the said lands, yet the defendant did not nor would, during the said term, in a husbandlike manner or otherwise, spend or employ in and upon the said lands (*i*) any part of the said manure. And although a crop of potatoes was, during the last year of the said term, grown on and taken by the defendant from a certain part of the said land, yet the defendant did not, during the said term, at any time after such crop, lay out, expend, or spend in a husbandlike manner or otherwise on any part of the land on which the potatoes were grown, as much good lime or dung as was at that time of the value of £3, or any other sum, for each of the said acres of potatoes. And the defendant further disregarded the said agreement in this, that he the defendant, at the end of the said term, left the said demised premises in a much worse state and condition than the same were in at the time of the making of the said agreement, whereby the said lands were deteriorated in value, and the plaintiff was unable to re-let the same. And the plaintiff claims £——.

(*i*) When the terms are that the tenant shall not sell any straw or manure without the landlord's license, he is disabled from selling it, even after the tenancy has expired. Massey *v.* Goodall, 17 Q. B. 310. As to this breach, Hindle *v.* Pollett, 6 M. & W. 529 As to breach for selling hay and straw, see Lowndes *v.* Fountain, 11 Ex. 487; Leigh *v.* Lillie, [6 H. & N. 165;] 30 L. J. Ex. 25 *infra*.

15. *For Breach of a Covenant not to plough up or convert Pasture Land into Tillage, or to pay an increased Rent for every Acre ploughed up.*

For that the plaintiff by deed let to the defendant a certain farm and lands [*&c. as ante*, 184, Form 4, *stating the demise to the defendant, and the defendant's covenant, the breach of which is complained of; if the covenant be to pay an increased rent at the same time that the reserved rent is payable, then the declaration should show how the reserved rent was payable; this will not be necessary if* one *payment in the nature of a penalty is reserved.* (*k*) *And then assign a breach according to the words of the covenant, as follows:*] yet the defendant, during the said term, that is to say, in and during the year A. D. ——, ploughed up and converted into tillage —— acres of the said demised *pasture lands*, whereby he became liable to pay to the plaintiff the said increased *rent* of £5 for each of the said acres so ploughed up and converted into tillage, that is to say, at the first and next rent day which happened after the said forfeiture. And [*although all conditions, &c. as ante*, 39] yet £—— for and in respect of such increased rent for —— quarters ending on the —— day of ——, A. D. ——, and then last elapsed, is now due and unpaid to the plaintiff. And the plaintiff claims £——.

16. *By Lessor against Lessee on Covenant not to cut down or lop or top Trees under a Penalty of £20 for each Tree cut, lopped, or topped.*

OBS. — Plaintiff may proceed for the penalty, or for unliquidated damages. If in his declaration he does not allege non-payment of the penalty, it must be assumed that the plaintiff sues for the breach of covenant in cutting and lopping, and not for non-payment of the penalty, and the jury are not bound to give the whole penalty. Hurst *v.* Hurst, 4 Ex. 571; Leigh *v.* Lillie, 30 L. J. Ex. 25.

17. *By a Landlord against his Tenant, for not delivering up Possession, whereby the Superior Landlord recovered Double Rent and Costs against the Plaintiff.* (*l*)

For that the plaintiff was possessed of a certain warehouse and premises as tenant thereof to one E. F., for the remainder of a term of —— years, ending on the —— day of ——, A. D. ——, at a yearly rent of £——, payable quar

(*k*) A sum reserved for every acre of land ploughed up may be recovered as liquidated damages, even though it be termed a penalty. Jones *v.* Green, 3 Y. & J. 304; Birch *v.* Stephenson, 5 Taunt. 469; Farrant *v.* Olmius, 3 B. & Ald. 692; Fuller *v.* Fenwick, 3 C. B. 705, 712; Bringloe *v.* Goodson, 8 Scott, 71. Where the sum is reserved as a further rent, payable on the same days as the rent of the premises, the increased rent attaches upon *one* breach, and is payable until the end of the term. Bowers *v.* Nixon, 12 Q. B. 558. As to what is a user of land, otherwise than for pasture or meadow, Aldridge *v.* Howard, 4 M. & G. 921; *post*, form 27. Where the covenant is not to do an act except under a penalty or increased rent, the declaration *must* allege non-payment of the penalty or rent, as the covenant is, in effect, a license to do the act on payment of such penalty or rent. Leigh *v.* Lillie, 6 H. & N. 165.

(*l*) Where a tenant holds over after notice to quit, his landlord may recover against him the damages and costs which he the landlord has been compelled to pay a third party to whom he had agreed, to the tenant's knowledge, to let the premises, and to whom he was unable to give possession. Bramley *v.* Chesterton, 2 C. B. N. S. 592.

terly by the plaintiff to the said E. F.; and the plaintiff let to the defendant the said warehouse [*&c.*], and the defendant became tenant thereof to the plaintiff upon the terms that he the defendant would quit and yield up possession of the said warehouse [*&c.*] to the plaintiff, on demand, at the expiration of the said term, and of the plaintiff's said interest therein; yet the defendant did not quit or yield up the said warehouse [*&c.*] to the plaintiff at the expiration of the said term, although then requested by the plaintiff so to do, but wrongfully withheld the possession thereof from the said plaintiff and the said E. F., for a long time after the expiration of the said term, and of the said interest of the plaintiff therein; by reason whereof the said E. F., after the expiration of the said term, brought an action against the plaintiff for the recovery of double the value of the said premises to which he was entitled for the holding over of the said warehouse [*&c.*] by the defendant as aforesaid, and the plaintiff was compelled to and did pay to the said E. F. £——, being the amount of the damages payable by the plaintiff in respect of the possession of the said warehouse [*&c.*] being withheld and held over as aforesaid, and of the costs of the said E. F. in the said action; and the plaintiff also incurred expenses in resisting and settling the said action. And plaintiff claims £——.

18. *By a Landlord for Double Value against his Tenant for holding over after Notice to quit given by the Landlord.* (*m*)

Commencement, as ante, 5.] For that the defendant was tenant to the plaintiff of a messuage and premises, to wit, from year to year, (*n*) for so long a time as the plaintiff and defendant should respectively please, [*or* "for a certain term of years ending on the —— day of ——, A. D. ——,"] the reversion of the said premises, with the appurtenances, during all that time belonging to the plaintiff; and thereupon, during the said tenancy, and whilst the said reversion thereof belonged to the plaintiff as aforesaid, the plaintiff gave

(*m*) By the stat. 4 Geo. 2, c. 28, s. 1, "in case any tenant for life, lives, or years, or other persons who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall *wilfully* hold over any lands, &c. after the determination of their term, and after demand made and notice in writing given for delivering the possession thereof by his or their landlord or lessor, or the person to whom the remainder or the reversion of such lands, &c. shall belong, his or their agents thereunto lawfully authorized, such persons so holding over shall, for the time he or they shall so hold over or keep the person or persons entitled out of the possession of the said lands, &c. pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the said lands, &c. for so long time as the same are detained, to be recovered by action of debt in one of the queen's courts of record." Chitty's Statutes by Welsby, tit. "Landlord and Tenant;" Woodfall, Land. and Tenant. Where a term expires by efflux of time, or a yearly tenancy is determined by notice to quit given by the *landlord*, the latter is entitled to double the yearly *value* of the premises, under the 4 Geo. 2. Where the tenant holds over after *he* has given notice, the claim is for double *rent* under 11 Geo. 2, c. 19, s. 18. See *post*, 194, form 19. It is only the landlord or person who stands in the relation of landlord to the defendant at the end of the tenancy who can bring this action; a person to whom the landlord has re-let the premises cannot sue. Blatchford *v.* Cole, 28 L. J. C. P. 140. Tenants in common cannot sue *jointly* for double *value* for holding over, unless there has been a joint demise by them. Wilkinson *v.* Hall, 1 Bing. N. C. 713; 3 Bing. N. C. 510. Husband and wife cannot join in action where there is a parol demise by husband alone of land of which he is seised in right of his wife. Harcourt *v.* Wyman, 3 Ex. 817. As to whether one joint tenant is liable for the holding over of the other, see Hirst *v.* Horn, 6 M. & W. 393.

(*n*) A quarterly tenancy will not support this allegation. Wilkinson *v.* Hall, *supra*.

notice in writing to the defendant, (*o*) and thereby then demanded (*p*) and required the defendant to quit and deliver up the possession of the said tenements, with the appurtenances, of the plaintiff, on the said —— day of ——, A. D. ——, whereby the tenancy was duly determined on the last-mentioned day by the said notice, and that after [*or* "upon," *as the case may be*] the determination of the said term as aforesaid, the plaintiff being entitled to the possession of the said premises, by a certain notice (*q*) in writing given by him to the defendant, demanded and required the defendant to deliver the possession of the said premises to the plaintiff; yet the defendant wilfully (*r*) held over the said tenements for —— months after the determination of the said term and tenancy, and after the said notice had expired, and after the said demand so made as aforesaid, during which time the defendant kept the plaintiff, being the person entitled to the possession thereof, out of such possession, and by reason of the premises and by force of the statute in such case made and provided, the defendant became liable to pay the plaintiff the sum of £——, (*s*) being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long as the same were so detained as aforesaid. [*A count for use and occupation may be added if there be any doubt as to the plaintiff's right to recover under the statute*, Thornton *v.* Whitehead, 1 M. & W. 14; 4 Dowl. 747, S. C., *and one on an account stated, and conclusion as ante*, 35.] (*s*)

19. *By Landlord for Double Rent under* 11 *Geo.* 2, *c.* 19, *s.* 18, *where Tenant holds over after Notice to quit given by him.* (*t*)

For that the defendant was tenant to the plaintiff of a house and premises from year to year [*or as the case may be*], at the yearly rent of £——, payable quarterly, and the defendant's said tenancy was duly determined by a notice (*u*) given by him to the plaintiff of his the defendant's intention to quit the said premises on the —— day of ——, A. D. —— (*or* "on a day mentioned in such

(*o*) See Humberstone *v.* Dubois, 10 M. & W. 765; 2 Dowl. N. S. 506.

(*p*) Evidence of authority to make this demand. Poole *v.* Warner, 8 Ad. & E. 582; Wilkinson *v.* Colley, 5 Burr. 2694.

(*q*) It seems the *written notice to quit is a demand* within the statute. Wilkinson *v.* Colley, 5 Burr. 2694; Lake *v.* Smith, 1 New R. 174, 179; Cobb *v.* Stokes, 8 East, 358; Hirst *v.* Horn, 6 M. & W. 393. In the form in Poole *v.* Warner, *ubi supra*, this allegation is omitted.

(*r*) Where a tenant holds over under a claim of right, though misfounded, this is not a wilful holding over within the statute; Wright *v.* Smith, 5 Esp. 203; the holding over must be contumacious. Swinfen *v.* Bacon, [6 H. & N. 184;] 30 L. J. Ex. 33.

(*s*) Exact amount need not be stated, but lay enough. See Anon. Lofft R. 275. As to the damages recoverable, see Cobb *v.* Stokes, 8 East, 361; Robinson *v.* Learoyd, 7 M. & W. 53. The value of the land, with its *real* easements only, is to be estimated, not steam power let with it. Ib.

(*t*) This count is founded on the stat. 11 Geo. 2, c. 19, s. 18, which enacts "that if any tenant, &c. shall give notice of his intention to quit the premises holden by him at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant, his executors or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered, at the times and in the same manner as the single rent or sum before the giving of such notice, could be levied, &c. and such double rent or sum shall continue to be paid during the time such tenant shall continue in possession." See other forms, 2 Chit. Pl. 7th ed. 48; Crocker *v.* Fothergill, 2 B. & Ald. 652.

(*u*) The notice to quit under this statute need not be *in writing*. Timmins *v.* Rawlinson, 3 Burr. 1603. But the statute only applies where a *valid* notice sufficient to determine the defendant's tenancy has been given. Farrance *v.* Elkington, 2 Camp. 591; Johnstone *v.* Hudlestone, 4 B. & C. 922. See a form of an avowry for double rent, Humberstone *v.* Dubois, 10 M. & W. 765; 2 Dowl. N. S. 506; *post*, tit. "Replevin."

notice, which has long elapsed"), but the defendant did not accordingly deliver up the possession of the said premises at the time in such notice contained, but continued to hold the same thence hitherto [*or* "for ——"], and by force of the statute in such case made and provided, the defendant became liable to pay double the rent aforesaid, of which one quarter is in arrear and unpaid. [*Add account stated, &c. as ante*, 34, 35.]

20. *Lessee against his Assignee, for a Breach of Covenant to pay the Rent to the Lessor, whereby the Plaintiff was obliged to pay it.* (*x*)

Commencement, ante, 5.] For that E. F., by deed, let to the plaintiff and his assigns a certain messuage and premises to hold [*&c.*] at the yearly rent [*&c.*], and the plaintiff thereby covenanted [*&c.; set out covenant to pay rent*], and the plaintiff, being possessed of the said premises during the said term, by deed, assigned to the defendant all his the plaintiff's estate and interest therein, *subject nevertheless* (*y*) to the payment of the said yearly rent, and to the performance and observance of the several covenants and agreements which, on the lessee's or tenant's part, were and are thereby required to be performed and observed. And the defendant thereby covenanted with the plaintiff that he the defendant should and would well and truly pay [*&c.; set out the covenant to pay the rent and perform the covenants and indemnify the plaintiff*]; (*z*) yet the plaintiff says that after the defendant became such assignee, and during the said demised term, £—— for one quarter of a year of the rent aforesaid became due; yet the defendant did not pay the same, whereupon the plaintiff was called upon to pay and paid the same to the said E. F. [*or* "to a certain person, to wit, G. H., who then had lawful right and title to the said tenements subject to the said lease, and had the estate and right of the said E. F. therein, and lawful right and title to demand and receive the said sum of £—— from the plaintiff as such lessee upon the said lease"], of which the defendant had notice, but the defendant hath not repaid the same to the plaintiff. And the plaintiff is now damnified to the amount thereof.

21. *By a Lessee against his Underlessee for not repairing, whereby a Forfeiture was incurred, and the Superior Landlord entered.*

OBS. — The value of the lease forfeited cannot be recovered, unless the forfeiture was *solely* owing to the underlessee's non-repair. Clow *v.* Brogden, 2 M. & G. 39; 2 Scott N. R. 303; unless the underlease contains a covenant to *indemnify*, the underlessee is only liable for such damages as necessarily result from the breach of his own covenants; though the covenants in the original lease and those in the underlease are identical in their terms; the lease is

(*x*) See Neale *v.* Willie, 3 B. & C. 533; and Obs. to the next form.

(*y*) It has been decided that these words, "subject, &c." do not constitute a covenant; so that the action of *covenant* does not lie except upon the *express* covenant of the lessee, and *case*, in the absence of such covenant, is the proper remedy. See Wolveridge *v.* Steward, 1 Cr. & M. 644, in error; Burnett *v.* Lynch, 5 B. & C. 589. A reassignment by the assignee does not destroy the assignor's right of action against him upon the covenant to indemnify; see Harley *v.* King, 2 Cr., M. & R. 18; nor the surrender of the lease to the original lessor. Greenwood *v.* Taylor, 9 Jur. 480.

(*z*) Where an underlessee covenants to observe the covenants in the original lease, it is the same as if those covenants had been inserted at length in the underlease; Piggott *v.* Stratton, 29 L. J. Chan. 1; [Brabant *v.* Wilson, L. R. 1 Q. B. 44]; but such covenant is limited in its operations to the period during which the original lease is subsisting unsurrendered. Ib. A breach should be assigned upon the covenant to indemnify if the plaintiff has been put to any costs or expenses. See the Obs. next form.

Obs. forfeited by the breach of the plaintiff's covenants, not the defendant's covenant. Logan *v.* Hall, 4 C. B. 598; Walker *v.* Hatton, 10 M. & W. 249. See a form, Clow *v.* Brogden, 2 M. & G. 39; 2 Scott N. R. 303; Smith *v.* Howell, 6 Ex. 730; Smith *v.* Peat, 9 Ex. 161.

22. *By a Lessee against Sub-Lessee for not repairing, &c. stating Special Damage by Reason of the Lessor having sued the Plaintiff for Breaches of Covenant.*

Walker *v.* Hatton, 10 M. & W. 249; 2 Dowl. N. S. 263.

Obs. — It was held in that case that the plaintiff could not recover the costs of defending the action brought against him by the lessor, but it would seem he might recover such costs if he received the sanction of the underlessee for defending it; see Blyth *v.* Smith, 5 M. & G. 405, 412; *ante*, 152; he may recover the amount of dilapidations recovered against himself, and occasioned by the underlessee's neglect. Penley *v.* Watts, 7 M. & G. 601.

23. *By Lessor against Assignee for Non-payment of Rent, and not Repairing.* (*a*)

Commencement, ante, 5.] For that the plaintiff, by deed, let to A. B. [*proceed as in the preceding forms to the end of the statement of the lease granted to the lessee, naming him, and covenants by him applicable to the case*]; and the plaintiff says, that after the making of the said deed, and during the said term, all the estate, interest, and term of years of the said E. F. of, in, and to the said demised premises, vested in the defendant by assignment; (*b*) yet the

(*a*) See form, &c. Harley *v.* King, 2 Cr., M. & R. 18. As to the liability of the assignee of a lease, see Harrison's Woodfall, tit. "Assignees;" *post*, Pleas in Contract, tit. "Landlord and Tenant." The liability is confined to breaches of covenant running with the land, committed while the party continues to be assignee. Ib.; Minshull *v.* Oakes, 2 H. & N. 793; Martyn *v.* Clue, 18 Q. B. 661. An heir; Derisley *v.* Custance, 4 T. R. 75; a devisee; Isherwood *v.* Oldknow, 3 M. & S. 382; Mayor of Carlisle *v.* Blamire, 8 East, 487; or an executor rightful or *de son tort*, or administrator of the lessee or an assignee; 1 Saund. 1 *a*, note; 1 Salk. 309, 317; Wollaston *v.* Hakewill, 3 M. & G. 297; Paull *v.* Simpson, 9 Q. B. 365; Buckworth *v.* Simpson, 1 Cr., M. & R. 834; Nation *v.* Tozer, 1 Cr., M. & R. 172; *post*, Pleas, "Landlord and Tenant;" or the assignees of a bankrupt lessee where they have unequivocably elected to take the benefit of the lease; Goodwin *v.* Noble, 27 L. J. Q. B. 204; may be charged in this form for breach of covenant after he becomes interested; but not an underlessee; Holford *v.* Hatch, Cowp. 766; Doug. 183, 445; Earl of Derby *v.* Taylor, 1 East, 502; nor can a person who becomes a mere *equitable* owner of a lease by contract, between himself and the lessee, but who takes no legal assignment, in the absence of special circumstances, be sued in equity by the lessor for rent or breach of covenant accrued or committed whilst he is in possession. Cox *v.* Bishop, 26 L. J. Ch. 389. A mortgagee who takes an assignment of the *whole* of the lessee's term, by way of security, is liable as assignee to the lessor, although he never entered or took possession. Williams *v.* Bosanquet, 1 B. & B. 238. In order to charge the assignee in this form, the original covenant with the lessor need not contain the word "assigns." Smith *v.* Arnold, 3 Salk. 4; Martyn *v.* Clue, 18 Q. B. 661; Minshull *v.* Oakes, 2 H. & N. 793.

(*b*) As the lessor is supposed not to know precisely *how* the defendant became assignee, and that fact is more peculiarly within the defendant's knowledge, this general statement of the title and liability of the latter suffices as against him. See 1 Saund. 112 *b*, note (1); Steph. Pl. 4th ed. 250. It is the proper form against any party who is charged as assignee in law, as an executor or administrator of the lessee, &c. Acland *v.* Pring, 2 M. & G. 937; Wollaston *v.* Hakewill, 3 M. & G. 297; Hopwood *v.* Whaley, 6 C. B. 744. And an executrix of an assignee may be charged in this form, though she has never entered or taken the profits. Wollaston *v.* Hakewill, 2 M. & G. 321; *post*, Pleas, "Landlord and Tenant." Where the defendant is assignee of *part* only of the premises, he should be declared against accordingly. See Curtis *v.* Spitty, 1 Bing. N. C. 756; Mercron *v.* Dowson, 5 B. & C. 479; Heap *v.* Livingstone, 11 M. & W. 91; *post*, Pleas, "Landlord and Tenant." It is not necessary to allege an entry against a lessee or assignee for years; 1 Saund. 203, note (1); or that they became possessed of the term. *Ante*, 185, note (*r*); Turner *v.* Richardson, 7 East, 340, note (*a*). Where the

plaintiff says that [*&c.; state the breaches as in the preceding forms, taking care to show that the breach occurred after the assignment, as that* "during the said term and after the said assignment, two quarters of the said rent became due from the defendant," (*c*) *or* "that during the said term and after the said assignment the said house was out of good and substantial repair"].

24. *By the Heir of the Lessor against the Lessee.* (*d*)

Commencement, ante, 5.] For that one E. F. now deceased, being seised (*e*) in his demesne as of fee (*f*) of and in certain tenements, by deed, let the same to the defendant [*&c.; state the lease and the covenants broken, as in the preceding forms, alleging them to have been made with the said E. F. and his heirs*], and the said E. F. afterwards, and during the said term, died so seised of the said reversion of and in the said demised premises, whereupon and whereby the said reversion descended to the plaintiff as [*son*] (*g*) and heir of the said E. F. deceased; yet [*&c.; assign breaches as usual, showing that they were committed*, "after the death of the said E. F."].

25. *By the Heir of Lessor against Assignee of Lessee for not keeping Premises in Repair, held under an Agreement not under Seal.*

Alderman *v.* Neate, 4 M. & W. 704.

26. *By the Devisee of the Lessor against the Lessee.* (*h*)

Commencement, ante, 5.] For that [*&c.; state the lessor's seisin in fee, the demise, the defendant's covenants, alleging them to have been made with and to the said E. F. and his assigns, as in* Form 24, *supra*]; and the said E. F., being so seised of the said reversion of and in the said premises, died, having first duly made and published his last will and testament in writing, and thereby devised the said reversion of and in the said demised premises to the plaintiff, *to hold the same unto and to the use of the plaintiff*, his heirs and assigns forever; yet [*&c.; assign breaches as in the preceding forms, showing that they occurred* "after the death of the said E. F. and during the said term"].

27. *By a Plaintiff, who was partly Devisee and partly Heir of a Lessor, for increased Rent (under a Penal Clause) for converting Pasture Land to other Purposes than were allowed by the Lease.*

Aldridge *v.* Howard, 4 M. & G. 924; *ante*, Form 15.

declaration alleged that defendant continued in possession until the end of the term, and whilst he was in possession as such assignee suffered non-repair, and the proof was, that he ceased to be assignee before the end of the term, held no variance. Burnett *v.* Lynch, 5 B. & C. 589.

(*c*) [See Dubois *v.* Van Orden, 6 John. 105; 1 Chitty Pl. 244, note (*h*).]

(*d*) See 2 Saund. 45 *a*, 305 *a*, note (13), 418; 2 Chit. Pl. 7th ed. 413, note (*n*); 1 Har. Ind. tit. "Covenant;" Jones *v.* King, 4 M. & S. 188. And see a form on a contract not under seal, Alderman *v.* Neate, 4 M. & W. 704, and Pleas.

(*e*) That is, seised at the time of the demise. Per Parke B. Smith *v.* Adkins, 8 M. & W. 369.

(*f*) As to the statement of a freehold title, see Steph. 4th ed. 343. In Harris *v.* Bevan, 4 Bing. 646, the action was by the assignee of the reversion, and the declaration alleged that the "lessor *was seised*," without stating of what estate, and being so seised, *devised*, &c. to plaintiff in fee. *After verdict*, held a sufficient allegation of title. The allegation in the text suffices, though the fee were conditional or determinable on a certain event. Dt. Pl. 287.

(*g*) Must show how heir, &c. Lidgbird *v.* Judd, 7 D. & R. 517.

(*h*) 2 Saund. 235, 253, 276 *a*, note (*a*); Steph. 4th ed. 341; 1 Har. Ind. tit. "Covenant."

28. *By the Assignee of the Reversion in Fee against the Lessee.* (*i*)

Commencement, ante, 5.] For that whereas one G. H., being seised in his demesne as of fee (*k*) of and in certain "messuages" [*&c. describing the premises shortly, ante,* 184, Form 4], by deed, let the same to the defendant [*&c.; state the demise and covenants* "with the said E. F. and his assigns," *as in the* Forms 4 *and* 5, *ante,* 185, *and then proceed as follows:*] And the said E. F., being so seised of the said reversion as aforesaid, afterwards and during the said term granted, conveyed, and assigned to the plaintiff the said reversion in the said demised premises; yet [*&c.; state the breaches, as in* Forms 4 *and* 5, *ante, alleging that they occurred after* "the plaintiff became seised as aforesaid"].

29. *By the Assignee of a Lessor being a Termor, against the Lessee.* (*l*)

Commencement, ante, 5.] For that one E. F., being possessed of a house [*&c. ante,* 184, Form 4], for the residue of a certain term of —— years, commencing from the —— day of ——, A. D. ——, by deed, let the same to the defendant [*&c.; here state the lease and covenants broken, alleging them to have been made by the defendant with the said E. F. and his assigns, as ante,* 184, Form 4], and the said E. F., being possessed of and in the said reversion therein, by deed, assigned to the plaintiff the said reversion of and in the said demised premises; yet the plaintiff says that [*state the breaches, as in the* Forms 4, 5, *and* 6, *showing that they occurred* "during the term and after the plaintiff became possessed of and in the said reversion as aforesaid"].

(*i*) See the Obs. *ante;* 2 Saund. 10, 275; Wootton *v.* Steffenoni, 12 M. & W. 129. Assignees of the reversion can only sue and be sued by virtue of the stat. 32 Hen. 8, c. 34. This act applies only to leases by *deed.* Standen *v.* Christmas, 10 Q. B. 135. Parol contracts do not run with the reversion; where the lease is not under seal the assignee of the reversion cannot sue the lessee for breach of his contract to repair; but in such case the lessor may sue notwithstanding the assignment. Bickford *v.* Parson, 5 C. B. 920. And in cases where the assignee can determine the tenancy, the continued holding of the tenant under him is evidence of an agreement on the part of the tenant with the assignee to hold on the old terms. Buckworth *v.* Simpson, 1 Cr., M. & R. 834; Arden *v.* Sullivan, 14 Q. B. 832. In strictness it should be shown what was the nature of the lessor's title, and how it has passed to the plaintiff; but see Cuthbertson *v.* Irving, 28 L. J. Ex. 306; [4 H. & N. 742;] affirmed, 29 L. J. Ex. 485; [6 H. & N. 135.] The lessor's title as alleged is traversable. Weld *v.* Baxter, 1 H. & N. 568. See several forms of titles and estates pleaded, 2 Chit. Pl. 7th ed. 403 *et seq.;* 1 Saund. 251, 258; 2 Ib. 275. The remedy given by the statute only extends to covenants running with the land. Gibson *v.* Doeg, 27 L. J. Ex. 37; [2 H. & N. 615;] Martin *v.* Williams, 1 H. & N. 817. [Covenant running with the land. Declaration by assignee of reversion against licensee to kill game. Hooper *v.* Clark, L. R. 2 Q. B. 200.]

(*k*) Tenants in common, assignees of the reversion, may sue and be sued jointly on the covenants in the lease. Womersley *v.* Dally, 26 L. J. Ex. 219. The assignee of the reversion of part of the premises demised may sue for not repairing. Twynam *v.* Pickard, 2 B. & Ald. 105. By the assignee of the reversion against the executor or administrator of the lessee. Perry *v.* Watts, 3 M. & G. 775; Badely *v.* Vigurs, 4 El. & Bl. 71. By assignee of reversion against assignee of lessee. Minshull *v.* Oakes, 2 H. & N. 793. By assignee of reversion by *estoppel.* Cuthbertson *v.* Irving, 28 L. J. Ex. 306; [4 H. & N. 742;] 29 L. J. Ex. 485; [6 H. & N. 135.] Where a termor of mines demised them by deed to the defendant, reserving a rent for a longer term than his own, and then assigned his interest and the rent, it was held that the assignee could sue the defendant for the rent reserved. Williams *v.* Hayward, 28 L. J. Q. B. 374.

(*l*) In general the commencement of particular estates must be shown, that is, traced from the title in fee; but there is an exception, where, as in the above case, the action is mainly grounded on the lease, and the title is alleged as matter of inducement only. Stephen, 4th ed. 337; *ante,* 181. An underlessee of a termor may enforce a covenant entered into with the latter by a previous under-tenant. Wright *v.* Burroughs, C. P. Nov. 10, 1846.

30. *By the Executor of the Lessor, a Termor, against the Lessee.* (*m*)

Commencement as Executor, ante, 13, Form 23.] For that [*&c.; state that the lessor was possessed of a term* (*n*) *as in the* Form 29, *ante,* 198, *unless the action be confined to breaches of covenant committed in the lifetime of the testator; and after showing the lease and covenants as in the* Forms 4 *and* 5, *ante,* 184, 185, *proceed thus:*] and the said E. F., being possessed of and in the said reversion of and in the said premises, during the said term so demised to the defendant, died, having duly made and published his last will and testament in writing, and thereby appointed the plaintiff executor thereof, after whose death the plaintiff duly proved the said last will and testament, and took upon himself the burden of the execution thereof; (*o*) and the plaintiff, as executor as aforesaid, became possessed of the said reversion of and in the said tenements; yet [*&c.; state breaches as usual, showing whether they occurred* "in the lifetime," *or* "after the death, of the said E. F."].

31. *By the Legatee of a Termor, who was the Lessor, against the Lessee.*

Commencement, ante, 5.] For that E. F. [*&c.; state that the lessor was possessed of a term, the lease, and the defendant's covenants, alleging them to have been made with the said E. F. and his assigns, as ante,* 198, Form 29]; and the said E. F., being so possessed of the said reversion as aforesaid, afterwards and during the said term so granted to the defendant, died, having duly made and published his last will and testament in writing, and thereby given and bequeathed the said reversion of and in the said demised premises, with the appurtenances, unto the plaintiff and his assigns, and by his said will appointed G. H. executor thereof, after whose death the said G. H. duly proved the said will, and, as such executor, assented (*p*) to the said bequest to the plaintiff; yet [*&c.; state breaches as usual, showing they were* "after the plaintiff became possessed of the said reversion as aforesaid"].

32. *For not granting a Lease to Plaintiff pursuant to Agreement.*

Wright *v.* Colls, 8 C. B. 150.

(*m*) See forms, Baker *v.* Gostling, 1 Bing. N. C. 18; 4 M. & Sc. 539, S. C. By the executor of the lessor against the executor of the lessee; Penley *v.* Watts, 7 M. & W. 601; and see a form by the executor of the lessor against the lessee for cutting trees in the lifetime of the testator, Liddard *v.* Holmes, 2 Cr., M. & R. 588.

(*n*) This is essential where the breach is after the testator's death, because the property and right of action would pass to the heir or devisee, if the testator had a freehold estate. See Mackay *v.* Mackreth, 2 Chit. R. 461; 4 Doug. 213. When executors may sue on lease or covenant, &c. Ib.; Kingdon *v.* Nottle, 1 M. & S. 355. See 10 Bing. 533; 2 Cr., M. & R. 588. The executor of a tenant for life may recover for the breach of covenant to repair committed by the lessee of the testator in his lifetime, without averring damage to the personal estate. Ricketts *v.* Weaver, 12 M. & W. 718.

(*o*) It has been usual, but *semble*, it is not necessary, to insert the averment within brackets, the plaintiff being described in the commencement of the declaration as executor or administrator of the deceased.

(*p*) In the case of *leasehold* property, the executor's assent to the bequest is essential, and must be alleged; 1 Saund. 278, note (5); whether this assent has taken place is matter of fact for the jury. Mason *v.* Farnell, 12 M. & W. 674.

33. *On an Agreement to recover a Sum of Money agreed to be paid by Defendant to Plaintiff, Plaintiff agreeing, upon Payment, to grant a Lease to Defendant.*

Baggalley *v.* Pettit, 5 C. B. N. S. 637. [Declaration on an agreement for a lease. Implied covenant for title. Stranks *v.* St. John, L. R. 2 C. P. 376.]

34. *By Tenant against Landlord upon a Contract, not under Seal, of Demise to the Plaintiff, with an Option of Purchase, for not making a Good Title.*

Worthington *v.* Warrington, 5 C. B. 635.

35. *For not putting Plaintiff into Possession, the Defendant having let the Premises to him by a present Demise, not under Seal.*

Coe *v.* Clay, 3 M. & P. 57; 5 Bing. 440; Drury *v.* Macnamara, 5 El. & Bl. 612; Jinks *v.* Edwards, 11 Ex. 775.

36. *By a Tenant against a Landlord, for not sending Furniture into a House pursuant to an Agreement under which the Plaintiff had become Tenant.*

Mechelen *v.* Wallace, 7 Ad. & E. 49.

37. *Form, showing that the Landlord had not Title to demise.*

Brashier *v.* Jackson, 6 M. & W. 549; Messent *v.* Reynolds, 3 C. B. 194.

38. *By a Lessee against his Lessor for Breach of his Covenant for Quiet Enjoyment, alleging a Distress by the Ground Landlord.* (*q*)

For that the defendant, by deed, demised and let to the plaintiff a messuage [*&c.*] and premises to hold to the plaintiff for —— years, from the —— day of ——, A. D. ——, and the defendant thereby covenanted with the plaintiff that he, the plaintiff, his executors, administrators, and assigns, paying [*&c.*] (*r*) and observing [*&c. as in the covenant*], should and might peaceably and quietly

(*q*) [Lock *v.* Furze, 19 C. B. N. S. 96.] The word "demise" implies this covenant; Line *v.* Stephenson, 5 Bing. N.C. 183; 6 Scott, 447; so also does the word "grant." Barber *v.* Harris, 9 Ad. & E. 532; [Moore *v.* Weber, 71 Penn. St. 429; Gallup *v.* Albany R. R. 7 Lansing, 471. That is, these words imply a covenant for quiet enjoyment during the period of the lessor's interest in the premises. Penfold *v.* Abbott, 32 L. J. Q. B. 67.] But in deeds executed since 1st October, 1845, the words "give" and "grant" shall not imply any covenant in law; 8 & 9 Vict. c. 106, s. 4; the words "warrant and defend," occurring in a lease, amount to an express covenant. Williams *v.* Burrill, 1 C. B. 402. An implied covenant is qualified and restrained by an express covenant for quiet enjoyment. On a *parol* demise there is an implied agreement for quiet enjoyment during the term, but not for good title. Bandy *v.* Cartwright, 8 Ex. 813; [Hall *v.* City of London Brewery Co. 31 L. J. Q. B. 257.] As to the construction of covenants for title and quiet enjoyment, see Young *v.* Raincock, 7 C. B. 310, 340. [The implied covenants for title and quiet enjoyment are limited to the duration of the lessor's estate, and cease upon its determination. Adams *v.* Gibney, 6 Bing. 656; and see Williams *v.* Burrell, 1 C. B. 402; Penfold *v.* Abbott, 32 L. J. Q. B. 67. The measure of damages for a breach of the covenant for quiet enjoyment is the value of the lease. Williams *v.* Burrell, 1 C. B. 402; Lock *v.* Furze, 34 L. J. C. P. 201; 35 Ib. 141; 19 C. B. N. S. 96.]

(*r*) The payment of the plaintiff's rent is not a condition precedent to the performance by defendant of his covenant. Dawson *v.* Dyer, 5 B. & Ad. 584; Briant *v.* Pilcher, 6 C. B. 354; *ante*, 155, note (*l*).

have, hold, occupy, possess, and enjoy the said demised premises for and during the said term, without the let, suit, trouble, denial, interruptions, protestations, or disturbance of him, the defendant, his heirs or assigns, or any other person or persons lawfully claiming or deriving, or to claim or derive, by, from, or under, or as trust for him or them, or any or either of them, or by or through their or either of their acts, means, defaults, or procurement; and although the plaintiff hath performed all conditions [*&c. as ante*, 39], *yet, after the said demise and during the said term, a distress was lawfully made by A. B. on the goods of the plaintiff upon the demised premises for £—— arrears of rent then due and owing from the defendant to the said A. B., as ground landlord of the said premises, whereby the plaintiff was put to great trouble and inconvenience, and disturbed in his possession of the said premises, and was obliged to and did pay the said sum of £——, and £—— for the charge of the said distress.

39. *A Similar Form, but alleging as a Breach that Plaintiff was evicted.* (*s*)

As in the preceding form to the *.] Yet after the said demise and during the said term, A. B., who, at the time of the demise to the plaintiff and thence hitherto, claimed to have and had lawful right and title to the said demised premises and the possession thereof by, through, and under the defendant, entered into the said premises and evicted the plaintiff therefrom [*or* "molested and disturbed the plaintiff in the possession thereof," *if there has been no actual eviction; see* Carpenter *v.* Parker, 25 L. J. C. P. 78–88, per Willes J.].

40. *By a Tenant against his Landlord, for not allowing him for Off-going Crops, according to the Custom of the Country.* (*t*)

See a form in such case on a covenant in a lease. Newson *v.* Smythies, 28 L. J. Ex. 97; 3 H. & N. 840; Hutton *v.* Warren, 1 M. & W. 466.

(*s*) See a form of declaration in Carpenter *v.* Parker, 3 C. B. N. S. 206. As to what is an eviction, Ib.; [1 Chitty Contr. (11th Am. ed.) 512, note (*b*); 2 Ib. 1081, note (*c*); Upton *v.* Townend, 17 C. B. 30, 64; Lounsbery *v.* Snyder, 31 N. Y. 514; Gilhooley *v.* Washington, 4 Comst. 217; Edgerton *v.* Page, 1 Hilton, 320; 20 N. Y. 281; Royce *v.* Guggenheim, 106 Mass. 201; Elliot *v.* Aiken, 45 N. H. 30; Greton *v.* Smith, 33 N. Y. 245, 249; Jackson *v.* Eddy, 12 Missou. 209; 3 Kent, 454, note (*f*).] An entry and distress for land-tax due from the lessor before the demise to plaintiff is not a disturbance by any one claiming under the lessor; it is a claim against him; Stanley *v.* Hayes, 2 Q. B. 105; *semble*, plaintiff might have paid the tax, and sued for money paid. The entry by the third party claiming lawful title is not the less a breach of covenant, because the plaintiff may have instigated him to enforce his claim; Young *v.* Raincock, 7 C. B. 310; see Neale *v.* Willie, 3 B. & C. 533; see a form by a lessee of a mine against the lessor for breach of covenant for quiet enjoyment by molestation and disturbance by the lessor in working iron-stone between the mine and surface, and causing roof of mine to fall in; Shaw *v.* Stenton, 27 L. J. Ex. 253; 2 H. & N. 858; form by lessee against lessor for breach of the covenant for quiet possession; Dawson *v.* Dyer, 5 B. & Ad. 584; by the assignee of a lessee *v.* lessor for eviction; Brookes *v.* Humfreys, 5 Bing. N. C. 55; 7 Dowl. 118; Stanley *v.* Hayes, 3 Q. B. 105; against executor of lessor in such case; Adams *v.* Gibney, 6 Bing. 656; see form, &c. by a mortgagor against a purchaser, for not keeping plaintiff indemnified against the mortgagee; Allard *v.* Kimberley, 12 M. & W. 410; and other forms on indemnities, *ante*, 155, 156, a refusal by the defendant to let the plaintiff into possession will not support a declaration charging that defendant evicted the plaintiff. Hawkes *v.* Horton, 5 Ad. & E. 367.

(*t*) Where, by custom, the incoming tenant pays the value of the fallows, &c. and the tenancy is determined so that there is no incoming tenant, there is an implied contract on the part of the landlord to pay the value. Faviell *v.* Gaskoin, 7 Ex. 723.

41. *By Outgoing Tenant against the Assignees of the Reversion on a Contract or Custom of the Country by which, on notice to quit by the Landlord, the Tenant is entitled to be paid for Tillages.*

Womersley *v.* Dally, 26 L. J. Ex. 219.

42. *By a Lessee against the Assignee of the Lessor for a Breach of Covenant in not destroying Rabbits on a Farm.*

Sturgeon *v.* Wingfield, 15 L. J. Ex. 212; 15 M. & W. 224; Martin *v.* Williams, 1 H. & N. 187.

43. *By Lessee against Lessor, on Covenant by Defendant in Consideration of the Surrender of the Term to pay for Manure, Tillages, &c. upon a Valuation.*

Newson *v.* Smythies, 28 L. J. Ex. 97; 3 H. & N. 840; 1 F. & F. 447.

44. *By Assignee of the Lessee against the Lessor for Breach of his Covenant to repair, whereby the Plaintiff was injured in his Trade and compelled to remove.* (*u*)

Green *v.* Eales, 2 Q. B. 225.

LIMITATIONS, STATUTE OF.

Count on a Conditional Promise to pay a Debt barred by the Statute of Limitations. (*x*)

For that whereas heretofore and more than six years next before the making of the defendant's promise in this count mentioned, to wit, on the 1st day of January, A. D. 1839, the defendant was indebted to the plaintiff in £100 for money payable by the defendant to the plaintiff [*&c.; state the debt as usual*], and six years from the time the plaintiff's cause of action thereon accrued had elapsed, and the right of action of the plaintiff against the defendant for the recovery of the said money had, by reason of such lapse of time, but not otherwise, become barred by virtue of the statute in such case made and provided, and at the time of the making of the promise next mentioned, and thereupon the said money being wholly unpaid and in arrear to the plaintiff,

(*u*) A landlord is under no obligation to repair demised premises unless he has expressly contracted to do so; Gott *v.* Gandy, 2 El. & Bl. 845; what are sufficient words to create such a contract or covenant, Cannock *v.* Jones, 3 Ex. 233; 5 Ib. 713.

(*x*) See [2 Chitty Contr. (11th Am. ed.) 1261 *et seq.*]; see a form, &c. Lechmere *v.* Fletcher, 1 C. & M. 623; Waters *v.* Earl of Thanet, 2 Q. B. 757. It would seem that the common form of declaration would suffice where the conditional contract has become absolute, creating a liability to pay the debt instanter. See Humphreys *v.* Jones, 14 M. & W. 1; Hart *v.* Prendergast, 14 M. & W. 741; *per cur.* Earle *v.* Oliver, 2 Ex. 71–90; Higgins *v.* Hopkins, 3 Ex. 163; Smith *v.* Thorne, 18 Q. B. 134; [Betton *v.* Cutts, 11 N. H. 170; 2 Chitty Contr. (11th Am. ed.) 1261, 1263.] But there are cases in which the new promise or acknowledgment may be so qualified as to render it advisable to frame a special declaration, as where the promise is to pay in a particular manner, by bill or note, or out of a particular fund, or at a certain time after demand. Waters *v.* Earl of Thanet, 2 Q. B. 757; [2 Chitty Contr. (11th Am. ed.) 1263 *et seq.*]

and the plaintiff being justly entitled to receive the same; the defendant, within six years next before the commencement of this suit, to wit, on the 1st day of January, A. D. 1845, in consideration of the premises, by a certain memorandum in writing, then signed by him, promised the plaintiff to pay the said moneys to him, the plaintiff, when [*&c.; state the terms of the defendant's promise*]; and although [*aver the happening of the condition*], and all conditions have been performed and fulfilled, and all events and things have existed and happened, and all periods of time have elapsed to entitle the plaintiff to a performance of the defendant's contract, and to enable him to maintain this action; yet the defendant hath not paid the plaintiff the said sum of £—— [*or*, hath not made or delivered to the plaintiff a "bill," or "promissory note," *&c. according to the terms of the contract. Add account stated*].

LIQUIDATED DAMAGES.

One.—Whether a specified sum is to be treated as a "penalty," *i. e.* a sum merely intended to cover any damage which may be actually incurred, or as "liquidated damages," *i. e.* a sum agreed to be paid for a breach of contract, without reference to the extent of the injury sustained, depends in each particular case on the *intention* of the parties, to be collected from the language they have used. The intention is not determined by the mere use of the word "penalty," or the words "liquidated damages," but by the nature of the provision and the language of the whole instrument. But if the instrument contains many stipulations, of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty and not liquidated damages. Dimech *v.* Corlett, 12 Moore P. C. 199; Sparrow *v.* Paris, 31 L. J. Ex. 137; [7 H. & N. 594;] Kemble *v.* Farren, 6 Bing. 141; Green *v.* Price, 13 M. & W. 695 (in error), 16 M. & W. 346; see forms, *ante*, 135, 136, and Sparrow *v.* Paris, *ubi sup.*; Galsworthy *v.* Strutt, 1 Ex. 659; Mercer *v.* Irving, El., Bl. & El. 563; 2 Chitty on Pl. 219, 7th ed.; [2 Chitty Contr. (11th Am. ed.) 1314 *et seq.*; Whitefield *v.* Levy, 6 Vroom, 149; Bagley *v.* Peddie, 5 Sandf. 192; Perkins *v.* Lyman, 11 Mass. 76; Williams *v.* Dakin, 17 Wend. 447, 455; S. C. 22 Wend. 201; Heard *v.* Bowers, 23 Pick. 455; Shaw C. J. in Shute *v.* Taylor, 5 Met. 61, 67; Hodges *v.* King, 7 Met. 583, 588; Beale *v.* Hayes, 5 Sandf. 640; Hoag *v.* McGinnis, 22 Wend. 163; Chamberlain *v.* Bayley, 11 N. H. 234, 240; Brewster *v.* Edgerly, 13 N. H. 275; Gammon *v.* Howe, 14 Maine, 250; Lingley *v.* Cutler, 7 Conn. 291; Davis *v.* Gillett, 52 N. H. 126, and cases cited. Upon the breach of a contract secured by a penalty, the plaintiff may either sue for the penalty, assigning the breach — in which case he can recover the damage actually sustained, not exceeding the amount of the penalty; or he may sue for unliquidated damages for the breach, to be assessed by the jury irrespectively of the penalty. In the former case the recovery of the full penalty will be a satisfaction for all breaches of the contract, but in the latter the plaintiff may sue *toties quoties* there are breaches, and recover a full indemnity. See per Lord Mansfield in Lowe *v.* Peers, 2 Burr. 2225, 2228; Winter *v.* Trimmer, 1 W. Bl. 395; Harrison *v.* Wright, 13 East, 343; Astley *v.* Weldon, 2 B. & P. 346; 1 Wms. Saund. 58; Bramwell B. in Betts *v.* Burch, 4 H. & N. 506, 510. Where the plaintiff sues for liquidated damages the non-payment of the damages must be assigned as a breach of the contract, otherwise the count will be taken as claiming unliquidated damages, and the jury may assess a smaller sum; Hurst *v.* Hurst, 4 Ex. 571; where the contract is alternative, either to do a thing or to pay a liquidated sum, the breach must negative both the alternatives. Leigh *v.* Lillie, 6 H. & N. 165. The plaintiff cannot sue for the liquidated damages payable on a breach of the contract and also claim an injunction to restrain the breach, but he may sue for unliquidated damages for a breach

Obs. and also claim an injunction. Carnes *v.* Nesbitt, 7 H. & N. 778. On a bond conditioned not to carry on a business within certain limits or to pay liquidated damages, an injunction may be granted to enforce the condition. Howard *v.* Woodward, 34 L. J. Ch. 47.

Count on a Covenant in a Deed of Sale of a Business, to pay Liquidated Damages in the event of Defendant carrying on the Business.

That by a deed bearing date the —— day of ——, A. D. ——, made between the plaintiff and the defendant, the defendant assigned to the plaintiff all the interest, benefit, and profit to be henceforth made from the profession or practice of a surgeon and apothecary as theretofore carried on by the defendant at ——, or from any of the patients belonging thereto, and by the said deed the defendant covenanted with the plaintiff that the defendant would not at any time afterwards, directly or indirectly, by himself or in copartnership with any other person or persons, carry on or exercise the practice or profession of a surgeon and apothecary, or either of them, either by residing or by visiting any patient within the distance of three miles from the then place of business of the defendant at —— aforesaid, and that in case of any breach of the last-mentioned covenant, the defendant would pay to the plaintiff the sum of $——, to be recovered against him as and for liquidated damages, and not as a penalty; and the defendant afterwards carried on and exercised the practice or profession of a surgeon and apothecary, within three miles of —— aforesaid, by visiting, within the said distance from that place, G. H., a patient of the defendant, in his character, practice, and profession of a surgeon and apothecary; yet the defendant has not paid to the plaintiff the said sum of $——.

Like counts. Rawlinson *v.* Clarke, 14 M. & W. 187; Green *v.* Price, 13 M. & W. 695; Mallan *v.* May, 11 M. & W. 653; Hitchcock *v.* Croker, 6 Ad. & E. 438; Reynolds *v.* Bridge, 6 El. & Bl. 528.

Count on a contract for the services of the defendant as a commercial traveller, stipulating that if he travelled over the same ground for any other person he should pay the plaintiff a stated sum. Mumford *v.* Gething, 7 C. B. N. S. 305. See Galsworthy *v.* Strutt, 1 Ex. 659; Leighton *v.* Wales, 3 M. & W. 545.

Count on a covenant in a lease not to top trees under a penalty for each tree so topped. Hurst *v.* Hurst, 4 Ex. 571; Farrant *v.* Olmires, 3 B. & Ald. 692; Aldridge *v.* Howard, 4 M. & G. 921; Leigh *v.* Lillie, 6 H. & N. 165; Sparrow *v.* Paris, 7 H. & N. 594.]

MANDAMUS.

See Com. L. P. Act. 1854, s. 68 *et seq.*, and *post*, Tort, "Mandamus."

MARRIAGE. (y)

1. *Count for Breach of a General Promise of Marriage.* (z)

For that the plaintiff and defendant agreed to marry one another, (y) and a reasonable time for such marriage has elapsed,* and the plaintiff has always

(y) See, in general, [2 Chitty Contr. (11th Am. ed.) 790 *et seq.*] tit. "Marriage;" defences and evidence, *post*, Pleas, tit. "Marriage." The promise must be mutual, except that an infant may sue, though not liable on his promise to marry; Holt *v.* Ward, Stra. 937; [Perry *v.* Orr, 6 Vroom, 295]; but see Harvey *v.* Johnston, 6 C. B. 695; where the defendant's promise was alleged to be "in consideration that the plaintiff *would go to Ireland* for the purpose of marrying the defendant." The plaintiff's promise to marry the defendant is a sufficient consideration for the defendant's promise, though defendant were then a married man, and the plaintiff's promise, therefore, not binding on her, she having no notice. Defendant cannot take advantage of his own wrong and *non constat* that his wife might not have died before the time arrived for his marrying the plaintiff. Wild *v.* Harris, 7 C. B. 999; Millward *v.* Littlewood, 5 Ex. 775; [Kelley *v.* Riley, 106 Mass. 339.] But *quære*, whether a promise by a married man to marry another woman *after his wife's death*, is good. Ib. The action is sustainable by a man against a woman. Harrison *v.* Cage, Carth. 467; 1 Salk. 24; 1 Ld. Raym. 386; 5 Mod. 511, S. C. But an executor cannot sue for the breach of a promise to marry made to his testator, and in whose lifetime it was violated, unless he alleges and proves special damage to the testator's estate. Chamberlain *v.* Williamson, 2 M. & S. 408; [1 Chitty Pl. 22; Hovey *v.* Page, 55 Maine, 142; Smith *v.* Sherman, 4 Cush. 408, 413.] Nor can an executor be sued for non-performance of the testator's promise to marry a person, not broken in his lifetime. Ib. [See Kelley *v.* Riley, 106 Mass. 339; Shuler *v.* Millspaps, 71 N. Car. 297.] The promise need not be in writing; Phillpot *v.* Wallett, 3 Lev. 65; Harrison *v.* Cage, 1 Ld. Raym. 380; Bul. N. P. 180; [see Derby *v.* Phelps, 2 N. H. 515; Clark *v.* Pendleton, 20 Conn. 495; Lawrence *v.* Cooke, 56 Maine, 187]; nor need a writing containing the promise be stamped. Orford *v.* Cole, 2 Stark. R. 351.

(z) This form, and form No. 2, are given by the C. L. P. Act, 1852, sch. B, Nos. 19, 20; and it is better to adopt it when it is not *clear* that the promise was to marry at a particular period, or upon a condition, &c.; in which latter cases the declaration should be framed accordingly. In the absence of an express stipulation as to the period within which the marriage should take place, the law infers a promise to marry "within a reasonable time after request." Harrison *v.* Cage, Carth. 467; 1 Ld. Raym. 386, S. C.; Potter *v.* Deboos, 1 Stark. R. 82; Atchinson *v.* Baker, Peake Ad. C. 103. [In such a case, it is sufficient for a female suing for a breach to allege her readiness to marry the defendant; that a reasonable time had elapsed; the defendant's failure to marry her, and his continued neglect and refusal to do so. Clements *v.* Moore, 11 Ala. 35.] If the defendant has married another, a request to marry plaintiff is not necessary; see forms 2, 3; Caines *v.* Smith, 15 M. & W. 189; Short *v.* Stone, 8 Q. B. 358; [see Clements *v.* Moore, 11 Ala. 35; Greenup *v.* Stoker, 3 Gil. 202; Blattmacher *v.* Saal, 29 Barb. 22;] and notice that defendant does not intend to perform his promise has been held a sufficient breach. Gough *v.* Farr, 2 C. & P. 631. [As to the effect of a positive refusal to perform a contract to marry, although the time specified in the performance has not arrived, see Burtis *v.* Thompson, 42 N. Y. 246; Holloway *v.* Griffith, 32 Iowa, 409; Frost *v.* Knight, L. R. 5 Ex. 322.] In a case where only *one* promise was proved, viz. to marry after the death of defendant's father, and the declaration charged only a general promise, Lord Kenyon held there was a fatal variance. Atchinson *v.* Baker, *ubi sup.* But where the defendant stated to the plaintiff's father that "he had pledged himself to marry his daughter in six months or a month after Christmas," Lord Ellenborough left it to the jury, "whether they would not presume, from the circumstances, a general promise to marry (which the law would consider as a promise to marry within a reasonable time), and whether the declarations of the defendant had any other effect than to render that definite and certain which before was uncertain." Potter *v.* Deboos, 1 Stark. R. 82. And in Phillips *v.* Crutchley, 3 C. & P. 178, it was held that the jury might, from circumstances, infer and find a promise so as to support a verdict on the above general form of count, though the proof was that defendant said he would marry the plaintiff "in July." If the promise be conditional to marry the plaintiff within a convenient time after the death of the defendant's father, it should be so declared upon. See Cole *v.* Cottingham, 8 C. & P. 75; Harrison *v.* Cage, Carth. 467, 1 Ld. Raym. 386; Seymour *v.* Gartside, 2 D. & R. 55; [Clark *v.* Pendleton, 20 Conn. 495.] Any variance, however, may now be amended at the trial.

been ready and willing (*a*) to marry the defendant; yet the defendant has neglected and refused to marry the plaintiff. (*b*)

[1*a*. *Form prescribed by the Massachusetts Practice Act.*

And the plaintiff says that she and the defendant mutually promised to marry each other; and she has always been ready to marry the defendant, but the defendant refuses to perform his promise.]

2. *For Breach of a Promise to marry on a Particular Day.*

For that the plaintiff and defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day; yet the defendant neglected and refused to marry the plaintiff.

3. *For a Breach of Promise of Marriage, where the Defendant has married Another Person.* (*c*)

Proceed as in Form 1 *to the asterisk.*] And although the plaintiff was ready

(*a*) [This is a material averment and the burden is on the plaintiff to establish it. Hook *v.* George, 108 Mass. 324.] It implies ability to marry; Wallis *v.* Warren, 4 Ex. 361; Spotswood *v.* Barrow, 1 Ex. 804; but it is no defence that the plaintiff at the time of the defendant's promise, was engaged by her promise to be married to another person, of which fact defendant was ignorant; Beachey *v.* Brown, El., Bl. & El. 796; nor is it any defence that defendant after his promise became afflicted with disease and incapable of marriage without danger to his life; Hall *v.* Wright, El., Bl. & El. 746; nor is prior lunacy a defence. Baker *v.* Cartwright, 30 L. J. C. P. 364. If the parties be related within the Levitical degrees, their promises are void, and no action will lie for the breach of promise. Harrison *v.* Cage, 1 Ld. Raym. 386. As to the defence generally, see *post*, Pleas.

(*b*) The damages should not be laid at a ridiculously large amount. The court will not interfere with the discretion of the jury as to the amount given by their verdict, unless there has been obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives. Smith *v.* Woodfine, 1 C. B. N. S. 660. [Although this action is assumpsit in form, it has always, as to the measure of damages, been classed with actions of tort. Thorn *v.* Knapp, 42 N. Y. 474; Wells *v.* Padgett, 8 Barb. 323; Johnson *v.* Jenkins, 24 N. Y. 252; Hunt *v.* Burnet, 19 John. 173; Bunns *v.* Buck, 1 Lansing, 268.] The jury may give damages for injury to the plaintiff's feelings, as also for the loss of an advantageous settlement and establishment in life, though not laid as special damage. Atchinson *v.* Baker, Peake's Ad. C. 124; [Harrison *v.* Swift, 13 Allen, 144; Kelley *v.* Riley, 106 Mass. 339; Lawrence *v.* Cooke, 56 Maine, 187; Sherman *v.* Rawson, 102 Mass. 395, 399, 400, and cases; Grant *v.* Wiley, 101 Mass. 336; Thorn *v.* Knapp, 42 N. Y. 474; Smith *v.* Woodfine, 1 C. B. N. S. 660; Berry *v.* Da Costa, 1 L. R. C. P. 331; Greenleaf *v.* McColley, 14 N. H. 303; Frost *v.* Knight, L. R. 5 Ex. 322; Southard *v.* Rexford, 6 Cowen, 254. The fact of plaintiff's seduction by the defendant, if it exists, may be taken into consideration by the jury on the question of damages. Sherman *v.* Rawson, 102 Mass. 395; Kelley *v.* Riley, 106 Mass. 339; Paul *v.* Frazier, 3 Mass. 73: Coil *v.* Wallace, 24 N. J. (Law) 291; Matthews *v.* Cribbett, 11 Ohio St. 330; Goodall *v.* Thurman, 1 Head, 209; Matteson *v.* Curtis, 11 Wisc. 424; Wells *v.* Padgett, 8 Barb. 323; Kniffen *v.* McConnell, 30 N. Y. 285; Tubbs *v.* Van Kleek, 12 Ill. 446; but see Weaver *v.* Bachert, 2 Penn. St. 80; Baldy *v.* Stratton, 11 Penn. St. 316. The length of time during which the engagement of marriage subsisted is an element for the consideration of the jury. Grant *v.* Willey, 101 Mass. 356.] And the defendant's affluent circumstances may be given in evidence in aggravation. *Per cur.* Hamlin *v.* The Great Northern Ry. Co. 1 H. & N. 408; [by general evidence. Kniffen *v.* McConnell, 30 N. Y. 285; Lawrence *v.* Cooke, 56 Maine, 187. As to the evidence admissible in mitigation of damages, see Button *v.* McCauley, 5 Abb. Pr. N. S. 29; Palmer *v.* Andrews, 7 Wend. 142; Thorn *v.* Knapp, 42 N. Y. 474; Johnson *v.* Jenkins, 24 N. Y. 252; Kniffen *v.* McConnell, 30 N. Y. 285.]

(*c*) Where the defendant has married another, it is not necessary to allege or prove a request to marry the plaintiff. Short *v.* Stone, 8 Q. B. 358; Caines *v.* Smith, 15 M. & W. 189; Lovelock *v.* Franklyn, 8 Q. B. 371; [2 Chitty Contr. (11th Am. ed.) 732, and note (*j*).] The discharging a defendant from his promise to marry, is a sufficient consideration for a promise to pay a sum of money, and it is sufficient in declaring to aver generally that the plaintiff did discharge the defendant without showing how. Baker *v.* Smith; cited in Aglionby *v.* Toverson, Sir T. Raym. 400.

and willing to marry the defendant until he broke his contract as hereinafter mentioned, yet the defendant, after the said agreement, married another person.

[*Like counts.* Caines *v.* Smith, 15 M. & W. 189; Short *v.* Stone, 8 Q. B. 358.

4. *For Breach of a Promise to marry, subject to the Consent of Another Person.*

That the plaintiff and defendant agreed to marry one another upon condition that G. H. would consent to the said marriage; and the said G. H. consented to the said marriage, whereof the defendant had notice, and a reasonable time for such marriage afterwards elapsed, and the plaintiff has always been ready and willing to marry the defendant; yet the defendant has neglected and refused to marry the plaintiff.]

5. *On a Contract to pay Money to the Plaintiff in Consideration of his marrying a Certain Person.* (*d*)

For that in consideration that the plaintiff, at defendant's request, would marry A. B. [on or before the —— day of ——, A. D. ——], the defendant promised the plaintiff to pay him £—— within —— (*e*) after his marriage. And the plaintiff says that he did ["before" *or* "on" the said —— day of ——, A. D. ——] marry the said A. B., of which defendant had notice, and that the period for payment of the said sum of £—— has elapsed; yet the defendant has not paid the same.

[*A like count, setting out the promise verbatim.* Shadwell *v.* Shadwell, 6 C. B. N. S. 679; 9 Ib. 159.]

MASTER AND SERVANT.

1. *Indebitatus Count for Wages as a Clerk or Servant.* (*f*)

For the wages (or salary) of the plaintiff payable by the defendant to the plaintiff, for work and services by him done and rendered as the hired ["ser-

(*d*) By the 4th section of the statute of frauds, 29 Car. 2, c. 3, no action shall be brought "to charge any person upon any *agreement* made upon consideration of marriage," unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. As to what is a sufficient writing to satisfy the statute, see 2 Vent. 361; 2 Vern. 600; Barkworth *v.* Young, 26 L. J. Ch. 153; Warden *v.* Jones, 2 De G. & J. 76; Shadwell *v.* Shadwell, 9 C. B. N. S. 154. See a form of declaration and notes, 2 Chit. Pl. 7th ed. 188; and see 1 Roll. Abr. 6 M. Pl. 1; Cro. Car. 194. If the defendant's contract be *under seal*, the covenant should be declared on thus: "For that the defendant by deed covenanted with the plaintiff to pay him £——, &c." following the terms of the covenant.

(*e*) This may be varied to meet the terms of the particular contract, as to pay on the day of marriage or to pay a sum annually. If a man promises another that if he will marry his daughter he will give him as much as he should give to any of his other daughters, and dies, leaving one of the latter a sum of money, his executor or administrator may be sued on his promise. 2 Leon. 3; Cro. Eliz. 59.

(*f*) See a special count for non-payment of wages. Cuckson *v.* Stones, 1 El. & Bl. 240. Under the above indebitatus count, wages earned and due may be recovered. Where the servant has been wrongfully dismissed during the currency of the period for which the wages are payable, one of the special counts following must be adopted. And see note (*k*), *post*, 209; [Wallis *v.* Warren, 4 Ex. 361; 2 Chitty Contr. (11th Am. ed.) 855; Harris *v.* Separks, 71 N. Car. 372.] Where a servant improperly leaves his master's employ; Huttman *v.* Boulnois, 2 C. & P. 510; [2 Chitty Contr. (11th Am. ed.) 844, and note (d^3), 845–847, and note (d^4)]; or is justifiably dismissed during the currency of the period for which the wages are payable, this

vant" *or* "clerk"] of the defendant, at his request, and for [*account stated, &c. as ante*, 33, Form 1].

2. *By a Servant against his Master, for discharging him before the end of his Term of Service.* (*g*)

For that in consideration that the plaintiff would enter into the employ of the defendant in the capacity (*h*) of ["a reporter of the proceedings of the court of queen's bench, and also of proceedings in the house of commons, and would furnish reports of such proceedings to the defendant, his servants or agents, for the purpose of publication in a public newspaper of the defendant," *as the case may be*] for one year, (*i*) at a salary, the defendant promised to

is a forfeiture of the accruing wages, and he cannot recover any of his salary from the last pay-day to the time of his leaving or dismissal. Ridgway *v.* Hungerford Market Company, 3 Ad. & E. 171; Lilley *v.* Elwin, 11 Q. B. 742; Atkin *v.* Acton, 4 C. & P. 208; Taylor *v.* Laird, 1 H. & N. 266; [2 Chitty Contr. (11th Am. ed.) 848; Beach *v.* Mullin, 5 Vroom, 343. But a different rule has been adopted in Maine and several others of the American states, and the servant has been allowed to recover even after dismissal for good cause, at least so far as his services have been beneficial to his employer. Lawrence *v.* Gullifer, 38 Maine, 532; Jones *v.* Jones, 2 Swan, 605; Eakin *v.* Harrison, 4 McCord, 249; Byrd *v.* Boyd, 4 McCord, 246. See Clark *v.* Manchester, 51 N. H. 594.] As to the form of particulars of demand, see Harris *v.* Montgomery, 11 C. B. 393. An officer appointed by commissioners under a local paving act, at a salary to be paid out of the *rates*, Bogg *v.* Pearse, 10 C. B. 534, or an officer of a municipal corporation, Addison *v.* Mayor of Preston, 12 C. B. 108, cannot sue the corporate body for wages; the remedy is by mandamus. Ib.; and see Ward *v.* Lowndes, 28 L. J. Q. B. 265. As to the case of a person contracting to do work on the credit of a particular *fund*, see Landman *v.* Entwisle, 7 Ex. 638; Higgins *v.* Hopkins, 3 Ex. 163.

(*g*) See a similar form, Dunn *v.* Murray, 9 B. & C. 680; Williams *v.* Byrne, 7 Ad. & E. 177; Gould *v.* Webb, 4 El. & Bl. 933; Brown *v.* Symons, 8 C. B. N. S. 208; 29 L. J. C. P. 251; Wilkinson *v.* Gaston, 9 Q. B. 137; Spotswood *v.* Barrow, 1 Ex. 804; and see in general, [2 Chitty Contr. (11th Am. ed.) 844 *et seq.*] Burn's J. tit. "Servants." The declarations should in general be special, as above, for dismissing a servant, &c. before the expiration of the stipulated period. See Hulle *v.* Heightman, 2 East, 145. Where the salary is payable quarterly, or at some other stated period, and the dismissal occurs during the currency of such period, so that the plaintiff, though he has served during part of the period, has been *prevented* from *earning* the wages, no part of such quarter's salary can be recovered on the common indebitatus count; Smith *v.* Hayward, 7 Ad. & E. 544; Ridgway *v.* Hungerford Market Company, 3 Ad. & E. 171; Fewings *v.* Tisdal, 1 Ex. 295; Lilley *v.* Elwin, 11 Q. B. 742; even though the action be brought after the expiration of the quarter. Goodman *v.* Pocock, 15 Q. B. 576, 581; Emmens *v.* Elderton, 13 C. B. 495, 507. [See Derby *v.* Johnson, 21 Vt. 17; Hall *v.* Rupley, 10 Barr, 312; Clark *v.* Marsiglia, 1 Denio, 317; Moulton *v.* Trask, 9 Met. 577; Webster *v.* Enfield, 5 Gilman, 298; Sloan *v.* Hayden, 110 Mass. 141; Partington *v.* Wamsutta Mills, 110 Mass. 467.] *Aliter*, when the dismissal takes place by mutual consent; Thomas *v.* Williams, 1 Ad. & E. 685; Lamburn *v.* Cruden, 2 Scott N. R. 533; 2 M. & G. 253; and see Turner *v.* Robinson, 6 C. & P. 16; 5 B. & Ad. 789; Lacy *v.* Osbaldiston, 8 B. & Ad. 87, note; in which case a new agreement to pay *pro rata* may be inferred. Ib.; and see Robins *v.* Power, 4 C. B. N. S. 778; [Cranmer *v.* Graham, 1 Blackf. 407; Rogers *v.* Steele, 24 Vt. 513.] On the other hand, wages actually due before the dismissal cannot be recovered under this count. Hartley *v.* Harman, 11 Ad. & E. 798. [But where the employer has broken and determined the contract on his part, the party employed may treat it as determined, and may recover on the common counts the value of his services previously earned. See Canada *v.* Canada, 6 Cush. 15; Cranmer *v.* Graham, 1 Blackf. 407; 2 Greenl. Ev. § 104.] As to the various remedies and the times at which they may be enforced, see notes to Cutter *v.* Powell, 2 S. L. Ca. 1.

(*h*) The *capacity* is material here; not so the amount of the salary. Cooper *v.* Blick, 2 Q. B. 915.

(*i*) The time during which the service was to continue is a material averment. Beckham *v.* Knight, 1 M. & G. 738. It would be a variance to describe the contract as an absolute hiring for a year, if there was any stipulation or any usage of trade for determining the hiring at any earlier period, or by any particular notice. Ib.; Parker *v.* Ibbetson, 4 C. B. N. S. 346; Metzner *v.* Bolton, 9 Ex. 518; Baxter *v.* Nurse, 6 M. & G. 935; Lilley *v.* Elwin, 11 Q. B. 742. A general hiring is usually a hiring for a year, Beeston *v.* Collier, 4 Bing. 311, but there is no inflexible rule on the subject, as every case depends on its own peculiar circumstances, and is for the jury to determine; Fairman *v.* Gakford, 5 H. & N. 535; 29 L.

retain him in such employment on the terms aforesaid during the said year, and the plaintiff entered into such employ and continued therein until he was dismissed as hereinafter mentioned. And although the plaintiff was always ready and willing (*k*) to continue in the employ of the defendant on the terms aforesaid ["and to furnish such reports as aforesaid for the purpose aforesaid, for the remainder of the said year,"] and has performed all conditions [*&c. as ante*, 39]; yet the defendant, before the expiration of the said year, wrongfully discharged (*l*) him, whereby the plaintiff lost the wages, profits, and advantages which he would have derived from being continued in the said employ, and has been out of employ for a long time. (*m*)] *Add an indebitatus count, ante*, Form 1, *if any wages are actually due, as they could not be recovered on this count.* Hartley *v.* Harman, 11 Ad. & E. 798.]

J. Ex. 459, except in the case of menial servants; Fawcett *v.* Cash, 5 B. & Ad. 907; *post*, 211, note (*r*), and gardeners; Nowlan *v.* Ablett, 2 Cr., M. & R. 58; Johnson *v.* Blenkinsop, 5 Jur. 870; and it seems a general hiring of husbandry servants is a yearly hiring. Lilley *v.* Elwin, 11 Q. B. 732. *Clerks* are not menials; Huttmann *v.* Boulnois, 2 C. & P. 510; Beeston *v.* Collyer, 4 Bing. 309; nor foremen, and if engaged at wages "*per annum*," a yearly hiring would be implied; there being no custom or usage in the particular trade to the contrary; Ib.; if there be any custom or usage, it will be taken to form part of the contract, if not inconsistent with it. Metzner *v.* Bolton, 9 Ex. 518; Parker *v.* Ibbetson, 4 C. B. N. 346; Turner *v.* Robinson, 5 B. & Ad. 789. But a general hiring may be explained by evidence to the effect that the services were to be paid for at their worth; Bayley *v.* Rimmell, 1 M. & W. 507; Hensman *v.* Schram, 10 M. & W. 553; Foord *v.* Morley, 1 F. & F. 496; or that the remuneration was to be left to the option of the employer, in which case the servant would have no right of action for wages; Roberts *v.* Smith, 4 H. & N. 315; and indeed in all cases it is a question of *fact for the jury* whether or not the hiring was for a year. Baxter *v.* Nurse, 6 M. & G. 935; Down *v.* Pinto, 9 Ex. 327. Where a contract of hiring was to be binding for twelve months certain from the date, and to continue from time to time until three months' notice in writing be given by either party to determine the same, it was held that it might be determined by notice expiring at the end of the first year. Brown *v.* Symons, 8 C. B. N. S. 208; 29 L. J. C. P. 251.

(*k*) This implies ability to continue, as that plaintiff has not entered into the service of another person, Spotswood *v.* Barrow, 1 Ex. 804, or is not in such a state of health as to be *permanently* incapacitated from performing the duties of his service; and that the plaintiff had ability in point of skill to perform the duties undertaken. Harmer *v.* Cornelius, 5 C. B. N. S. 236. It is not necessary to aver that plaintiff offered to continue. Wallis *v.* Wassen, 4 Ex. 361. As to what justifies dismissal, see *post*, Pleas, "Master and Servant." [If a party is prevented, by sickness or other similar inability occasioned by a visitation of Providence, from laboring during the stipulated period, he may recover, upon a *quantum meruit*, for the services actually performed, as far as they have been beneficial to the employer. Fenton *v.* Clark, 11 Vt. 557; Patrick *v.* Putnam, 27 Vt. 759; Hubbard *v.* Belden, 27 Vt. 645; Ryan *v.* Dayton, 25 Conn. 188; Lakeman *v.* Pollard, 43 Maine, 463; Dickey *v.* Linscott, 20 Maine, 453; Fuller *v.* Brown, 11 Met. 440; Fahy *v.* North, 19 Barb. 341; Wolfe *v.* Howes, 24 Barb. 174; McMullen *v.* Kelso, 4 Texas, 235; Seaver *v.* Morse, 20 Vt. 620; Nichols *v.* Coolahan, 10 Met. 449; Hunter *v.* Waldron, 7 Ala. 753; Thomas *v.* Woodruff, 2 Speers, 148. Effect of offer to return after recovery from sickness. Ryan *v.* Dayton, 25 Conn. 188.]

(*l*) If an employing firm dissolves partnership, *quære* if this, *per se*, is a breach of the contract to employ. A discharge by a remaining partner would be. Hobson *v.* Cowley, 27 L. J. Ex. 205. As to the effect of the death of one partner, see Tasker *v.* Shepherd, 6 H. & N. 575. See *post*, 211, note (*s*).

(*m*) The plaintiff is entitled as damages to his salary up to the time when his service could have been legally determined, and the jury should also take into consideration the wages for the broken period up to the dismissal. Goodman *v.* Pocock, 15 Q. B. 576; Emmens *v.* Elderton, 13 C. B. 495; [Moody *v.* Leverich, 4 Daly (N. Y.), 401.] We have seen he cannot recover such salary on the common count, *ante*, 208, note (*g*). He is also entitled to compensation for the loss of board, lodging, commission, &c. to which he would have been entitled whilst in defendant's service, and compensation for being out of employment. But the plaintiff ought not to enhance the damages by remaining out of employ; and if he has obtained employment as eligible as defendant's, a small amount of damage will indemnify him. Emmens *v.* Elderton, *ubi sup.*; [2 Chitty, Contr. (11th Am. ed.) 855. 856.]

3. *By a Servant against his Master for Breach of a Special Agreement as to the Terms of Service.* (*n*)

For that by agreement between the plaintiff and defendant, the plaintiff entered into the service of the defendant as foreman and manager of the defendant's business of ——, at a yearly salary, payable quarterly [monthly *or* weekly, *according to the agreement*], upon the terms that such service should continue for —— years, determinable by —— months' notice (in writing) to be given by either party to the other, expiring at the end of any current quarter [*or* at the end of any year of the said term], and that the defendant should find and provide for the plaintiff during the continuance of such service, rooms and apartments in the [house or] factory of the defendant, for the use and occupation of the plaintiff and his family, with firing, gas-light, &c. for their use [*according to the special terms agreed upon*]. And although the plaintiff was always ready and willing to continue in the said service on the terms aforesaid, of which defendant had notice, and although the plaintiff has performed all conditions [*&c. as ante*, 39]; yet the defendant, before the expiration of the said term of —— years, wrongfully dismissed the plaintiff from his service without giving any such notice as aforesaid, and refused to allow him to continue therein, (*o*) whereby [*&c. as in* Form 2].

4. *By a Menial or Domestic Servant entitled to a Month's Warning or a Month's Wages against a Master for a wrongful Dismissal.* (*p*)

For that in consideration that the plaintiff would enter into the service of the defendant in the capacity of a menial and domestic servant [to wit, a cook] at wages at the rate of £—— per year, such employment and service to continue until either of the said parties should determine the same by giving to the other of them one calendar month's notice of his intention so to do, or in case of the defendant's dismissing the plaintiff from such service without such notice, then that the defendant should pay the plaintiff his [*or* her] wages at the rate aforesaid for one calendar month, (*q*) the defendant promised the

(*n*) This form may be readily adapted to any case in which special terms have been agreed upon between the plaintiff and defendant; see forms, Harmer *v.* Cornelius, 5 C. B. N. S. 236; Cuckson *v.* Stones, 1 El. & Bl. 248; Brown *v.* Symons, 8 C. B. N. S. 208.

(*o*) If there was not an actual dismissal of the plaintiff, but the defendant failed to find him apartments or coals, &c. the breach may be confined to that part of the case.

(*p*) Domestic servants are generally hired at yearly wages; but it is implied that they are liable to be dismissed at a month's notice, or on payment of a month's wages. Turner *v.* Mason, 14 M. & W. 112; Fewings *v.* Tisdal, 1 Ex. 295; Fawcett *v.* Cash, 5 B. & Ad. 904; Robinson *v.* Hindman, 3 Esp. 235; and the contract should be described as in the above form. Williams *v.* Byrne, 7 Ad. & E. 177; see a form, Hartley *v.* Harman, 11 Ad. & E. 798. These terms are implied in cases where there is a written contract of hiring not inconsistent with them. Johnson *v.* Blenkinsop, 5 Jur. 870. If the hirings be for more than a year, the contract must be in writing under the statute of frauds, 29 Car. 2, c. 3, s. 4. Girand *v.* Richmond, 2 C. B. 835. But any written contract for the hiring of a menial servant is exempt from stamp. 55 Geo. 3, c. 184. A head gardener, living in a house within his master's grounds, is a domestic servant within the above rule; Nowlan *v.* Ablett, 2 Cr. M. & R. 54; Johnson *v.* Blenkinsop, *ubi sup.* but a governess is not; Todd *v.* Kerrick, 5 Ex. 151, nor are clerks; Huttman *v.* Bonnois, 2 C. & P. 510; nor foremen. Turner *v.* Robinson, 5 B. & Ad. 789. The monthly wages are payable in the nature of damages for the wrongful dismissal; they cannot be recovered under form 1, for services rendered; Fewings *v.* Tisdal, 1 Ex. 295; but *semble*, an indebitatus count might be framed for the purpose of recovering the month's wages. East Anglian Ry. Co. *v.* Lythgoe, 10 C. B. 726; such wages may be *set off* against any money claim made by the master. Ib.

(*q*) See last note.

plaintiff to retain him [*or* her] in his service until such service should be determined as aforesaid; and the plaintiff entered into the defendant's service, and was ready and willing to continue therein, of which the defendant had notice; yet the defendant wrongfully dismissed the plaintiff from his service without such notice as aforesaid, and without paying the plaintiff one month's wages at the rate aforesaid. (r) [*Add* Form 1 *for any arrears of wages due at the time of dismissal, and a count on an account stated, as ante*, Form 2.]

5. *Against an Employer for refusing to receive a Hired Servant into his Employ.* (s)

For that in consideration that the plaintiff, at the defendant's request, had agreed with the defendant to enter into the service of the defendant as ——, and to serve him in that capacity for [one year], at wages at the rate of £—— a year, payable [*state the terms of the hiring accurately, as in the preceding forms*], the defendant promised the plaintiff to receive him into the defendant's service, and retain him therein on the terms aforesaid; and although the plaintiff was ready and willing to enter into the defendant's service, of which he had notice, and has performed all conditions precedent [*as ante*, 39]; yet the defendant refused to receive the plaintiff into his service, whereby the plaintiff has been for a long time unemployed.

6. *By Master against his Servant for leaving his Employ without Notice, or before the Expiration of his Term of Service.*

Messiter *v.* Rose, 13 C. B. 162; Less *v.* Whitcombe, 5 Bing. 34.

[7. *By an Employer against his Servant for doing Work under a Contract negligently.*

Holmes *v.* Onion, 2 C. B. N. S. 790.]

OTHER FORMS.

1. *By an Editor of a Newspaper.*

Cooper *v.* Blick, 2 Q. B. 915.

(r) It is not unusual to aver as special damage the loss of wages and advantages which would have accrued from a continuance in the defendant's service, and that the plaintiff has remained unemployed; but in the case of domestic servants, the month's wages in lieu of a month's warning appears to be the measure and extent of damages recoverable. Hartley *v.* Harman, 11 Ad. & E. 798.

(s) Where an employer, before the time for service has arrived, renounces the contract, and refuses to receive the plaintiff into his service, the latter may at once treat this as a breach of contract, and sue thereon; and though he has entered into another engagement, that will merely go in reduction of damages. Hochster *v.* De la Tour, 2 El. & Bl. 678; and see The Danube & Black Sea Ry. Co. *v.* Zenos, [11 C. B. N. S. 152;] 31 L. J. C. P. 284; [2 Chitty Contr. (11th Am. ed.) 1079, 1080, and notes. See forms and law, and cases there cited; also, a form for not allowing plaintiff to complete a voyage as boatswain on board defendant's ship, and for not paying him his wages, 2 Chit. Pl. (7th ed.) 239, 240. See form, Leroux *v.* Brown, 12 C. B. 801, for not receiving plaintiff into defendant's employ as clerk and agent; and a form for not employing plaintiff as shepherd, Clarke *v.* Allatt, 4 C. B. 335; and see Snelling *v.* Lord Huntingfield, 1 Cr., M. & R. 20.

2. *By a Reporter to a Newspaper.*

Dunn *v.* Murray, 9 B. & C. 780; Gould *v.* Webb, 4 El. & Bl. 933; Williams *v.* Byrne, 7 Ad. & E. 177.

3. *By a Printer of a Newspaper against the Publisher.*

Cunningham *v.* Fonblanque, 6 C. & P. 44.

4. *By an Editor of a Periodical.*

Baxter *v.* Nurse, 1 C. & K. 10; 6 M. & G. 935; and see Holcroft *v.* Barber, 1 C. & K. 4.

5. *By a Secretary.*

Wilkinson *v.* Gaston, 9 Q. B. 137.

6. *By an Usher in a School.*

Fillieul *v.* Armstrong, 7 Ad. & E. 557.

7. *By Governess.*

Todd *v.* Kerrick, 8 Ex. 151.

8. *By Actor against the Manager of a Theatre, and Plea of Misconduct.*

Lucy *v.* Osbaldiston, 8 C. & P. 80; Webster *v.* Emery, 10 Ex. 901.

9. *By Actor against the Manager of a Theatre for Salary.*

Frazer *v.* Bunn, 8 C. & P. 704, and by manager against actor for not performing according to agreement, Batty *v.* Melillo, 10 C. B. 282.

10. *By Scene Painter.*

Harmer *v.* Cornelius, 5 C. B. N. S. 236.

11. *By Accountant.*

Baillie *v.* Kell, 4 Bing. N. C. 638.

12. *By Commercial Traveller.*

Metzner *v.* Bolton, 9 Ex. 518. See Spotswood *v.* Barrow, 5 Ex. 110; Hart *v.* Denny, 1 H. & N. 609.

13. *By Country Traveller to a Wine Merchant for refusing to allow him to make the stipulated Journeys.*

Brown *v.* Symonds, 8 C. B. N. S. 208.

14. *By Agent or Representative of Defendant in his Business of Woollen Manufacturer.*

Parker *v.* Ibbetson, 4 C. B. N. S. 346.

15. *By Manager of a Shipping Business.*

Smith *v.* Thompson, 8 C. B. 44.

16. *By Manager of a Cotton Factory, &c.*

Cussons *v.* Skinner, 11 M. & W. 161; Hobson *v.* Cowley, 27 L. J. Ex. 205.

17. *By Foreman of Type Founders.*

Beckham *v.* Knight, 1 M. & G. 738.

18. *By Foreman and Manager of Foreign Smelting or other Manufacturing Works.*

Down *v.* Pinto, 9 Ex. 327; Lomax *v.* Arding, 10 Ex. 734.

19. *By Superintendent of Coal Works.*

Hartley *v.* Harman, 11 Ad. & E. 798.

20. *By Mercantile Clerk, and Plea that Plaintiff set up a Claim of Partnership with Defendant.*

Amor *v.* Fearon, 9 Ad. & E. 548.

21. *By Attorney against a Public Company for Breach of an Agreement to employ him permanently at a Salary in lieu of rendering a Bill of Costs.*

Emmens *v.* Elderton, 13 C. B. 495.

22. *By Attorney's Clerk.*

Mercer *v.* Whall, 5 Q. B. 447.

23. *By Courier engaged to travel Abroad, and Pleas.*

Fischer *v.* Aide, 3 M. & W. 486; Hochster *v.* De la Tour, 2 El. & Bl. 678.

24. *By Ship's Carpenter, for wrongfully putting him on Shore, and Plea that he mutinied.*

Renno *v.* Bennett, 3 Q. B. 768.

25. *For refusing to take Plaintiff into Defendant's Service as Farming Bailiff.*

Snelling *v.* Lord Huntingfield, 1 Cr., M. & R. 20.

26. *For refusing to receive Plaintiff into Defendant's Service as Shepherd.*

Clarke *v.* Allatt, 4 C. B. 335.

27. *For not employing Plaintiff in a certain Trade, or using best Endeavors to procure him Similar Employment.*

Rust *v.* Nottidge, 1 El. & Bl. 99.

28. *Against a Surgeon who had engaged to go on board a Ship in that Capacity for not performing his Engagement, and Pleas.*

Richards *v.* Hayward, 2 M. & G. 54.

29. *By a Journeyman against his Master on a Custom of the Trade, for not paying his Expenses back from the Country where his Master had sent him, and Plea of Misconduct.*

Read *v.* Dunsman, 9 C. & P. 588.

MEDICAL ATTENDANCE.

See "Apothecary," *ante*, 48.

MINES.

1. *For the Use of Land and Veins of Minerals.*

Obs. — See a form, Jones *v.* Reynolds, 4 Ad. & E. 805; where a person enters into the occupation of a mine, under an agreement to grant him a lease thereof, he takes not a mere license, but such an hereditament in respect of which use and occupation will lie. Ib.

2. *For Non-payment of Galeage Rent of Coal Mines.*

See a form, 2 Chit. Pl. 7th ed. 400.

MORTGAGE DEEDS.

1. *On the Covenant in a Mortgage Deed.* (*t*)

For that the defendant, by deed dated the —— day of ——, A. D. ——,

(*t*) Formerly the remedy was by action of debt or covenant on the mortgage deed; by debt where the covenant was absolute, Evans *v.* Jones, 5 M. & W. 295, but not where it was collateral, as to pay if A. or B. did not do so; Harrison *v.* Matthews, 10 M. & W. 768; Addison *v.* Gibson, 10 Q. B. 111; White *v.* Handcock, 2 C. B. 830; though the distinctions between the forms of action are abolished, the terms of the particular covenant must be attended to in framing the declaration. If the money was only payable after demand in writing, it will of course be necessary to describe the covenant and to aver such demand. See Trott *v.* Smith, 10 M. & W. 453; 12 M. & W. 688; and see another form, King *v.* Greenhill, 6 M. & G. 59. Where the covenant was to pay the money at a certain time and place, it was held no material variance to omit all mention of the place in setting out the covenant. Paine *v.* Emery, 4 Dowl. 191. Declaration stated defendant covenanted for himself, his "heirs," &c.; the covenant did not contain the word "heirs;" held not a variance. Hamburgh *v.* Wilke, 1 Chit. R. 518; 4 M. & S. 474, note. See a form for not paying the premiums on a policy of insurance which defendant covenanted in the mortgage deed to keep up as an additional security, Bennett *v.* Burton, 12 Ad. & E. 657. See a similar form, Brown *v.* Price, 4 C. B. N. S. 598, and also Warburg *v.* Tucker, 5 El. & Bl. 384; Wodehouse *v.* Farebrother, 5 El. & Bl. 277. As to the amount of damages recoverable, Ib.; National Ins. Co. *v.* Best, 2 H. & N. 605. If a mortgage deed contain no covenant for the payment of the principal or interest, an action for money lent will lie notwithstanding. Yates *v.* Aston, 4 Q. B. 182; Matthew *v.* Blackmore, 1 H. & N. 762, and see Brown *v.* Price, *ubi sup.*, and *ante*, 28. A mortgagee may sue although he has never executed the deed. Morgan *v.* Pike, 14 C. B. 473; The Northampton Gas Light Co. *v.* Parnell, 15 C. B. 690. But see the distinction in cases of *demise by indenture*. Pitman *v.* Woodburn, 3 Ex. 4; Cooch *v.* Goodman, 2 Q. B. 580; see *post*, deed pleas. A municipal corporation may be sued on a covenant in a mortgage deed under their common seal, though the mortgage may have been *ultra vires*, and it is no answer that the corporation has no property liable to execution in such action. Payne *v.* The Mayor of Brecon, 3 H. & N. 572. By 3 Geo. 2, c. 20, s. 1, where no foreclosure suit is pending, if the mortgagor render the principal, interest, and costs into court, it shall be deemed a satisfaction, and the court may compel the mortgagee to surrender the premises. See *post*, "Ejectment;" C. L. P. Act, 1852, s. 219.

covenanted with the plaintiff [*this should correspond in substance with the defendant's covenant contained in the deed*], that he the defendant would pay to the plaintiff £——, with interest at the rate of [£5] per cent. per annum, upon the —— day of —— then next ensuing, but the defendant did not pay the same. [*Add a count on an account stated, which would be proper*, per Lord Denman, Simmons *v.* Wood, 5 Q. B. 173.] (*u*)

2. *Declaration on a Mortgage Deed for securing the Re-transfer of Stock.*

Morgan *v.* Pike, 14 C. B. 473.

NECESSARIES. (*x*)

For meat, drink, washing, lodging, attendance, and other necessaries, and goods found, supplied, and provided by the plaintiff for the defendant ["and other persons," *if the fact*] at his request, and for [*add money paid, if applicable, and account stated*].

PARTNERS.

Obs. — All cases of partnership depend on the same principles as cases of agency. [See 1 Lindley Partn. (3d Eng. ed.) 40 *et seq.*; 1 Chitty Contr. (11th Am. ed.) 328, 344; Lord Cranworth and Lord Wensleydale in Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 92, 99; Cox *v.* Hickman, 8 H. L. Cas. 268; Kilshaw *v.* Jukes, 3 B. & S. 847; Bullen *v.* Sharp, L. R. 1 C. P. 86; Eastman *v.* Clark, 53 N. H. 276, in which the cases are fully reviewed.] One partner cannot sue his copartner at law in any matter connected with the partnership business accounts; [1 Chitty Contr. (11th Am. ed.) 339 *et seq.*; Collyer Partn. § 264 *et seq.*; Lawrence *v.* Clark, 9 Dana, 257; Gridley *v.* Dole, 4 Comst. 486; Leidy *v.* Messinger, 71 Penn. St. 177; Klase *v.* Bright, 71 Penn. St. 186, 192; Chase *v.* Garvin, 19 Maine, 211; Chadsey *v.* Harrison, 11 Ill. 151; Kennedy *v.* M'Faden, 3 Harr. & J. 194; Causten *v.* Burke, 2 H. & Gill, 295; Bevans *v.* Sullivan, 4 Gill, 383; Chandler *v.* Chandler, 4 Pick. 78; Johnson *v.* Ames, 6 Pick. 330; Brinley *v.* Kupfer, 6 Pick. 179; Henshaw *v.* Williams, 12 Pick. 59; 2 Lindley Partn. (3d Eng. ed.) 919 *et seq.*;] except in the county court, when the whole or part of the unliquidated balance of a partnership account does not exceed £50; 9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61, s. 1. But partners may sue each other on express contracts or covenants between them, as on a covenant to account; Foster *v.* Allanson, 2 T. R. 482; Owston *v.* Ogle, 13 East, 538; Venning *v.* Leckie, 13 East, 7; Elgie *v.* Webster, 5 M. & W. 518; Brown *v.* Tapscott, 6 M. & W. 119; [2 Lindley Partn. (3d Eng. ed.) 910 *et seq.*;

(*u*) A sum sufficient to cover principal and interest. The interest which has accrued since the day fixed for payment is in strictness claimable only as *damages*, and the declaration should therefore conclude by claiming an amount sufficient to cover all such interest. Simmons *v.* Wood, 5 Q. B. 170. The jury can give as the *debt*, only the principal and the exact arrears of interest to the day on which defendant covenanted to pay the interest. See Watkins *v.* Morgan, 6 C. & P. 651; 3 & 4 W. 4, c. 42. If the covenant be to pay the principal on a day certain, and in case of non-payment to pay interest on the principal, so long as it should remain in arrear, by half-yearly payments, the breach may be framed thus: "Yet the defendant did not pay the said sum of £—— and the interest thereon on the said —— day of ——, A. D. ——, and there is now due and owing £—— of the said principal, and £—— for interest thereon, to the said —— day of —— A. D. ——. If the interest reserved by the deed be £10 per cent., and the principal be not paid at the day, interest continues payable at the same rate of £10 per cent. Morgan *v.* Jones, 8 Ex. 620.

(*x*) For board and lodging, see *ante*, 87; furnished apartments, *ante*, 184; Chit. jr. Cont. Index, "Infant," "Husband and Wife."

Obs. Leighton *v.* Wales, 3 M. & W. 545; Barker *v.* Allan, 5 H. & N. 61; Greenham *v.* Gray, 4 Ir. Com. Law Rep. 501;] or on any other agreement or transaction, so separated from the partnership affairs as not to involve any general account; Coffee *v.* Brian, 3 Bing. 54; Jackson *v.* Stopherd, 2 C. & M. 361; Lomas *v.* Bradshaw, 9 C. B. 620; [Gibson *v.* Moore, 6 N. H. 547; Sawyer *v.* Proctor, 2 Vt. 480; Lawrence *v.* Clark, 9 Dana, 257; Gridley *v.* Dole, 4 Comst. 486; Gulick *v.* Gulick, 2 Green, 578; Clark *v.* Dibble, 16 Wend. 601; McColl *v.* Oliver, 1 Stewart, 510;] thus an action lies for money received by one partner to the separate use of the other, but wrongfully carried to the partnership account; Smith *v.* Barrow, 2 T. R. 746; or money which one partner has been compelled to pay in satisfaction of a promissory note wrongfully made by his copartner in the name of the firm, and given for his own debt; Cross *v.* Cheshire, 7 Ex. 43; *ante*, 28; or a copartner's share of money paid by plaintiff his partner, in taking up a promissory note made and negotiated by them for raising money for the partnership; Sedgwick *v.* Daniell, 2 H. & N. 319; or money advanced by one partner for his copartner, as his share of the capital of the firm. French *v.* Styring, 2 C. B. N. S. 357; *ante*, 28.

And if upon winding up of the business and striking a *final* balance of all partnership accounts, money be found due from one partner to another, it may be recovered at law; Bovill *v.* Hammond, 6 B. & C. 149; Coffee *v.* Brian, 3 Bing. 54; Foster *v.* Allanson, 2 T. R. 482; without any *express* promise to pay the same. Wray *v.* Milestone, 5 M. & W. 21; Middleditch *v.* Ellis, 2 Ex. 623–627; Sedgwick *v.* Daniell, 2 H. & N. 319, per Bramwell B.; [1 Chitty Contr. (11th Am. ed.) 342, and note (*b*); Fanning *v.* Chadwick, 3 Pick. 423; Williams *v.* Henshaw, 11 Pick. 82; S. C. 12 Pick. 378; Collyer Partn. § 281, in notes.]

Subscribing creditors to a deed of assignment are not partners as to third persons. Hickman *v.* Cox, [8 H. L. Cas. 268; S. C. 3 C. B. N. S. 522,] Dom. Proc.

A partner in a private partnership as in a mining company conducted on the cost-book principle, cannot be sued for calls due to the partnership, either by any other partner in the firm, or by the purser, though, by the rules of the company, calls in arrear shall be considered to be debts due from defaulting shareholders to the purser, one partner not being liable to be sued at law by his copartner, and there being no privity or consideration between the defendant and purser. Hybart *v.* Parker, 4 C. B. N. S. 209.

It is no answer to an action on an agreement to enter into a partnership with A., that A. had been guilty of fraud and dishonesty towards a former partner, which was unknown to the defendant at the time of entering into the agreement. Andrewes *v.* Garstin, [10 C. B. N. S. 444.]

See, further, as to the law of partners, Waugh *v.* Carver, 1 S. L. Ca.; Smith's Mercantile Law, tit. Partners; Story's Equity Jurisprudence; Seton on Decrees, *sub voce.*; Lindley on Partnership; [Collyer on Partn.; Bullen *v.* Sharp, L. R. 1 C. P. 86; st. 28 & 29 Vict. c. 86.]

1. *By a surviving Partner for Goods sold, &c. by the late Firm, and Account stated with the Survivor.* (*y*)

Commencement in the ordinary form, not noticing the deceased. See forms of commencement where the death occurs after the writ, ante, 15.] For money

(*y*) See form on a bill of exchange by surviving drawer against acceptor, *ante*, 84, Form 27. The executor of the deceased partner cannot be added as a plaintiff. 1 Chit. Plead. 7th ed. 22; *ante*, 119, 120. In general all the partners, when living, must join, or the plaintiff may be nonsuited. See Pleas, "Partners," *post*; C. L. P. Act, 1852, ss. 34, 35. And now by C. L. P. Act, 1860, s. 19, all persons supposed to be legally entitled may be joined. But it seems that a *dormant* partner may be omitted. See Leveck *v.* Shaftoe, 1 Esp. R. 468; Lloyd *v.* Archbowle, 2 Taunt. 324; and that even a *nominal* or ostensible partner, having no interest, and not in fact contracting, need not be joined as a plaintiff; Kell *v.* Nainby, 10 B. & C. 20; [Spurr *v.* Cass, L. R. 5 Q. B. 656; 1 Lindley Partn. (3d Eng. ed.) 490, 491]; but a partner *really interested* may be joined as plaintiff, though not a contracting partner. Garrett *v.* Handley, 4 B. & C. 664; Cooke *v.* Seeley, 2 Ex. 746; and a surviving partner must sue specially as

payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff and one E. F., since deceased, to the defendant, and for [*stating any other debt, as ante*, 33, Form 1, *writing the words* "plaintiff and the said E. F." *for* "plaintiff," *and proceed thus :*] and for money found to be due from the defendant to the plaintiff and the said E. F. on accounts stated between them, and for money found to be due from the defendant to the plaintiff on accounts stated between them. (*z*)

Against a Surviving Partner.

Obs.—It is never necessary to declare against a surviving partner *as such;* he may be sued as having solely contracted, and in such form debts due from him individually and from the late firm may be recovered. Richards *v.* Heather, 1 B. & Ald. 29; *ante*, 15. If the cause of action were joint, and not joint and several, the executor of the deceased is not liable at law. 1 Chit. Plead. 58, 7th ed.; *ante*, 119. A dormant partner may be sued, but need not if no party to the contract. See Ib. 49; Chit. jr. Contr. tit. "Partners;" Farrer *v.* Duflinne, 1 Car. & K. 580; De Mautort *v.* Saunders, B. & Ad. 398; Beckham *v.* Knight, 1 M. & G. 738. Form against three partners on an agreement signed by two only, Beckham *v.* Drake, 9 M. & W. 79.

BY ONE PARTNER AGAINST HIS COPARTNER.

[1. *By one Partner against his Copartner on a Stipulation to render an Account and divide Profits.*

Owston *v.* Ogle, 13 East, 538.]

2. *On a Deed of Dissolution of Partnership between Plaintiff and Defendant, by which Defendant covenanted not to carry on Business within Certain Limits during a period of Seven Years, or to pay £1,000 as Liquidated Damages.*

Galsworthy *v.* Strutt, 1 Ex. 659.

3. *By a Partner against his Copartner, for improperly closing the Business Premises, in Breach of the Covenant of the latter.*

Hodges *v.* Gray, 4 Dowl. 733.

4. *Against Surviving Partner on a Contract to Employ, for not continuing to Employ.*

Tasker *v.* Shepherd, 6 H. & N. 577.

5. *For Breach of an Agreement to enter into Partnership.*

Andrewes *v.* Garstin, 31 L. J. C. P. 15; 10 C. B. N. S. 444.

[for a debt due to the *firm*. Jell *v.* ouglas, 4 B. & Ald. 374; Israel *v.* Sim- ns, 2 Stark. R. 356; [1 Lindley Partn. Eng. ed.) 505.] But a contract with A. Co. may be described as a contract with A. only if he was surviving partner at the date of the contract. Boyd *v.* Moyle, 2 C. B. 644.

(*z*) A count may also be added on a cause of action accruing entirely to the plaintiff only. Hancock *v.* Haywood, 3 T. R. 433; Slipper *v.* Slidstone, 5 T. R. 493; Jell *v.* Douglas, 4 B. & Ald. 374.

PARTY WALLS.

Obs. — The common use of a wall separating adjoining lands belonging to different owners is *primâ facie* evidence that the wall and the land on which it stands belongs to the owners of those adjoining lands in equal moieties as tenants in common. Cubitt *v.* Porter, 8 B. & C. 257, and note, 259; [3 Kent, 437, 438, and note (*a*).] But this presumption will be rebutted if it can be shown that part of the wall stands upon the land of each. Matts *v.* Hawkins, 5 Taunt. 20. If one tenant in common pull down the common party wall in order to rebuild it the other cannot maintain trespass. Per Crompton J. Stedman *v.* Smith, 8 El. & Bl. 1.

See, further, as to the general law relating to party walls, Gale on Easements by Willes, 411; Woodfall's Landlord and Tenant, Murley *v.* McDermott, 8 Ad. & E. 138; Stedman *v.* Smith, *ubi supra*. But where party walls are situated within the metropolis and its neighborhood, many questions relating to them are regulated by "The Metropolitan Building Act, 1859," 18 & 19 Vict. c. 122, and "The Metropolitan Building Act (amendment), 1860," 23 & 24 Vict. c. 52.

The rights of the building and adjoining owner respectively with regard to repairing or rebuilding party walls in the metropolis and its neighborhood are defined by 18 & 19 Vict. c. 122, ss. 83, 84. Section 88 lays down rules as to the expenses of party structures to be borne by the building and adjoining owners respectively. By section 89 the building owner is to deliver to the adjoining owner an account in writing of the expense to be borne in whole or in part by him. By section 90, within one month after the delivery of such account, the adjoining owner may object to such account, and in such case the dispute is to be referred as directed by s. 85. But if he do not object within one month then he shall be deemed to have accepted the same, and if he fail to pay it on demand, it may be recovered as a debt. As to payment of expenses by the owners, *vide* s. 97. The plaintiff may recover in the cases provided for by the act on a count for money paid. Peck *v.* Wood, 5 T. R. 130; Barrett *v.* Duke of Bedford, 8 T. R. 602. A contract for the erection of a building in contravention of the building acts, cannot be enforced. Stevens *v.* Gourley, 7 C. B. N. S. 99.

In many provincial towns local acts regulate the structure of party walls; they must, of course, be looked into before framing a declaration in an action arising thereon, see forms, 2 Chit. on Pleading, 7 ed.; and see *post*, "Torts."

PATENT.

1. *Indebitatus Count for Remuneration for License to Use.* (*a*)

For money payable by the defendant to the plaintiff for the license and

(*a*) See similar forms in Chanter *v.* Hopkins, 4 M. & W. 399; Chanter *v.* Deedhurst, 12 M. & W. 823; Chanter *v.* Johnson, 14 M. & W. 408; Lawes *v.* Purser, 6 El. & Bl. 930; and see forms of special counts, Chanter *v.* Lees, 4 M. & W. 295; 5 Ib. 698; Hall *v.* Bainbridge, 5 Q. B. 233; [Oxley *v.* Holden, 8 C. B. N. S. 666; Smith *v.* Scott, 6 C. B. N. S. 771.] The license to use a patented invention need not be under seal; Chanter *v.* Deedhurst, 12 M. & W. 823; if under seal, *semble*, it does not require a stamp; Chanter *v.* Johnson, 14 M. & W. 408; where the plaintiff's invention has been actually used under license from him, a plea that the plaintiff's patent was void is bad, the action being on an executed consideration. Lawes *v.* Purser, 9 El. & Bl. 930, and see Smith *v.* Neale, 2 C. B. N. S. 67; [Warner *v.* Willington, 3 Drew. 523; Reuss *v.* Picksley, 2 R. I. Ex. 342.] If the license be by deed, the deed is an estoppel to the defendant's disputing the validity of the patent. Smith *v.* Scott, 6 C. B. N. S. 771; 28 L. J. C. P. 325. As to warranting that the patent is valid, see Hall *v.* Conder, 2 C. B. N. S. 22; Smith *v.* Scott, 6 C. B. N. S. 771. The assignor of a patent, who has sold it as valid, cannot, as between himself and the assignee to whom he has sold it, raise any question as to the patent being void for want of novelty. Walton *v.* Lavater, 29 L. J. C. P. 272; 8 C. B. N. S. 163; [nor can the assignee dispute the validity of the patent as against the assignor. Hills *v.* Laming, 9 Ex. 256; Smith *v.* Neale, 2 C. B. N. S. 67; Lawes *v.* Purser, 6 El. & Bl. 930; Crossley *v.* Dixon, 10 H. L. Cas. 293.]

permission of the plaintiff, by him granted to the defendant at his request, to use a certain patent invention, of which the plaintiff was the owner and proprietor, and for the defendant's use thereof under such license and permission.

2. *On a Deed by which Plaintiff licensed the Defendant to use the Plaintiff's Patented Invention for making Wire Rope, Defendant covenanting to pay £1 per Ton for all Rope manufactured by him, to render periodically an Account of the Quantity of Rope manufactured, and to allow the Plaintiff to inspect Defendant's Books, assigning Breaches of each of the Covenants.*

Smith *v.* Scott, 6 C. B. N. S. 771.

3. *On a Deed of Covenant to pay a Royalty for every Ton of Articles manufactured under a License granted to Use a Patent, and to render Accounts.*

Bower *v.* Hodges, 13 C. B. 765.

4. *By Patentee of Improvements in Slubbing Machines, against Licensee on his Covenant, not to Make or Sell any Machines without applying Plaintiff's Patented Improvements.*

Jones *v.* Lees, 1 H. & N. 189.

5. *On a Covenant by a Public Company to pay a Sum of Money to the Plaintiff out of the first Calls on Shares of the Company, in consideration of Plaintiff covenanting to convey his Patent to the Defendant.*

Pilbrow *v.* Pilbrow's Atmospheric Railway Company, 5 C. B. 440.

6. *For Breach of an Agreement to do all that was necessary for obtaining and perfecting a Patent about to be taken out by the Plaintiff, on the occasion of the Assignment to the Defendant of a Share therein.*

Hill *v.* Mount, 18 C. B. 72.

7. *On an Agreement for the Sale by the Plaintiff to the Defendant, of a Moiety of the Plaintiff's Interest in a Patent which he had obtained, assigning Breaches for Non-payment of the Purchase-money, &c.*

Hall *v.* Conder, 2 C. B. N. S. 22.

8. *On an Agreement by which Plaintiff's Patent was to be assigned to and worked by the Defendant, the Plaintiff receiving Percentages upon all Goods sold to which the Patent applied, and the Defendant agreeing to make the necessary Periodical Payments for Stamp Duty, to keep the Patent alive, for not making such Payments, whereby Plaintiff's Patent ceased.*

Smith *v.* Neale, 2 C. B. N. S. 67.

PENAL STATUTES. See "Statutes."

PENALTY. See "Liquidated Damages."

PHYSICIAN.

Obs. — The rule that a physician shall not recover his charges in an action, is founded on the general custom of the profession not to charge. [But see American law upon this subject, *ante*, 48, 49.] There is nothing to prevent his making a special contract that he shall be paid for his services, and recovering under such contract. The Attorney General *v.* The Royal College of Physicians, 30 L. J. Ch. 757. Now by 21 & 22 Vict. c. 90, s. 31, every person registered under that act may recover his reasonable charges, but it is also provided that any college of physicians may pass a by-law to the effect that no one of their fellows or members shall be entitled to sue, and such by-law may be pleaded in bar, and see *ante*, "Apothecaries," Obs. 47–49.

POUNDAGE. See "Sheriff," *post*, 244.

PRINCIPAL AND SURETY. See "Guaranties," *ante*, 136, 137.

PROMISSORY NOTES IN ORDINARY CASES.

See the Obs. and notes to the forms on Bills, *ante*, 73.

1. *Payee against Maker.* (*b*)

For that the defendant, (*c*) on the —— day of ——, A. D. ——, (*d*) by his promissory note, (*e*) now overdue, promised to pay to the plaintiff (*f*) £——

(*b*) This form is the one given by the C. L. P. Act, 1852, sch. B, 15.

(*c*) Although the note be made by many persons *jointly and severally*, yet if one only be sued, it may be stated that "he" (only) made the note, without noticing the other makers. Mountstephen *v.* Brook, 1 B. & Ald. 224; Bulbeck *v.* Jones, 5 Jur. N. S. 1317; Beecham *v.* Smith, El., Bl. & El. 442. If a note be made by several persons *jointly*, if one only be sued, by which the risk of a plea in abatement will be incurred, unless the others be dead or out of the jurisdiction of the court, it should be stated that the defendant only made the note. On a promissory note in the ordinary form "we promise to pay," signed by the members describing themselves as directors or trustees of a building society, the makers are personally liable. Healey *v.* Story, 3 Ex. 3; Price *v.* Taylor, 5 H. & N. 540; Mare *v.* Charles, 5 El. & Bl. 978; *ante*, 73, note (*k*); when otherwise, Aggs *v.* Nicholson, 1 H. & N. 165; Lindus *v.* Melrose, 3 H. & N. 167. A promissory note signed by directors of a company, may be binding on a company though not drawn strictly in pursuance of the provisions of the deed of settlement, so as to be binding on the shareholders. Allen *v.* The Sea Fire & Assurance Company, 9 C. B. 574; Gordon *v.* The Sea Fire & Life Assurance Society, 1 H. & N. 599; Enthoven *v.* Hoyle, 13 C. B. 373.

(*d*) As to the date, *ante*, 73, note (*g*). The date of the bill should be inserted here as being *presumptively* the day on which it was accepted. Morgan *v.* Whitmore, 6 Ex. 716. If the defendant really accepted on a day different from the date, that would be immaterial; Smith *v.* Lord, 2 D. & L. 739; or amendable at the trial. Bentying *v.* Scott, 4 C. & P. 24.

(*e*) As to ambiguity in the nature of the instrument, see *ante*, 73, note (*f*), and see Arinfield *v.* Allport, 27 L. J. Ex. 42. A note, "I promise to pay or cause to be paid," may be declared on as a note in the common form. Lovell *v.* Hill, 6 C. & P. 238. There must be a *delivery* of the note to the plaintiff with an intention to give him a title to it; Gough *v.* Findon, 7 Ex. 48; Marston *v.* Allen, 8 M. & W. 494; but such delivery need not be averred. Brind *v.* Hampshire, 1 M. & W. 371.

(*f*) A promissory note is not a negotiable instrument, within the 3 & 4 Ann. c. 9, s. 1;

two months after date, (*g*) but did not pay the same. [*Add count on the original debt, and upon an account stated, ante*, 74, note (*p*). *See* Fryer *v.* Roe, 12 C. B. 437.]

[1*a*. *Form prescribed by Massachusetts Practice Act.*

And the plaintiff says the defendant made a promissory note payable to the plaintiff or order, a copy whereof is hereto annexed. And the defendant owes the plaintiff the amount of said note and interest thereon. (g^1)]

2. *Indorsee against Maker.*

For that the defendant, on [*&c.*], by his promissory note, now overdue, promised to pay to one E. F. or order £100, two months after the date thereof; and the said E. F. indorsed the said note [to one G. H., who then indorsed the same] to the plaintiff; and the defendant has not paid the same. [*Add count upon the original consideration, if any, between these parties.*]

3. *Indorsee against Payee or other Indorser.*

For that one E. F., (*h*) on [*&c.*], by his promissory note, now overdue, promised to pay to the defendant [*or* "G. H."] or order, £100, two months after the date thereof, and the defendant [*or* "G. H."] indorsed the said note [to I. J., who indorsed (*i*) the same] to the plaintiff; and the said note was duly presented (*k*) for payment, and was dishonored, whereof the defendant had due notice, (*l*) but did not pay the same. [*Add count upon the consideration for the note, if any, between the plaintiff and defendant, as directed in last form, and see note.*]

[3*a*. *Form prescribed by Massachusetts Practice Act.*

And the plaintiff says that one C. D. made a promissory note, a copy of

unless a payee be expressly named, or appears by necessary implication. Flight *v.* Maclean, 16 M. & W. 51; Wood *v.* Mytton, 10 Q. B. 805. Therefore a note payable to maker's own order, is not *per se* a negotiable instrument, but when indorsed in blank, it has the effect of and should be declared on as a note payable to bearer; Masters *v.* Barretto, 8 C. B. 433; Brown *v.* De Winton, 6 C. B. 836; when indorsed specially as a note payable to the indorsee or his order; Gay *v.* Lander, 6 C. B. 336; Hooper *v.* Williams, 2 Ex. 13; Absalon *v.* Marks, 11 Q. B. 19; an instrument payable to the order of the secretary *for the time being* of an insurance company, is invalid as a promissory note or bill of exchange. Storm *v.* Stirling, 3 El. & Bl. 832; 6 El. & Bl. 333; Yates *v.* Nash, 8 C. B. N. S. 581. The addition of the words "as per memorandum of agreement," to a promissory note in the ordinary form, does not qualify the note or render it void; Jury *v.* Barker, 27 L. J. Q. B. 245; where money was advanced on a note to the maker upon the understanding that defendant would sign it as surety, which he subsequently did, it was held that he was liable to be sued on it as a maker. Dodge *v.* Pringle, 29 L. J. Ex. 115. As to designating a name by initials or contractions, see *ante*, 74, note (*q*). Form, &c. when payees or indorsers are a *firm*, 75, note (*t*). As to stating all the indorsements, *ante*, 75, note (*y*), and see Waynam *v.* Bend, 1 Camp. 175.

(*g*) When no time for payment of the note was stated, a demurrer objecting this, was set aside as frivolous. Gurney *v.* Hill, 2 Dowl. N. S. 936.

(g^1) [Hollis *v.* Richardson, 13 Gray, 392; Moore *v.* Royce, 10 Allen, 556.]

(*h*) See *ante*, 220, note (*d*).

(*i*) As to stating all the indorsements, *ante*, 75, note (*y*). If an indorsement to the plaintiff be not stated, it will be fatal after verdict. *Ante*, 75, note (*y*). *Delivery* need not be stated; but in order to charge an indorser, there must be a delivery with the intention to create a liability and *contract* between the parties; indorsement alone is not sufficient; Castrique *v.* Buttigieg, 10 Moore P. C. C. 94; though as against the *maker* such an indorsement as gives the indorsee a title to the note, is sufficient, although it might not give a right of action against the indorser. Smith *v.* Johnston, 3 H. & N. 222.

(*k*) As to presentment, *ante*, 76, note (*e*).

(*l*) As to notice, *ante*, 76, note (*f*).

which, with the indorsements thereon, is thereto annexed, payable to said E. F. or order; and the said E. F. indorsed the same to the plaintiff; and payment of said note was duly demanded of said C. D., who neglected to pay the same, and due notice of its non-payment was given to the said E. F.; and the said E. F. owes the plaintiff the amount of said note and interest thereon.]

4. *Payee against Maker of Note made in the Body payable at a Particular Place.* (*m*)

For that the defendant, on [*&c.*], by his promissory note, now overdue, promised to pay to the plaintiff, at [Messrs. E. F. and Co., Lombard Street, London], £100, two months after the date thereof,* and the said note was duly presented at [Messrs. E. F. and Co., Lombard Street,] for payment thereof, but has not been paid. [*Add count, &c.*]

5. *Payee against Maker of Note payable on Demand, or after Notice.* (*n*)

For that the defendant, on [*&c.*], by his promissory note, now overdue, promised to pay to the plaintiff on demand £100, but did not pay the same. [*If payable "—— months after notice," state the note accordingly, and aver* "and afterwards notice was given by the plaintiff to the defendant to pay the said money —— months after notice, and the time for payment thereof elapsed before the commencement of this suit, but the defendant did not pay the same."]

6. *Against a Maker of a Note payable by Instalments where the whole Sum is due.* (*o*)

For that the defendant, on [*&c.*], by his promissory note, promised to pay to the plaintiff £100 in manner following, viz. £20 on the 1st day of Feb-

(*m*) When a note is made payable at a particular place in the *body of the note*, the note must be so described and a presentment at the particular place must be averred; Vander Donckt *v.* Thellusson, 8 C. B. 812; Emblin *v.* Dartnell, 12 M. & W. 830; Spindler *v.* Grellet, 1 Ex. 384; Sanderson *v.* Bowes, 14 East, 500; Dickinson *v.* Bowes, 16 East, 110; even though the maker be not at the named place to pay, or may have absconded and left no effects there or other means of payment. Sands *v.* Clarke, 8 C. B. 751. A promise by defendant to pay the note, is evidence against him of due presentment. Croxen *v.* Worthen, 5 M. & W. 5. It is a *variance* to omit the statement that the note was thus specially payable, provided that defendant plead that he did not make the note, and take the objection at the trial. Trinder *v.* Smedley, 1 H. & W. 164. If the particular place of payment be mentioned only at the foot or in the margin of the note, it is merely a memorandum which does not form part of the contract, and the ordinary form of declaration suffices. Masters *v.* Baretto, 8 C. B. 433; Williams *v.* Waring, 10 B. & C. 2; Exon *v.* Russell, 4 M. & S. 505.

(*n*) A note payable on demand is payable immediately, and the statute of limitations begins to run from its date. No demand is necessary; Norton *v.* Ellam, 2 M. & W. 461; even though the defendant be only a surety. Whitworth *v.* Mayor, 2 Mont., D. & D. 2. But the *notice* in the second case is essential. Dixon *v.* Nuttall, 1 Cr., M. & R. 307. And a presentment is necessary where a note is payable at or after sight. Holmes *v.* Kerrison, 2 Taunt. 323. A promissory note payable on demand cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest had been paid on it for several years before such indorsement. Brooks *v.* Mitchell, 9 M. & W. 15. See Bartrum *v.* Caddy, 9 Ad. & E. 275. An additional signature to a note payable on demand placed there some years after its date, is not an alteration making the note void, but an addition in the nature of an indorsement though on the face of the note. Ex parte Yates, 2 De G. & J. 191. A note payable on demand is within the bills of exchange act. Maltby *v.* Murrells, 5 H. & N. 813.

(*o*) A promissory note payable by instalments is a negotiable instrument within the

ruary in the year aforesaid, £40 on the 1st day of March in the year aforesaid, and the remainder of the said sum of £100 on the 1st day of April in the year aforesaid, all which periods had elapsed before the commencement of this suit, but the defendant did not pay any of the said instalments.

7. *The like, where the Times for Payment of some only of the Instalments have elapsed.*

The form will be like the last, except that instead of the allegation "all which periods had elapsed," *&c. it should be stated,* "and although the periods for payment of the said first and second instalments [*the instalments in arrear, according to the fact*] had elapsed before the commencement of this suit, the defendant hath not paid the same. [*If by the terms of the note the whole of the principal is at once to become due if any instalment be not paid, set out the note accordingly, and show the non-payment of the instalment first in arrear, and the breach at the end will be that defendant hath not paid* "any of the said moneys."]

8. *On Note payable to E. F. or Bearer.*

For that the defendant, on [*&c.*], by his promissory note, now overdue, promised to pay to E. F. or bearer £100, two months after the date thereof, and the plaintiff is the lawful bearer thereof; but the defendant did not pay the same. [*Add count, and conclude as directed, ante,* 220, Form 1.]

[8*a*. *Form prescribed by Massachusetts Practice Act, on Note payable to Bearer.*

And the plaintiff says the defendant made a promissory note, a copy of which is hereto annexed, payable to G. H. or bearer; and the plaintiff is the bearer of said note, and the defendant owes him the amount of said note and interest thereon. [*If payments are indorsed on the note, the declaration should be varied as follows:* "a copy whereof, with the indorsements thereon, is hereto annexed, and the defendant owes the plaintiff the balance of said note and interest thereon." *If payments have been made which are not indorsed on the note, the allegation should be varied accordingly.*]

9. *On a Country Bank-note payable in the Body in Town or Country.* (*p*)

For that the defendants, on [*&c.*], by their promissory note, promised to pay the bearer, on demand, at the [Truro Union Bank], or at [Messrs. E. F. and Co., bankers, Lombard Street, London], £100; and the plaintiff became the lawful bearer thereof, and the said note was duly presented for payment at the said [Messrs. E. F. and Co., bankers, Lombard Street, London, aforesaid,

statute 3 & 4 Ann. c. 9; Orridge *v.* Sherborne, 11 M. & W. 374; and an indorsee may sue on it whether all or some only of the instalments have become due. Carlon *v.* Kenealy, 12 M. & W. 139. The maker is entitled to the days of grace for payment of each instalment. Ib.

(*p*) As to the law of bank-notes, &c. given before the failure of a bank, see Turner *v.* Stones, 1 D. & L. 122; Robson *v.* Oliver, 10 Q. B. 704. See Chambers *v.* Miller, 32 L. J. C. P. 30. If a man take a bank-note or other negotiable security *bonâ fide, i. e.* giving value for it, and without notice that the party from whom he takes it has no title, he is entitled to recover upon it, although he may at the time have had the means of knowledge of that fact, and neglected to avail himself of it. Raphael *v.* Bank of England, 17 C. B. 161.

or at the said Truro Union Bank (*a presentment at one place only suffices*)], but has not been paid. [*Add a count on the original debt, if any; at all events, on an account stated.*]

10. *Against Payee, being Indorser, who had not due Notice of Dishonor, but had no Effects with Maker.*

The form will be like Form 3, *ante*, 221, *omitting the averment*, "whereof the defendant had due notice," *and inserting instead the following allegation*, "and the plaintiff says that neither at the time when the said note was made," *proceed according to the principle, ante*, Form 15, p. 79, *which may easily be adapted, and add a count on the original debt and on the account stated, &c.: see ante*, 221, Form 3.

IN CASE OF PARTICULAR PERSONS.

1. *By Executor or Administrator of Payee against Maker.* (q)

Commencement as ante, 7 *or* 13.] For that the defendant in the lifetime of the said E. F., on [*&c.*], by his promissory note, now overdue, promised to pay to the said E. F. £100, two months after the date thereof, but hath not paid the same. [*Proceed as directed in* Forms 19, 20, *ante*, 81, 82, *declaring, if expedient, in another count, as there suggested.*]

2. *Against the Executor or Administrator of the Maker.*

Commencement as ante, 8 *or* 13.] For that the said E. F. in his lifetime, on [*&c.*], by his promissory note, now overdue, promised to pay to the plaintiff £100, two months after the date thereof; but the said E. F. in his lifetime did not pay, nor hath the defendant as executor as aforesaid paid the said note. [*Proceed as directed, ante*, 82, Form 21.]

3. *By the Assignees of a Bankrupt Payee against the Maker.*

Commencement as ante, 8, Form 7.] For that the defendant, before the bankruptcy of the said E. F. on [*&c.*], by his promissory note, now overdue, promised to pay to the said E. F. £100, two months after the date thereof, but the defendant has not paid the same. And the plaintiffs also sue the defendant for money payable [*&c.; proceed as directed, ante*, 83, Forms 24, 25].

4. *By a Surviving Payee against Maker.* (r)

Commencement as ante, 15.] For that the defendant in the lifetime of one E. F. since deceased, on [*&c.*], by his promissory note, now overdue, promised to pay to the plaintiff and the said E. F. £100, two months after the date thereof, but did not pay the same. [*Add a count on the original debt.*]

(q) If the action be by the representative of an indorsee against an *indorser*, form 3, *ante*, 221, may readily be altered to meet the case, using the words "the said E. F. in his lifetime," instead of the words "the plaintiff;" and the declaration should, if necessary, be on the principle of forms 19, 20, *ante*, 81, 82.

(r) An action against a surviving maker may be in the ordinary form, not noticing the deceased, *ante*, 84, form 27; *ante*, 22[illegible] note (a).

Husband and Wife, on Note payable to Wife before Marriage, against the Maker. (*s*)

mencement as ante, 14.] For that the defendant, whilst the said [Mary] le and unmarried, on [*&c.*], by his promissory note, now overdue, prom- pay to the said [Mary] £100, two months ["weeks" *or* "days"] after te thereof, but hath not paid the same. [*Proceed as directed, ante*, 84, 28, *attending to the directions there given.*]

Husband and Wife on a Note given to the Wife dum sola, pay- by Instalments, where some of them became due before and some r the Marriage. (*t*)

Spindler *v.* Grellet, 1 Ex. 384.

ainst Husband and Wife on a Note made by the Wife before Marriage.

that the said defendant "Mary," whilst she was sole and unmarried, on by her promissory note, now overdue, promised to pay to the plaintiff two months after date [*or, if the plaintiff is not the payee*, "promised to one E. F. £—— two months after the date thereof, and the said E. F. ed the said note to the plaintiff"]; but the same is still unpaid.

8. *On Foreign Promissory Notes.*

a form of Declaration and Pleas, and the law on this subject, Vander t *v.* Thellusson, 8 C. B. 812.

PUBLIC COMPANY.

r Calls by a Railway or other Public Company under the Companies Clauses Consolidation Act, 1845.

- See in general as to actions for calls, and the evidence necessary in them, Wordsworth's Joint Stock Companies; Rosc. Ev.

8 & 9 Vict. c. 16, s. 22 ("Companies Clauses Consolidation Act, 1845"), power is given to public companies to make calls after twenty-one days' previous notice; and by s. 25 an action may be brought to recover the amount of such calls, with interest, from the time when due; accordingly a count for interest will not be allowed. Southampton Dock Company *v.* Richards, 1 M. & G. 448; and see London & Brighton Ry Co. *v.* Fairclough, 2 M. & G. 690.

section 26, "In any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be nec-

ee forms on bills by and against husd wife, *ante*, 84, 85. In this case the *ust* be joined as a plaintiff. As to usband and wife should be made parplaintiffs or defendants, Obs. *ante*, 147, The assignees of a bankrupt husband sue on such a note. Sherrington *v.* 12 M. & W. 855. See form by exeof deceased wife on bill or note given *dum sola*. Hart *v.* Stevens, 6 Q. B. 937; Obs. *ante*, 146. On a bill or note given to the wife *during coverture*, the husband may sue alone or the wife may be joined. Howard *v.* Oakes, 3 Ex. 136.

(*t*) The wife *may* be joined as a plaintiff in this case to recover the instalments due subsequently to the marriage. She must be a plaintiff to recover those due *before* the marriage. See Obs. *ante*, 147, 148.

Obs. essary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more on one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act."

By section 27, "On the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever, and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls within one year, had been made within that period."

By section 28, the production of the register of the shareholders shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares. See note (*x*), *infra*.

By section 16, "No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid all calls for the time being due on every share held by him." Where a person was a shareholder at the time the call was made, but transferred his shares before the day upon which the call was payable, it was held that he, and not the person who accepted the transfer, was liable for the amount of the calls. Aylesbury Ry. Co. *v.* Mount, 2 Dowl. N. S. 143; 4 M. & G. 651; Aylesbury Ry. Co. *v.* Thompson, 10 L. J. Q. B. 124. This decision was upon clauses of the Aylesbury Railway Act, similar to the clauses in the more recent general act. [See Hubbersty *v.* Manchester &c. Ry Co. L. R. 2 Q. B. 59, 471.]

See, further, *post*, Pleas, title, "Public Company." And as to the legality of the sale of shares, *post*, 227, note (*b*). [Declaration against a dock company for not docking vessel according to contract. Wilson *v.* Newport Dock Co. L. R. 1 Ex. 177. Power of directors to bind company. Totterdell *v.* The Fairham Blue Brick and Tile Co. L. R. 1 C. P. 674.]

2. *Declaration for Calls.*

Commencement, *ante*, 11, Form 17.] For that (*u*) the defendant is the holder (*x*) of [100] shares in the said company, and is indebted to the said

(*u*) In some of the railway acts passed before the general companies clauses consolidation act, there were clauses containing similar forms for declarations. See a form of declaration on such an act, Edinburgh, Leith & Newhaven Railway Company *v.* Hebblewhite, 6 M. & W. 802. The form in the text is that authorized by the companies clauses act, 1845, s. 26, and should be strictly followed; see forms and law, The Newport Ry. Co. *v.* Hawes, 3 Ex. 476; Birkenhead L. & C. Ry. Co. *v.* Wilson, Ib. 478; Wilson *v.* Birkenhead L. & C. Ry. Co. 6 Ex. 626; Wolverhampton New Waterworks Co. *v.* Hawkesford, 29 L. J. C. P. 121.

(*x*) The defendant must have been a holder of shares when the call was made. Wolverhampton New Waterworks Co. *v.* Hawkesford, [6 C. B. N. S. 336; 11 C. B. N. S. 456;] 28 L. J. C. P. 242; Belfast & County Down R. Co. *v.* Strange, 1 Ex. 739; [East Gloucestershire Ry. Co. *v.* Bartholomew, L. R. 3 Ex. 15.] But a defendant is not liable to pay calls unless the shares which have been allotted to him are specifically numbered and appropriated by number. The Irish Peat Co. *v.* Phillips, 1 B. S. 598: Wolverhampton New Waterworks Co. *v.* Hawksford, 11 C. B. N. S. 456. If if the defendant was a shareholder when calls were *made*, but transferred them before the calls became *payable*, he and not his transferee is liable for the calls. Aylesbury Ry. Co. *v.* Mount, 4 M. & G. 651; Aylesbury Ry. Co. *v.* Thompson, 10 L. J. Q. B. Wolverhampton New Waterworks Co. Hawkesford, 29 L. J. C. P. 121; 31 L. J. P. 184; [6 C. B. N. S. 336; 11 C. B. S. 456.] A transferee may, however, be shareholder though his name is not on register of shareholders, if it is on the ter of transfers when the calls is made.

ıy in £500, in respect of a call (*y*) of £5 upon each of the said shares, vo several calls, the first of the said calls being a call of £—— upon the said shares, and the other of the said calls being a call of £—— ach of the said shares"] duly made by the said company, whereby an hath accrued to the said company by virtue of "The Companies Clauses idation Act, 1845," and also by virtue of an act of parliament made and in a session of parliament held [*&c.*], and intituled "An act [*&c.*], (*z*) *ecial railway act of the company*], to demand from the defendant the m of £——, yet the said defendant has not paid the said sum. (*a*)

refusing to transfer Railway Shares or Scrip bought by the Plaintiff from the Defendant. (*b*)

pest *v.* Kilner, 2 C. B. 300; Stephens *v.* De Medina, 4 Q. B. 422;

ɔrm does not apply in an action an executor for calls made in the s lifetime. Birkenhead L. & C. Ry. otesworth, 5 Ex. 226. See Ness *v.* ɔng, 4 Ex. 21; Wills *v.* Murray, Ib. n infant may become a shareholder way company, and if sued as in the r calls, a plea of infancy when the re made will be no defence, unless it n that he is still an infant or has re- l the shares; North Western Ry. Co. lichael, 5 Ex. 114; Birkenhead L. & Co. *v.* Pilcher, Ib. 121; Cork & Ban- Co. *v.* Cazenove, 10 Q. B. 535. As ability of a bankrupt or his assignees made on shares of the bankrupts, South Staffordshire Ry. Co. *v.* Burn- Ex. 129. The company cannot sue nal subscriber for such calls, as upon non law liability arising upon the tion contract — the covenants there- g made with third persons — not e company. Wolverhampton New orks Co. *v.* Hawksford, 28 L. J. 42; [6 C. B. N. S. 336; 7 Ib. 795; 56.] It seems that defendant must ome register of shareholders, Ib. 29 P. 121; 31 L. J. C. P. 184, with the such holder inserted therein, as the of shares numbered and specifically iated to him; but it is not necessary h register should have been sealed at nary meeting of the company. Ib.; ish Peat Co. *v.* Phillips, 1 B. & S. L. J. Q. B. 114. If the book of of the company be made by statute cie evidence of the propietorship, it ve had the seal of the company when was made. Cheltenham & Great n Union Ry. Co. *v.* Price, 9 C. & P. see London Grand Junction Ry. reeman, 2 M. & G. 607; and Lon- Brighton Ry. Co. *v.* Fairclough, 2 M. 4. But a non-compliance with mere regulations of the statute, as to the f keeping such book, or the time which it is to be made or sealed, not render it inadmissible; South- Co. *v.* Richards, 1 M. & G. 448; nor it does not contain the names of *all* the shareholders. London Grand Junction Ry. Co. *v.* Graham, 1 Q. B. 271; London Grand Junction Ry. Co. *v.* Freeman, 2 M. & G. 606. A book *bonâ fide* intended to be valid and to operate as such may be valid *de facto*, as a register. Wolverhampton New Waterworks Co. *v.* Hawksford, 29 L. J. C. P. 121; 31 L. J. C. P. 184; [7 C. B. N. S. 795; 11 Ib. 456.] Although the register is *primâ facie* evidence against a defendant, it is not conclusive: he may show that *de jure* he is not a shareholder. Shropshire Union Ry. Co. *v.* Anderson, 3 Ex. 401; Waterford, Wexford, Wicklow & Dublin Ry. Co. *v.* Pidcock, 22 L. J. Ex. 146. As to actions on the covenant on the deed of settlement, Smith *v.* Geldsworthy, 4 Q. B. 430; Hutts *v.* Giles, 12 M. & W. 492.

(*y*) If the action is brought to recover the amount of several calls, the declaration should be framed accordingly. So where the calls are payable by instalments, which they may be; The North Western Ry. Co. *v.* McMichael, 6 Ex. 273; The Birkenhead L. & C. Ry. Co. *v.* Webster, 6 Ex. 277; but all the instalments must be due before an action can be brought for any one instalment. Ambergate &c. Ry. Co. *v.* Coulthard, 5 Ex. 459; see forms, Cork & Bandon Ry. Co. *v.* Goode, 13 C. B. 618; Belfast & County Down Ry. Co. *v.* Strange, 1 Ex. 739; Newport &c. Ry. Co. *v.* Hawes, 3 Ex. 476. A general meeting is not necessary to enable the directors to make a call. Sheffield, Ashton-under-Lyne & Manchester Ry. Co. *v.* Woodcock, 7 M. & W. 574.

(*z*) This allegation, that the action accrues by virtue of the general and special acts, is necessary to entitle plaintiff to this statutory form of remedy. Moore *v.* The Metropolitan Sewage Manure Co. 3 Ex. 333.

(*a*) The plaintiffs are entitled to interest upon the calls due by virtue of the statute, s. 25; and a count for interest, therefore, is not necessary. But the sum claimed here must be sufficient to cover the debt and all interest due up to the time of trial, *vid.* Obs. *ante*, 225.

(*b*) If the transfer requires a deed, then an allegation to the effect that the deed was

Powell *v.* Jessopp, 18 C. B. 336; Watson *v.* Spratley, 10 Ex. 222; S Russell, 1 El. & El. 888, 916.

[4. *By Vendor of Shares against Purchaser for not acceptii*

That in consideration that the plaintiff would sell to the defendar shares in the —— Company at the price of $—— per share, and wo all things necessary on the plaintiff's part to transfer the said shares defendant on the —— day of —— then next, the defendant promi plaintiff that he would at the time aforesaid accept the transfer of t shares, and do all things necessary on his part in that behalf, and pay t price for the same upon the transfer thereof; and all conditions were f and all things happened, and all times elapsed, necessary to entitle th tiff to have the said promise of the defendant performed by him; defendant did not accept the transfer of the said shares, nor do all things sary on his part in that behalf, nor pay the said price for the same, reason thereof the plaintiff, as the legal owner of the said shares, becam to pay and paid calls made upon the said shares, subsequently to t breach by the defendant of his said promise. [*Such calls must be specially, and are not recoverable under the common count for mone* Sayles *v.* Blane, 14 Q. B. 205.]

5. *Against a Railway Company upon a Judgment of the Sher the Damages assessed by his Jury as Compensation in respect Plaintiff's Lands having been injuriously affected by the D ant's Railway, and for the Costs of the Inquiry.*

Mortimer *v.* The South Wales Ry. Co. (*c*) 1 El. & El. 375; Flet Great Western Ry. Co. [4 H. & N. 242]. (*d*)

prepared and tendered is necessary. By "The Companies' Act, 1862," s. 22, the mode of transferring shares is provided by the regulations of each particular company. Shares in companies which require an act of parliament to carry them into effect, such as railways, &c. may be legally sold by parol during provisional registration. Young *v.* Smith, 15 L. J. Ex. 81; [15 M. & W. 121.] Afterwards the transfer must be by deed, 8 & 9 Vict. c. 16, s. 16, but cannot be made until the transferrer has paid up all calls due. Ib. See Wordsworth on Joint Stock Companies, 5th ed. 362. If the transfer be not legally completed, there is no implied liability on the part of the purchaser to reimburse the seller for calls which he is subsequently obliged to pay. Humble *v.* Langston, 7 M. & W. 517. A shareholder may transfer to a man of straw, and so get rid of his liability if the transfer is made *bonâ fide*. Re The Phœnix Life Assurance Co. ex parte Hatton; 31 L. J. Ch. 340; [2 J. & H. 441;] Ex parte Costello, 30 L. J. Ch. 113; [2 De G., F. & J. (Am. ed.) 302, and cases in note (1).] In re Mexican & South American Co. ex parte Hyam, 29 L. J. Ch. 243; [1 De G., F. & J. 75, and cases in note (1);] Ex parte Budd, 31 L. J. Ch. 4; [3 De G., F. & J. 297; Musgrave & Hart's case, L. R. 5 Eq. 204 Case, L. R. 6 Ch. Ap. 196.] The measure of damages is the differe tween the price agreed on, and the price when the contract was broken, for a further advance, which took p terwards at the time of the actual is the scrip. Shaw *v.* Holland, 15 M 136; Tempest *v.* Kilner, 3 C. B. 25 other forms, Stewart *v.* Cauty, 8 M 160; Hibblewhite *v.* M'Morine, 6 M 212; Hare *v.* Waring, 3 M. & W. 362 *v.* Lelean, 6 H. & N. 617.]

(*c*) Where the lands are injurio fected to some extent, the *quantum* ages given by the jury cannot be d —the inquisition is conclusive. [Lia a railway company to pay compens respect of mines lying under land t them. Great Western Railway *v.* 36 L. J. Q. B. 133.]

(*d*) But it may be shown by de that the lands are not injuriously within the meaning of the act, and t subjoined matters of complaint a within the 68th section. Chapman mouthshire Railway & Canal Co. 2 267.

Obs. — There is a right to compensation under the act, where the injury is done under the powers given to the company by act of parliament. Where the cause of injury is not authorized by the companies' act, the common law remedy by action remains. Imperial Gas Light &c. Co. *v.* Broadbent, [7 H. L. Cas. 600.]

6. *Against a Railway Company for the Amount awarded to the Plaintiff upon an Arbitration under the Lands Clauses Consolidation Act*, 1845, 8 & 9 *Vict. c.* 18, *ss.* 23–68, *as Compensation for Lands injuriously affected.*

Evans *v.* Lancashire & Yorkshire Ry. Co. 1 El. & Bl. 754. [What is the subject of compensation under lands and railway clauses consolidation acts, Rickett *v.* Metropolitan Ry. Co. L. R. 2 H. L. 175; Brand *v.* Hammersmith Ry. Co. L. R. 1 Q. B. 130; L. R. 2 Q. B. 223; Beckett *v.* Midland Ry. Co. L. R. C. P. 241; L. R. 3 C. P. 82. As to what the sections as to costs under lands clauses act apply to, Copp *v.* The Midwales Ry. Co. L. R. 1 Q. B. 342. When verdict was returned for less than the offer made by company, that offer including plaintiff's costs, Balls *v.* Metropolitan Ry. Co. L. R. 1 Q. B. 337.]

7. *Declaration for recovery of the Costs of an Arbitration under s.* 34 *of the Lands Clauses Consolidation Act*, 1845, 8 & 9 *Vict. c.* 18.

Martin *v.* The Leicester Waterworks Co. 3 H. & N. 463.

Obs. — The costs are recoverable by action, although the plaintiff had not given any notice to the company of the amount of compensation claimed, and the company in consequence had not offered any sum to the plaintiff. Martin *v.* The Leicester Waterworks Co. 3 H. & N. 463.

THE COMPANIES' ACT, 1862.

Obs. — "The Companies' Act, 1862," 25 & 26 Vict. c. 89 (which is now the act regulating trading companies), s. 70, enacts that, "In any action or suit brought by the company against any member to recover any call or other moneys due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due, whereby an action or suit hath accrued to the company."

The calls on shares depend upon the regulations for management made by each company, which, of course, must be considered before commencing or defending an action. See ss. 14, 15, and 16, and Table A in the first schedule of the act.

By s. 41, the publication of the name of a limited company is prescribed, and if the company do not comply with the requirements of the section certain penalties may be imposed, s. 42. And where a bill of exchange was addressed to a limited company, with the omission of the word "limited," the secretary who had accepted it as secretary of the company was held personally liable. Penrose *v.* Martyn, El., Bl. & El. 499; 28 L. J. Q. B. 28, and form.

As to promissory notes and bills of exchange, see s. 47, and the regulations for the management of the particular company.

In actions brought by certain limited companies a judge may in particular cases order such company to give security for costs. S. 69.

Part IX. of the act relates to the repeal of acts and temporary provisions, and the first part of the third schedule gives a list of the repealed acts, and the

Obs. second part saves s. 47 of 7 & 8 Vict. c. 113, which gives to existing b companies the power of suing and being sued.

It is not competent to the adventurers or shareholders in a cost-book m stipulate by their rules that unpaid calls shall be recovered as a debt du the defaulting shareholder to the purser of the mine. Hybart *v.* Ps C. B. N. S. 209. A call founded on colonial acts is a simple contrac The Welland Railway Co. *v.* Blake, 6 H. & N. 410, and form.

For Calls due to a Company registered under the Companies' Act,

The —— Company, Limited, being a company completely registered a ing to the "Companies' Act, 1862," by ——, their attorney, sue ——. that the defendant is a holder (*e*) of —— shares in the said company, indebted to the plaintiffs in £—— for a call of £—— [*or* "for two c the respective sums of £—— and £——"] upon each of the said share made by the company upon the defendant, as holder of such shares, in a ance with the said act; and the defendant has not paid the same.

REAL PROPERTY. See "Vendors and Purchasers."

RECOGNIZANCE OF BAIL. (*f*)

On a Recognizance of Bail in Q. B., C. P., or Ex.

The venue is local, and should be laid in Middlesex; the recognizance entered, being a record. The sum demanded will be the amount recove the judgment against the principal, unless the recognizance were taken in and in such case the recognizance is taken in a sum certain, which i demanded in an action thereon.] For that the defendants, on [*&c.*], can

(*e*) By the companies' act, 1862, s. 23, "The subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members thereinafter mentioned;" s. 25, "and every other person who has agreed to become a member of a company under this act whose name is entered on the register of members, shall be deemed to be a member of the company." In the repealed joint stock companies' act, 1856, s. 19, the words are "accepted any share." See The New Brunswick &c. Railway & Land Co. *v.* Muggeridge, 3 H. & N. 160, 580.

(*f*) See Practice, &c. Chit. Arch. Index, "Recognizance of Bail," and "Bail;" "Bail Bond," *ante*, 67. The bail may be sued jointly or separately. If there be any difficulty in serving one of them with the writ, or if it be material to preserve the legal remedy against the assets of each in the event of death, they should be sued separately; otherwise not. In declaring against one bail only, it will suffice to set out the recognizance as if he alone were a party thereto, withou ing the other bail. The two bail gether not liable in C. P. beyond the specified in the recognizance. Van *v.* Nash, 10 Bing. 329. See points the declaration and setting out jud 2 Chit. Plead. 7th ed. 335; Engl Eyre, 5 B. & Ad. 68. The above fo easily be adapted to the form used court of common pleas. The plaintiff enter the recognizance on the roll, an in and docket it, before the bail can as they might otherwise plead *nul tiel* and the plaintiff, would, it seems, b jected to the costs of such plea, if cognizance were not carried in when pleaded. Hartley *v.* Hodson, 1 Moo The statement of the recognizance correspond with the entry on record. declaration, on a recognizance to pr an appeal is bad, if it does not aver th recognizance was returned to the ap court, and there entered of record; seems that such declaration must sho the court in which the recognizanc taken had jurisdiction of the action. bell *v.* Gray, 4 Gray, 444.]

court of queen's bench at Westminster, in their proper persons, and became ges and bail for E. F., that if he should be convicted at the suit of the tiff in an action then depending in the said court, at the suit of the plain- gainst the said E. F., then the defendant consented to pay all such moneys ould be adjudged to the plaintiff in that behalf, to be made of their and of their lands and chattels, and levied to the use of the plaintiff, if it ld happen that the said E. F. should not pay to the plaintiff the said eys, or render himself to the queen's prison on that occasion; and although plaintiff afterwards, by the judgment of the said court, recovered in the n against E. F. £——, (*a*) for his damages and costs of suit in that behalf, eof E. F. was convicted, yet E. F. hath not paid to the plaintiff his said eys, nor rendered himself on that occasion to the queen's prison, according e said recognizance, and the said recognizance and the said judgment still in in force; and the plaintiff hath not obtained any execution or satis- on of the said judgment, yet the defendants have not, nor hath either of , paid the said moneys.

REPLEVIN.

— Replevin is a remedy grounded and granted upon a distress, being a re-delivery of the thing distrained, to remain with the first possessor on security, or pledges given by him to try the right with the distrainor. 1 Inst. 145 *b*. It lies of all goods and chattels unlawfully taken and wrongfully detained. Com. Dig. Repl. A. As for a distress levied under a warrant of justices, George *v.* Chambers, 11 M. & W. 149. So if goods have been *unlawfully* taken, though not as a distress; Mellor *v.* Leather, 22 L. J. M. C. 76; [1 El. & Bl. 619;] and in every case of an alleged wrongful taking; Allen *v.* Sharp, 2 Ex. 352; [Metcalf J. in Richardson *v.* Reed, 4 Gray, 443; Meany *v.* Head, 1 Mason, 322; Hopkins *v.* Hopkins, 10 John. 373. How far trespass *de bonis* is concurrent with replevin, see Richardson *v.* Reed, 4 Gray, 443, 444; Allen *v.* Crary, 10 Wend. 349; Stewart *v.* Wells, 6 Barb. 79.] But there must be a taking out of the possession of the owner. Meunie *v.* Blake, 25 L. J. Q. B. 399; [6 El. & Bl. 842.] But he who brings it ought to have the property in himself, although a special property is sufficient. Com. Dig. Repl. B. [As to cases in which this action lies, in the American states, see 1 Chitty Pl. 181 *et seq.* and notes; 3 Kent, 483, note (*f*).] It lies against him who takes or commands the taking of the goods, or both together. Com. Dig. Repl. C.; Jones *v.* Johnson, 5 Ex. 962. But it does not lie for goods taken in execution; Com. Dig. Repl. D.; the claimant must, in that case, interplead. [A creditor at whose suit an attachment is made of goods not the property of the debtor is not, in Massachusetts, liable in replevin for the goods attached, either alone or jointly with the attaching officer. Richardson *v.* Reed, 4 Gray, 441. In this case Metcalf J. said: "In our opinion, replevin cannot be maintained, in this commonwealth, against a person who has no possession or control of the goods to be replevied. Replevied goods cannot be restored and returned to a person from whom they were never taken, and such person cannot rightfully be made a defendant, sole or joint, in an action of replevin." Hall *v.* White, 106 Mass. 599. But see Allen *v.* Crary, 10 Wend. 349; Stewart *v.* Wells, 6 Barb. 79; Sharp *v.* Whittenhall, 3 Hill, 576.]

The sheriff used to grant replevin and take replevin bonds. Now, however, by 19 & 20 Vict. c. 108, s. 63, the powers and responsibilities of the sheriff have ceased, and the registrar of the county court of the district in which any *distress* subject to replevin shall be taken is empowered, subject to certain regulations, to approve of replevin bonds, and to grant replevins, and to issue all necessary powers in relation thereto, and such replevin is to be ex-

(*a*) Be particular in making this sum with the record, as a variance would not be amended. Davis *v.* Dunn, 1 Dowl N. S. 317.

Obs. ecu ed by the high bailiff. Actions on replevin may be commenced in the superior or in the county courts, and in both cases the registrar shall, at the instance of the person whose goods have been *distrained*, cause the same to be replevied to such party on his giving securities (s. 64), in the former case as pointed out by s. 65, and in the latter by s. 66. Replevins may, at the instance of the defendant, be removed into any of the superior courts by *certiorari* in certain cases. S. 67. There is an appeal on questions of law from the county court, where the amount of rent or damages exceeds £20. S. 68. The security to be given by the replevisor is in the form of a bond with sureties given to the distrainor at the costs of the replevisor, subject to the conditions of ss. 65 and 66 respectively. S. 70. The duty of the registrar under s. 70 is only to see that the bond is executed by the party to the cause with sureties. And as to the sufficiency of the sureties, it is incumbent on the registrar to exercise proper and vigilant discretion; but he is not called upon to examine further, nor can he incur any liability. Young *v.* The Brompton &c. Waterworks Co. [1 B. & S. 675].

By the C. L. P. Act, 1862 (23 & 24 Vict. c. 126), s. 22, the provisions of the 19 & 20 Vict. c. 108, which relate to replevin, shall be deemed and taken to apply to all cases of replevin in like manner as to the cases of replevin of goods distrained for rent, or damage feasant. By s. 23, the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction in like manner and subject to the same proceedings as to costs and otherwise as upon a payment into court by a defendant in other actions. And by s. 24, such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond.

1. *On a Replevin Bond conditioned to sue in a Superior Court.* (*g*)

For that the defendants, by their bond, made the —— day of ——, A. D. ——, acknowledged themselves to be bound to the plaintiff in £——, to be paid to him, subject to the condition that if the defendant A. B. should, within one week from the date of their said bond, commence an action of replevin against the plaintiff in her majesty's court of ——, at Westminster, for taking and unjustly detaining certain goods and chattels of the plaintiff in the said bond mentioned, and prosecute such action with effect and without delay, and unless judgment be obtained thereon by default, should prove before the said court of —— that he, the said defendant A. B., had good ground for believing that the title to the hereditament, in respect to which the distress was made, was in question, [*or* "that the title to the toll, market, fair, or franchise in respect of which the distress was made was in question," *or* "that the rent or damage in respect of which the distress was made exceeded £20,"] and should make a return of the said goods and chattels if return thereof should be awarded; and the said defendant A. B. did not, within one week from the date of the said bond, commence an action of replevin against the said plaintiff, [*or* "and although the said defendant A. B. did commence an action of replevin within one week from the date of the said bond, yet he did not prosecute such action with effect and without delay,] (*h*) [*or set out the breach complained of, according to the particular facts, and conclude:*] whereby the said bond became forfeited.

2. *On a Replevin Bond conditioned to sue in a County Court.* (*i*)

A count may be readily framed from the above, reference being had to the bond itself and the section of the act of parliament.

(*g*) 19 & 20 Vict c. 108, s. 65.

(*h*) These words mean, to carry the suit to a successful termination, and are applicable to a case removed to a superior court by the defendant. Tummons *v.* Ogle, 6 El. & Bl. 571; 25 L. J. Q. B. 403.

(*i*) 19 & 20 Vict. c. 108, s. 66.

REWARD.

1. *For a Reward offered by the Defendant by Public Advertisement for the Discovery of an Offender.* (*k*)

For that the defendant published an advertisement, whereby, after reciting that W. C. had been robbed, and that there was great reason to suppose that he had been murdered, the defendant promised that whosoever would give such information as might lead to a discovery of the murderer of the said W. C. should, *on conviction*, (*l*) receive a reward of £20, and that any person concerned therein, or privy thereto, except the person who actually committed the offence, should be entitled to such reward, and every exertion used to procure a pardon; and by the said advertisement, the defendant directed that the said information should be given, and application for the said reward be made, to him, or Mr. W., solicitor, Hereford; and the plaintiff, not being the party who actually committed the said offence, gave (*m*) to the defendant such in-

(*k*) Williams *v.* Carwardine, 5 C. & P. 566; 4 B. & Ad. 621, S. C.; [England *v.* Davidson, 11 Ad. & E. 856; Neville *v.* Kelly, 12 C. B. N. S. 740; Tarner *v.* Walker, L. R. 1 Q. B. 641; S. C. L. R. 2 Q. B. 301;] and see forms of declarations in Lancaster *v.* Walsh, 4 M. & W. 16; [Neville *v.* Kelly, 12 C. B. N. S. 740;] and other forms in the cases cited *infra*. For offering premium for best plan for a building; Ward *v.* Lowndes, 8 L. J. Q. B. 265; [for discovering a lost child; Fallick *v.* Barber, 1 M. & S. 108.] When a person gives the required information, he may sue as upon a contract, although there is no express agreement to which the plaintiff and defendant were parties. Roll. Ab. 6 M. Pl. per Martin B.; Warlow *v.* Harrison, 1 El. & El. 295; per Lord Campbell, Gerhard *v.* Bates, 2 El. & Bl. 488. [In Loring *v.* Boston, 7 Met. 411, Shaw C. J. said: "The offer of a reward for the detection of an offender, is an offer or proposal on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such an offer on one side and acceptance and performance of the service on the other, form a valid contract, made on a good consideration, which the law will enforce." See Williames *v.* Frazier, 6 Mass. 344; Freeman *v.* Boston, 5 Met. 56; Crawshaw *v.* Roxbury, 7 Gray, 374; Wentworth *v.* Day, 3 Met. 352; Gilmore *v.* Lewis, 12 Ohio, 281; Newman *v.* Parke, 1 N. J. 310; Denton *v.* Great Northern Railway Co. 5 El. & Bl. 860, 865, 868. The offer or proposal should be acted upon within a reasonable time. Loring *v.* Boston, 7 Met. 409. Such an offer may be withdrawn or revoked at any time before acceptance. Sanford J. in Crocker *v.* New Lond. Willimantic & Palmer R. R. Co. 24 Conn. 261; Freeman *v.* Boston, 5 Met. 56, 57.] In general the person to sue is he who *first* gives the required information; Lancaster *v.* Walsh, 4 M. & W. 16; Thatcher *v.* England, 3 C. B. 254; though led to inform, not by the proffered reward, but by other motives. Williams *v.* Carwardine, 4 B. & Ad. 621. A *constable* may give the information and claim the reward. England *v.* Davidson, 11 Ad. & E. 856. The information must be given with the *intention* of its being acted on, and not in the course of cursory conversation; Lockhart *v.* Barnard, 14 M. & W. 674; Tullock *v.* Barber, 1 M. & S. 108; and if *two* give it, both must join in the action. Lockhart *v.* Barnard, *ubi sup.* If A. communicate the means by which the *confession* of the guilty party may be procured from him, which leads to his confessing and being convicted, A. will be entitled to the reward. Smith *v.* Moore, 1 C. B. 438; [Tarner *v.* Walker, L. R. 1 Q. B. 641; L. R. 2 Q. B. 301.] Corruptly taking a reward for helping to the recovery of stolen property without bringing the offender to trial, is prohibited and punishable. 24 & 25 Vict. c. 96, s. 101. And in publicly advertising a reward for the return of stolen or lost property, care must be taken, that the advertisement does not purport that no questions will be asked, or that the reward will be given or paid without seizing or making inquiry after the person producing the property, or that any money advanced upon the property will be returned, under a penalty of £50, to be sued for by action of debt by any person. S. 102. By 24 & 25 Vict. c. 96, s. 20, corruptly taking a reward to restore dogs is made a misdemeanor.

(*l*) In this case there is no cause of action *until conviction*. Hernaman *v.* Smith, 10 Ex. 659.

(*m*) This will depend upon the facts and nature of the particular advertisement. It is not in all cases necessary that the information should be given to the defendant if it be given to a person authorized to act upon it, as to a constable. See Lancaster *v.* Walsh, 4 M. & W. 16; Thatcher *v.* England, 3 C. B. 254.

formation as led to the discovery that E. F. was the murderer of the said W. C.; and the said E. F. was, in due course of law, tried for and convicted of the said murder in consequence of such information so given by the plaintiff as aforesaid, of all which the defendant had notice, and was requested by the plaintiff to pay him the said money, yet the defendant hath not paid the same. [*Add a count for work done* (*n*) *and an account stated, if there is any evidence to support the latter.*]

2. *For recovery of a Reward offered for Lost Property.*

For that the defendant promised to pay £—— to any person who should find and would deliver to the defendant a [watch] then lately lost by him, and the plaintiff having found the ——, delivered it to the defendant, and requested him to pay to the plaintiff the said £——, but the defendant hath not paid the same.

[*Count on a promise made by an advertisement offering a pretnium to the architect who should produce the best plan for a building.* Ward *v.* Lowndes, 28 L. J. Q. B. 265.]

SALE OF GOODS.

Obs. — See the common *indebitatus* count, and when it lies, *ante*, 27, 28, Obs. 1 and 2. The declaration should be special: 1st. Where the action is *not* against the vendee, but against a party who guarantied the price, if the vendee made default, *ante*, 137, Obs.; as to which see Dodsley *v.* Varley, 12 Ad. & E. 632. 2d. Where there has been no delivery or acceptance of the goods, *and* by reason of their being mixed and undistinguished from others, or not having been weighed out, &c. so as to ascertain the exact price, &c. no *property* in the *identical* goods has vested in the defendant, and they have not been appropriated to his use, &c. See the cases cited, Rhode *v.* Thwaites, 6 B. & C. 388; Gillett *v.* Hill, 2 Cr. & M. 535, per Bayley J.; Elliot *v.* Pybus, 4 M. & Sc. 389; S. C. 10 Bing. 512; [1 Chitty Pl. 166, and notes; Benj. Sales (1st Am. ed.), § 352 *et seq.* and notes, § 358 *et seq.* and notes; Blackburn Sales, 122, 128; Warren *v.* Buckminster, 24 N. H. 336; Scudder *v.* Worster, 11 Cush. 373; Ropes *v.* Lane, 9 Allen, 502; Waldo *v.* Belcher, 11 Ired. 609; Messer *v.* Woodman, 22 N. H. 172; Bailey *v.* Smith, 43 N. H. 141; Bell *v.* Farrar, 41 Ill. 400; Rodee *v.* Wade, 47 Barb. 63; Chapman *v.* Shepard, 39 Conn. 413; Hunter *v.* Hutchinson, 7 Barr, 140; Browning *v.* Hamilton, 42 Ala. 484; 1 Chitty Contr. (11th Am. ed.) 522 *et seq.* and notes; Fuller *v.* Bean, 34 N. H. 300; Merchants' National Bank *v.* Bangs, 102 Mass. 295. As to sales of grain stored with other grain of the same kind in elevators, see Benj. Sales (1st Am. ed.), 354, note (*o*); Cushing *v.* Breed, 14 Allen, 380; Warren *v.* Milliken, 57 Maine, 97; Kimberly *v.* Patchin, 19 N. Y. 330; Russell *v.* Carrington, 42 N. Y. 118; Dole *v.* Olmstead, 36 Ill. 150; 41 Ill. 344; Young *v.* Miles, 20 Wisc. 615; 23 Wisc. 643; Chapman *v.* Shepard, 39 Conn. 413.] 3d. Where by the terms of the contract the goods are to be paid for by a bill of exchange or promissory note, and the vendee refuses to give it. Paul *v.* Dod, 2 C. B. 800; Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 B. & P. 582; [1 Chitty Pl. 357, and notes; 1 Chitty Contr. (11th Am. ed.) 615; Bass *v.* White, 7 Lansing, 171; Hunneman *v.* Grafton, 10 Met. 454, 458, 459; Ascutney Bank *v.* McOrmsby, 28 Vt. 721; Eddy *v.* Stafford, 18 Vt. 235; Rugg *v.* Weir, 16 C. B. N. S. 471; Hanna *v.* Mills, 21 Wend. 90; Rice *v.* Andrews, 32 Vt. 691.] 4th. In general, if goods are paid for partly in money and *partly in goods* to be delivered,

(*n*) In an action for a reward offered by advertisement, "there is the consideration for work done, and I never could see why an action for work done would not in such a case lie." Per Crompton J. Denton *v.* The Great Northern Ry. Co. 5 El. & Bl. 868.

Obs. the vendor should declare specially. Harrison *v.* Luke, 14 M. & W. 139; [1 Chitty Pl. 357.] But if the goods are delivered to him in part performance, the *money* may be recovered under the common count. Bull *v.* Parker, 2 Dowl. N. S. 345; *ante*, 119, note (*d*), tit. "Exchange;" [1 Chitty. Pl. 357.]

By § 17 of the statute of frauds, 29 Car. 2, c. 3, it is enacted, "That no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or *memorandum* in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." And by 9 Geo. 4, c. 14, s. 7, it is enacted, after referring to the 17th section of the statute of frauds, "That the said enactment shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." As to the law of cases upon these enactments, see Smith's Mercantile Law; Blackburn on the Contract of Sale; [1 Chitty Contr. (11th Am. ed.) 540 *et seq.* and notes; Benj. Sales (1st Am. ed.), § 90 *et seq.*; Gibson *v.* Holland, L. R. 1 C. P. 1; Vanderberg *v.* Spooner, L. R. 1 Ex. 316; Noble *v.* Ward, L. R. 1 Ex. 117; L. R. 2 Ex. 135; Wilkinson *v.* Evans, L. R. 1 C. P. 407.]

Damages. — In actions for *not accepting* goods, the measure of damages is the difference between the contract price and the market price on the day when the goods ought to have been received by the purchaser, for the seller may sell his goods and obtain the market price for them. Boorman *v.* Nash, 9 B. & C. 145; Barrow *v.* Arnaud, 8 Q. B. 595, 610; Phillpotts *v.* Evans, 5 M. & W. 475; [Benj. Sales (1st Am. ed.), § 758 *et seq.* and cases in notes; Gordon *v.* Norris, 49 N. H. 376; Allen *v.* Jarvis, 20 Conn. 38; Haskell *v.* Hunter, 23 Mich. 305; Whelan *v.* Lynch, 65 Barb. 329; Griswold *v.* Sabin, 51 N. H. 167; Northup *v.* Cook, 39 Missou. 208; Orr *v.* Bigelow, 14 N. Y. 556; Ballantine *v.* Robinson, 46 Penn. St. 177; Dana *v.* Fiedler, 12 N. Y. 40; 2 Chitty Contr. (11th Am. ed.) 1331, and cases in note (*s*); Whitmore *v.* Coates, 14 Missou. 9; Thompson *v.* Alger, 12 Met. 428, 443; Ganson *v.* Madigan, 13 Wisc. 37.] And if no difference is proved, the plaintiff is only entitled to nominal damages. Valpy *v.* Oakley, 16 Q. B. 941; Griffiths *v.* Perry, 1 El. & El. 680. In an action for the *non-delivery* of goods, the damage is the difference between the contract price and the market price of similar goods at the time when the delivery ought to have taken place. Gainsford *v.* Carroll, 2 B. & C. 624; Chinery *v.* Viall, 5 H. & N. 288; Leigh *v.* Paterson, 8 Taunt. 540; Josling *v.* Irvine, 6 H. & N. 512; Startup *v.* Cortazzi, 2 Cr., M. & R. 165; [Benj. Sales (1st Am. ed.), § 758; 1 Chitty Contr. (11th Am. ed.) 621, and note (*c*); 2 Ib. 1331; Worthen *v.* Wilmot, 30 Vt. 555; Clement & Hawkes Manuf. Co. *v.* Meserole, 107 Mass. 362; Deming *v.* Grand Trunk R. R. Co. 48 N. H. 455; Cutting *v.* Grand Trunk R. R. Co. 13 Allen, 381; Gordon *v.* Norris, 49 N. H. 376; McNaught *v.* Dodson, 49 Ill. 446.] If there is no difference the damages will be only nominal; *supra.* [Where there is no market for such goods to which the buyer can resort to replace them, the seller is liable for the special damage caused by his breach of contract, which the buyer cannot prevent accruing by purchasing the goods elsewhere. Borries *v.* Hutchinson, 18 C. P. N. S. 445; Benj. Sales (1st Am. ed.), § 876; Furlong *v.* Polleys, 30 Maine, 493, 494; McHose *v.* Fulmer, 73 Penn. St. 365. Where the buyer has contracted to resell the goods at a greater price than the market price at the time of delivery, he cannot in general recover the additional profit of his bargain as damages. Williams *v.* Reynolds, 6 B. & S. 495; and see Josling *v.* Irvine, 6 H. & N. 512; Randall *v.* Raper, El., Bl. & El. 84. It cannot be taken into consideration in assessing the damages that an enhanced price was agreed for and paid in consideration of delivery at the time specified. Brady *v.* Oastler, 33 L. J. Ex. 300.]

If a person contracts with another for the sale of a particular article, and

Obs. breaks his contract, the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of it. Hadley *v.* Baxendale, 9 Ex. 341; [Wilson *v.* Newport Dock Co. L. R. 1 Ex. 177;] Smeed *v.* Toord, 1 El. & El. 602; Portman *v.* Middleton, 4 C. B. N. S. 322; [Scott *v.* Boston & New Orleans Steamship Co. 106 Mass. 468; Williams *v.* Reynolds, 6 B. & S. 495; Cate *v.* Cate, 50 N. H. 149; Horne *v.* Midland Railway Co. L. R. 8 C. P. 131, and remarks in this case on Hadley *v.* Baxendale, *supra;* 2 Chitty Contr. (11th Am. ed.) 1325, and note (*h*), where this subject is fully discussed, and the cases cited; Ogle *v.* Vane, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; Cory *v.* Thames &c. Co. L. R. 3 Q. B. 181; British Columbia Saw Mill Co. *v.* Nettleship, L. R. 3 C. P. 499.] In Fletcher *v.* Tayleur, 17 C. B. 21, Jervis C. J. and Willes J. were of opinion that, as in the case of breach of a contract to pay money, the interest of the money is the measure of damages; so in the case of a breach of contract to deliver a chattel, the measure of damages should be the average profit made by the use of such chattel. See, also, Ger *v.* The Lancashire & Yorkshire Railway Co. 6 H. & N. 211.

The purchaser has now a further remedy than by action for non-delivery. He may have a specific delivery of the goods. By the mercantile law amendment act, 1856, 19 & 20 Vict. c. 97, s. 2, it is enacted, "In all actions and suits in any of the superior courts of common law at Westminster, or Dublin, or in any court of record in England, Wales, or Ireland, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover and which remained undelivered; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court, or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the court, or such judge or baron as aforesaid, shall otherwise order, the sheriff, or other officer of such court of record, shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, or within the jurisdiction of such other court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action or suit."

1. *Indebitatus Count for Goods bargained and sold.*

Ante, 33, 34. (*o*)

2. *Indebitatus Count for Goods sold and delivered.*

Ante, 33, 34. (*p*)

(*o*) This form is given by the C. L. P. Act, 1852, sch. B, 1. As to when it lies, see *ante*, 28.

(*p*) As to when the common indebitatus count lies, see *ante*, 27.

3. *Vendor against Vendee of Goods sold, for not accepting them.* (*q*)

For that the defendant bought of the plaintiff, and the plaintiff sold to the defendant, certain goods [*or state the kind of goods*], at a certain price, and upon the terms that the said goods should be delivered by the plaintiff to the defendant, and accepted and paid for by him; and [*here aver performance of conditions precedent, as ante*, 39], yet the defendant did not accept or pay for the same, whereby * the plaintiff has incurred expense in keeping the said goods, and in endeavoring to procure the completion of the said contract by the defendant, and has been forced to resell (*r*) the said goods for a less price than the price to have been paid by the defendant, and has incurred the costs and charges of such resale. [*Add account stated.*]

4. *Vendor against Vendee, on his Promise to pay for Goods by a good Bill of Exchange.* (*t*)

For that the plaintiff sold to the defendant, and the defendant bought of the plaintiff, forty tons of iron, on the terms that they should be paid for by bill of exchange drawn at three months' date, or made equal to cash in three months, on delivery of the said goods, such bill to be satisfactory to the plaintiff; and the plaintiff delivered the said iron to the defendant upon the terms aforesaid; and [*here aver performance of conditions precedent, as ante*, 39], yet the defendant hath not paid the price of the said iron by a bill of exchange as aforesaid, whereby the plaintiff hath lost and been deprived of the use and benefit of the said bill, and is otherwise injured.

(*q*) See forms, &c. Boyd *v.* Lett, 2 D. & L. 847; S. C. 1 C. B. 222; Macdonald *v.* Longbottom, 28 L. J. Q. B. 293; [1 El. & El. 977; Graves *v.* Legg, 9 Ex. 709; Jones *v.* Clarke, 2 H. & W. 725.] See forms on bought and sold notes, Lucas *v.* Bristowe, 27 L. J. Q. B. 364; [El., Bl. & El. 907;] Beckh *v.* Page, 5 C. B. N. S. 708. Another form may be adapted from that for not accepting railway shares, *ante*, 228, form 4. [Specific goods. Right to reject. Heyworth *v.* Hutchinson, L. R. 2 Q. B. 447.]

(*r*) If the vendee refuse to pay for the goods, the vendor may resell and sue specially for the loss on the resale. Maclean *c.* Dunn, 4 Bing. 722; Hone *v.* Milner, Peake R. 58, 3d. ed.; [1 Chitty Contr. (11th Am. ed.) 599, 600; Benj. Sales (1st Am. ed.), § 782 *et seq.*, § 788; 2 Kent, 495, 504; Sargent J. in Gordon *v.* Norris, 49 N. H. 383; Sands *v.* Taylor, 5 John. 395; Eastman J. in Warren *v.* Buckminster, 24 N. H. 336, 344; Pollen *v.* Le Roy, 30 N. Y. 558; Haines *v.* Tucker, 50 N. H. 307, 313; Appleton *v.* Hogan, 9 B. Mon. 69; Redmond *v.* Smock, 28 Ind. 365; Saladin *v.* Mitchell, 45 Ill. 80; M'Combs *v.* M'Kennan, 2 Watts & S. 216.] *Sed vide* Greaves *v.* Ashlin, 3 Camp. 426. If the vendor has not resold, he may recover the full price of the goods if that price was to be paid on a named day, nor is it necessary for him to show that any specific goods were appropriated. Dunlop *v.* Grote, 2 C. & K. 153; [Benj. Sales (1st Am. ed.), § 762. Vendee is justified in refusing to receive goods when more are sent than have been ordered. Levy *v.* Green, 1 El. & El. 968.]

(*t*) See forms, Fair *v.* M'Iver, 16 East, 130; *ante*, 239; Gordon *v.* Whitehouse, [18 C. B. 747;] 25 L. J. C. P. 300; Clementson *v.* Blessig, 11 Ex. 135. And for not *delivering* goods to be paid for by bill, Griffiths *v.* Perry, 28 L. J. Q. B. 204; [1 El. & El. 680;] law, *ante*, 27, 28. Where a bill is to be given, the price of the goods cannot be recovered on the common counts until the period of credit has expired. Paul *v.* Dod, 2 C. B. 800; Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 B. & P. 582; [1 Chitty Pl. 357.] But if the credit has expired, then the common count suffices. Ib. Where goods are sold and delivered to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods on the common count for goods sold and delivered. Farr *v.* Ward, 3 M. & W. 25.

5. *Vendor against Vendee, for not giving Security for the Price of Goods sold by Auction, according to the Conditions, the Credit not having expired.* (*u*)

For that the plaintiff caused to be put up and exposed to sale by public auction, in lots, certain goods and chattels, one of the said lots being a horse, upon the terms that the highest bidder should be the purchaser; that the purchaser should be allowed seven months' credit for the payment of the prices, after giving such security as should be approved of by J. W. P. on the part of the said plaintiff, or that such purchasers respectively should at their election pay down the price of the lots purchased by them respectively at the time of the said sale, and in that event that a certain sum should be deducted by way of discount from the amount of the purchase-moneys to be paid by such purchasers respectively, at the rate of £5 per cent. thereon; of all which the defendant had notice; and the defendant became the purchaser of the said horse, upon the terms aforesaid, for £7 13*s.*, and the plaintiff delivered the said horse to the defendant as such purchaser; and although [*here aver performance of conditions precedent, as ante*, 39], yet the defendant hath not paid him the said sum of £7 13*s.*, or given any security as aforesaid for the same. [*Add account stated.*]

6. *Vendor against Vendee, for not accepting Goods which were to have been delivered in Parcels on different Days, and to be paid for on Delivery, with a Discount, &c.* (*x*)

Commencement as ante, 5.] For that the defendant bought of the plaintiff, and the plaintiff sold to the defendant, a quantity of oil, at a certain rate or price for each ton thereof, usual allowance, to be free delivered, half in the month of February then next, and the remainder in the month of March then next, to be paid for upon each delivery in ready money, allowing £2 10*s.* per cent. discount, half of the oil to be delivered in the last fourteen days in February aforesaid, and the other half to be delivered in the last fourteen days in March aforesaid; and although the plaintiff was ready and willing and offered to deliver the said oil to the defendant as aforesaid, according to the terms aforesaid, of all which the defendant had notice [*here aver performance of conditions precedent, as ante*, 39], yet the defendant did not accept the said oil, or pay for the same as aforesaid, whereby [*&c. as before*, Form 3, *from the* *; *add account stated.*]

7. *For not accepting Goods which were to be manufactured for a Railway Company, showing a Wrongful Discharge from further proceeding with the Manufacture.*

Scott *v.* Eastern Counties Ry. 12 M. & W. 33; and see similar forms, Pontifex *v.* Wilkinson, 1 C. B. 75; Cort *v.* Ambergate Ry. [17 Q. B. 127.]

(*u*) See another form for not clearing away and paying for goods sold by auction, according to conditions of sale, Pettitt *v.* Mitchell, 4 M. & G. 819.

(*x*) See forms, Boorman *v.* Nash, 9 B. & C. 145; Hoare *v.* Rennie, [5 H. & N. 19; Baker *v.* Firminger, 28 L. J. Ex. 130.] As to the measure of damages, see Obs. *ante*, 235.

8. *For not taking away from Plaintiff's Land Timber sold by him to Defendant.* (*y*)

For that the plaintiff sold to the defendant, and the defendant bought from the plaintiff, a quantity of timber, at the rate or price of 18*d.* for each foot thereof, to be carried away by the defendant from the lands of the plaintiff, whereon the same then were, within a reasonable time, and to be paid for by the defendant, when so carried away; and although [*here aver performance of conditions precedent, as ante*, 39], yet the defendant hath not, although requested by the plaintiff so to do, carried away the said timber from the said lands, or paid the plaintiff for the same. [*Add account stated.*]

9. *For not paying for or returning a Horse received by Defendant on Trial.* (*z*)

For that in consideration that the plaintiff, at the request of the defendant, would deliver a gelding of the plaintiff, to be had and used on trial by the defendant, he the defendant promised the plaintiff to return the same to the plaintiff within a reasonable time, or to pay him for the same; and the plaintiff avers that he did deliver the said gelding to the defendant to be had and used on trial by the defendant as aforesaid, yet the defendant did not return the said gelding to the plaintiff, though a reasonable time has elapsed, nor hath he paid for the same. [*Add account stated.*]

10. *On a Contract for the purchase of Hemp to be delivered at a Named Place "in the Months of September and October," and to be paid for by the Buyer's Acceptance, payable Six Months from Date of Invoice and Delivery.* (*a*)

Commencement as ante, 5.] For that the plaintiffs, at the request of the defendant, bargained and sold to the defendant a large quantity of St. Petersburg clean hemp, of the import of the year 1813, to be delivered at Hull, of fair merchantable quality and good condition, in the months of September and October then next, to be paid for by the defendant's acceptance, payable in London at six months from the date of the invoice and delivery; and although the plaintiffs were *ready* and *willing* (*b*) to have delivered at Hull to the defendant the said hemp in the time aforesaid, and always have been and still

(*y*) Smith *v.* Surman, 9 B. & C. 561.

(*z*) Where goods are sold under a contract of "sale or return," they pass to the purchaser, subject to an option in him to return them within a reasonable time, and if he fails to exercise that option within a reasonable time, the price of the goods may be recovered, as upon an absolute sale in an action for goods sold and delivered. Moss *v.* Sweet, 16 Q. B. 493; Beverly *v.* Lincoln Gas Light Co. 8 Ad. & E. 829; *ante*, 27; [Schlesinger *v.* Stratton, 9 R. I. 478; Dearborn *v.* Turner, 16 Maine, 17; Perkins *v.* Douglass, 20 Maine, 317; Walker *v.* Blake, 37 Maine, 373; Sargent *v.* Gile, 8 N. H. 327, 328; Porter *v.* Pettengill, 12 N. H. 300, 301; Meldrum *v.* Snow, 9 Pick. 441; Crocker *v.* Gullifer, 44 Maine, 491; Benj. Sales (1st Am. ed.), § 597.]

(*a*) The following was the form of the agreement or broker's note: "Hull, August 13, 1813. — Sold for account of Messrs. M. & Sons to Mr. G. G., ten tons of St. Petersburg clean hemp, of this year's import, and to be *delivered* at *Hull* of *fair merchantable quality* and good condition in *all* the *months of September and October next*, at £84 per ton, payment per the buyer's acceptance, payable in London six months from date of invoice and delivery." Form for not accepting goods to be delivered at a particular place, Philpotts *v.* Evans, 5 M. & W. 475.

(*b*) This averment seems sufficient. Rawson *v.* Johnson, 1 East, 203; Waterhouse *v.* Skinner, 2 B. & P. 447; *ante*, 172, note (*t*).

are ready and willing to deliver the same at Hull to the defendant, and the plaintiffs delivered to the defendant an invoice of the said hemp, and drew a bill of exchange for the amount of the purchase-money of the said hemp, payable at six months date, and requested the defendant to accept the same according to the terms of the said bargain and sale; and although [*here aver performance of conditions precedent, as ante*, 39], yet the defendant did not accept the said bill of exchange, and has not paid for the said hemp.

11. *Vendee against Vendor, for not delivering Goods.* (*c*)

For that the plaintiff bargained and agreed with the defendant to buy of him, and the defendant then sold to the plaintiff, certain goods [*or* "chests of tea"], at £——, to be delivered by the defendant (*d*) to the plaintiff on [*&c. or* "on request," *or* "at," *according to the fact*], and to be paid for by the plaintiff to the defendant on delivery [*or* "as follows," *&c.; if it be paid for by bill, state the fact, alleging a readiness to accept or give it, &c.*]; and although [*here aver performance of conditions precedent, as ante*, 39], (*e*) yet the defendant did not deliver the said goods to the plaintiff, whereby the plaintiff hath been deprived of the gains and profits which would have accrued to him from the delivery of the said goods. [*Add account stated.*]

[11*a*. *Another Form for Same.*

And the plaintiff says he purchased of the defendant the following goods, viz: ——, for the sum of one hundred dollars, to be paid therefor on delivery thereof; and the defendants promised to deliver the same on the —— day of ——, at the defendant's store in ——; and on said day the plaintiff demanded said goods at said store, and tendered to the defendant said sum of one hundred dollars in payment of the same, and the defendant refused to deliver the same to the plaintiff.

Like counts. Ramsden *v.* Gray, 7 C. B. 961; Porritt *v.* Baker, 10 Ex. 759. *For not delivering goods agreed to be delivered as required;* Jones *v.* Gibbons, 8 Ex. 920; *to be delivered in certain quantities weekly;* Josling *v.* Irvine, 6 H. & N. 512; *for not delivering the residue after part delivery under the contract;* Bentley *v.* Dawes, 9 Ex. 666; *for not delivering timber under contract to deliver at a foreign port;* Gabriel *v.* Dresser, 15 C. B. 622.

11*b*. *Purchaser against Vendor on a Contract for the Sale of Goods expected by a Certain Ship, for not delivering.*

That it was agreed by and between the plaintiff and the defendant, that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy from the defendant, —— tons of [Petersburg hemp], expected to arrive at —— by the ship ——, at the price of $—— per ton from the quay, and

(*c*) See another form, &c. Wood *v.* Tassell, 6 Q. B. 234; and see Chit. jr. Contr. Index, "Sale." See another form, Salter *v.* Woollams, 2 M. & G. 651. Form with special damages for not being able to fulfil subcontract. Josling *v.* Irvine, 6 H. & N. 512; Smeed *v.* Foord, 28 L. J. Q. B. 178. When the vendee may sue for non-delivery, *vide* Obs. *sup.* 234. [As to time of delivery, Coddington *v.* Palaeologo, L. R. 2 Ex. 193.]

(*d*) If plaintiff was to *send* for them, state the fact, and that he was ready and willing to take them away, with a request to defendant to be allowed to take them, &c.

(*e*) A *tender* of the price need not be stated; but a request of delivery must be alleged where the contract is that the goods should be delivered on request. Bach *v.* Owen, 5 T. R. 409; Radford *v.* Smith, 3 M. & W. 254. Demand of delivery by servant, Squier *v.* Hunt, 3 Price, 68.

on the terms that if the ship should be lost or the [hemp] should be damaged on the voyage, the said agreement should be considered void for such quantities as might be lost or damaged, the quality to be of fair average of the season, and payment to be made by the plaintiff by six months' acceptance, or cash in fourteen days, less two and a half per cent. discount, at the plaintiff's option; and after the making of the said contract, the said ship arrived at —— aforesaid with —— tons of the said [hemp] on board not damaged; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to the delivery of the last mentioned goods as aforesaid, yet the defendant did not deliver to the plaintiff the said —— tons of the said [hemp]. (*f*)

11*c*. *Purchaser against Vendor on a Contract for the Sale of Goods sold by Description, for delivering Goods inferior to the Description.*

That it was agreed by and between the plaintiff and the defendant, that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy and accept from the defendant, —— sacks of flour, at the price of —— shillings per sack, of the same quality as certain flour which the defendant had then lately sold and delivered to G. H.; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have such flour delivered as aforesaid, yet the defendant did not deliver to the plaintiff any such flour as aforesaid, but delivered to the plaintiff, as and for the flour so agreed to be sold and delivered as aforesaid, certain flour not of the same quality as the flour which he had so sold and delivered to the said G. H., but of an inferior quality, whereby the plaintiff lost the price paid by him to the defendant for the said flour, and the profits which he would have derived from the performance of the said agreement by the defendant. (*g*)]

12. *Vendee against Vendor, on his Promise to return a Sum deposited with him, if Plaintiff should, on Trial of a Horse, decline to purchase it.*

For that the defendant was possessed of a certain horse, and was desirous of selling the same, and it was agreed between the plaintiff and the defendant that the plaintiff should pay to and deposit with the defendant a certain sum of money, and that the defendant should let the plaintiff have the said horse on trial, on the terms that if the plaintiff did not upon such trial like the said horse, and declined buying the same, he the defendant would take back the said horse, and would return the said sum of money to the plaintiff, when he

(*f*) [Like counts. Moore *v.* Campbell, 10 Ex. 323; Fischel *v.* Scott, 15 C. B. 69. Like counts on contracts for the sale of goods "on arrival" by a certain ship; Boyd *v.* Siffkin, 2 Camp. 326; "on arrival" before a certain day; Idle *v.* Thornton, 3 Camp. 274; "to arrive" by a certain ship; Lovatt *v.* Hamilton, 5 M. & W. 639; Johnson *v.* Macdonald, 9 M. & W. 600. [All held to be conditional on the arrival of the ship with the goods.] Like counts on contracts for the sale of goods "now on passage, and expected to arrive by" a certain ship; Gorissen *v.* Perrin, 2 C. B. N. S. 681; "to be delivered on the safe arrival of" a certain ship: Hale *v.* Rawson, 4 C. B. N. S. 85. [All held absolute on the arrival of the ship, although without the goods on board.] Count on a contract of sale of 500 tons of nitrate of soda, to form the full cargo of a ship named, for delivering only the full cargo, being less than the quantity, Bourne *v.* Seymour, 16 C. B. 337.]

(*g*) [Like counts. Harnor *v.* Groves, 15 C. B. 667; Loder *v.* Kekulé, 3 C. B. N. S. 128; Ramsden *v.* Gray, 7 C. B. 961; St. Losky *v.* Green, 9 C. B. N. S. 370.]

the plaintiff should return and redeliver the said horse to the defendant; and the plaintiff paid to and deposited with the defendant the said sum of money, and received the said horse on the terms aforesaid; and although he did not like the said horse on trying the same, and declined to buy the same, and hath always been ready and willing to return the same to the defendant, whereof the defendant had notice, and the plaintiff tendered the said horse to the defendant, and requested him to return to him the plaintiff the said sum of money, yet the defendant did not receive back the said horse from the plaintiff, or repay the said sum of money, whereby the plaintiff incurred expenses in and about taking care of the said horse, and endeavoring to cause the defendant to take back the same, and hath lost and been deprived of the use of the said sum of money, and was and is otherwise injured. [*Add a count for money had and received and an account stated.*]

[12*a*. *Purchaser against Vendor, for not delivering* [*a Machine*] *within a Time agreed upon, stating Special Damage.*

That the defendant bargained and sold to the plaintiff, and the plaintiff bought from the defendant, [a threshing machine,] at a certain price, and upon the terms that the defendant should deliver the same to the plaintiff on or before the —— day of ——, A. D. ——; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to a delivery of the said [threshing machine] as aforesaid, yet the defendant did not deliver the said [threshing machine] to the plaintiff on or before the said —— day of ——, A. D. ——, whereby the plaintiff was unable to thresh his wheat, and the same became damaged and wetted by the rain, and deteriorated in value, and the plaintiff incurred expense in drying and carting and stacking the same, and was unable to sell the same as soon or for so large a price as he otherwise would have done. (*h*)]

13. *For not supplying Machinery for a Steam Vessel according to Drawings.*

Wimshurst *v.* Deeley, 2 C. B. 253.

14. *For not supplying Girders according to Drawings.*

Kingdom *v.* Cox, 2 C. B. 661.

SALE OF LAND. See "Vendors and Purchasers."

SCHOOLMASTER.

1. *Declaration by a Schoolmaster, for Tuition, Board, &c.* (*i*)

Commencement as ante, 33.] For work done by the plaintiff as a schoolmaster in and about instructing A. B. [*or* "divers infants and other persons"]

(*h*) [A like count; Smeed *v.* Foord, 1 El. & El. 602; count for not delivering part of a machine, whereby the plaintiff was prevented from completing and delivering the whole machine according to a contract; Portman *v.* Middleton, 4 C. B. N. S. 322.]

(*i*) As to the liability of an infant for his teaching, [1 Chitty Contr. (11th Am. ed.) 198; Raymond *v.* Loyl, 10 Barb. 489; Middlebury College *v.* Chandler, 16 Vt. 686.]

for the defendant at his request, and for meat, drink, washing, lodging, and other necessaries by the plaintiff provided for the said A. B. [*or* "the said infants and other persons"] at the defendant's request, and for [*money paid and account stated*].

SEAMAN.

Obs. — As to the legal rights to wages, see, in general, the merchant shipping act, 17 & 18 Vict. c. 104, s. 181 *et seq.* By s. 188 a seaman may sue in a summary manner before two justices, for any amount of wages due, not exceeding £50, over and about the costs of any proceeding for the recovery thereof, so soon as the same become payable, and the order made by the justices shall be final. By s. 189 no suit for the recovery of wages under the sum of £50 shall be brought in any superior court of record in her majesty's dominions, *unless* the owner of the ship is adjudged a bankrupt, or *unless* the ship is under arrest, or is sold by authority of a competent court, or *unless* the justices acting under s. 188 refer the case to be adjudged by such court, or unless neither the owner nor master reside within twenty miles of the place where the seaman or apprentice is discharged or put on shore. Where a seaman brought an action for an assault, and also for wages under £50, a plea founded upon the above section was allowed by the court. Rossi *v.* Grant, 5 C. B. N. S. 699. It seems that it is doubtful whether this section applies to a foreign vessel. Burns *v.* Chapman, 5 C. B. N. S. 481. And where an owner resided more than twenty miles from London, but regularly attended the corn market in London, and frequented the house of his agent in Mark Lane when he did so, it was held that he did not reside within twenty miles, so as to deprive the seaman of his right to proceed in the court of admiralty. The Blakeney, 5 Jur. N. S. 418. See a form of indebitatus count for wages; Robins *v.* Power, 4 C. B. N. S. 778; and law as to who should be sued, where there has been a change in the ownership of the vessel during voyage. Where a seaman is sent home during a voyage as a witness under authority of a naval court, he cannot recover any wages subsequently to leaving the ship. Melville *v.* De Wolf, 4 El. & Bl. 844. Where a seaman has engaged to serve for a certain term at given wages, as a general rule, any agreement to pay him higher wages is without consideration, and cannot be enforced. Frazer *v.* Hatton, 2 C. B. N. S. 512; [3 Kent, 185;] but where a ship in harbor during a voyage became so short-handed that it would be dangerous to life to put to sea, a promise to the remainder of the crew of an additional sum if they would proceed on the voyage, was held binding, as they were not by their original contract bound to proceed with the diminished number of hands at the risk of their lives. Hartley *v.* Ponsonby, 7 El. & Bl. 872; The Mobile, 1 Swabey, 256; 3 Jur. N. S. 893. [On the death of the captain, a seaman promoted to be mate, is entitled to an increase of wages. Hanson *v.* Royden, L. R. 3 C. P. 47.] But there is no express obligation on the part of the owner of a ship, towards a seaman who had agreed to serve on board of her, that the ship shall be in a fit state to perform the voyage; and in the absence of any express warranty to that effect, or any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action by reason of the ship becoming leaky and of his being obliged to undergo extra labor. Couch *v.* Steel, 3 El. & Bl. 402. [But see Savary *v.* Clements, 8 Gray, 155; Dixon *v.* The Cyrus, 2 Pet. Adm. 407, 411; Rice *v.* The Polly, 2 Pet. Adm. 420.] The master as well as the owner may be sued for wages. As to suing for double wages, see s. 187. As to the law generally, see Maule & Pollock on Shipping, 169. The master has now the same remedies for wages as a seaman. S. 191. A seaman's share of salvage cannot be recovered by action from the owner or master, although the salvage claimed shall have been paid by the owner of the vessel saved to the owner of the salvor. Atkinson *v.* Woodall, 31 L. J. M. C. 174.

1. *Indebitatus Count for Wages as a Seaman.*

For the wages for the work and services of the plaintiff done and rendered

for the defendant at his request as a hired seaman and mariner on board the ship ——. (*k*)

2. *On a Sailor's Advance Note.*

M'Kune *v.* Joynson, 5 C. B. N. S. 218.

[3. *Action for Breach of Contract for an Ordinary Voyage by employing Plaintiff on a Voyage which would expose him to Greater Danger.*

Burton *v.* Pinkerton, L. R. 2 Ex. 340.]

SERVICES. See "Master and Servant."

SHARES. See "Public Company," *ante*, 226.

Indebitatus Count for Shares sold.

For shares in the —— Company [Limited] sold, delivered, and transferred by the plaintiff to the defendant.

SHERIFF.

1. *By a Sheriff, for Poundage and Fees.* (*l*)

For poundage and fees payable to the plaintiff as sheriff of the county of ——, for and in respect of work done by the plaintiff, as such sheriff, and his officers and servants, for the defendant at his request. (*m*)

2. *By Sheriff's Officer against the Attorney in the Cause for Fees and Conduct Money.* (*n*)

Newton *v.* Chambers, 1 D. & L. 869.

SHIP.

See "Carriers," *ante*, 97; "Charter Party," *ante*, 110; "Demurrage," *ante*, 117; "General Average," *ante*, 133; "Insurance," *ante*, 158; "Seaman," *ante*, 243.

(*k*) [Like counts. Frazer *v.* Hatton, 2 C. B. N. S. 512; Melville *v.* De Wolf, 4 El. & Bl. 844; Robins *v.* Power, 4 C. B. N. S. 778; Edward *v.* Trevellick, 4 El. & Bl. 59.]

(*l*) A sheriff may maintain an action for his poundage fees (Tyson *v.* Parke, 2 Ld. Raym. 1212) against the person issuing the execution, but *not* against the attorney in the cause; Maybery *v.* Mansfield, 9 Q. B. 754; [2 Chitty Contr. (11th Am. ed.) 871; Campbell *v.* Cothran, 65 Barb. 534; Seal *v.* Hudson, 4 D. & L. 760;] or he may levy them and the expenses of the execution, over and above the sum recovered. C. L. P. Act, 1852, § 123. See 1 Vict. c. 55. As to when a sheriff is entitled to poundage, see [2 Chitty Contr. (11th Am. ed.) 870, and notes, 871;] Chit. Arch. Pr. tit. "Poundage." As to remedies against a sheriff for taking more than he ought, see *ante*, "Extortion," 125; *ante*, "Arrest," 52; [2 Chitty Contr. (11th Am. ed.) 871, 872.]

(*m*) [See other forms, Maybery *v.* Mansfield, 9 Q. B. 754; Walbank *v.* Quarterman, 3 C. B. 94; Miles *v.* Harris, 12 C. B. N. S. 550; Carter *v.* Hughes, 2 H. & N. 714.]

(*n*) An officer who executes process can recover for his fees against the attorney in the cause and not against his client. Walbank *v.* Quarterman, 3 C. B. 94; Brewer *v.* Jones, 10 Ex. 665; Maile *v.* Mann, 2 Ex. 608.

Against the Captain of a Ship, (o) for excluding Plaintiff, a Passenger, from the Cuddy, &c. and Pleas.

Prendergast *v.* Compton, 8 C. & P. 454.

STATUTES — PENAL.

Obs. — See titles "Arrest," *ante*, 52; "Bribery," *ante*, 92; "Extortion," *ante*, 125. In an action on a penal statute, the omission in the declaration that the act was done "against the form of the statute, &c." is fatal in arrest of judgment. Fife *v.* Bousfield, 6 Q. B. 100; 2 D. & L. 481. See C. L. P. Act, 1852, s. 143; [1 Chitty Pl. 387.] In a *qui tam* action upon a local act, incorporating 11 & 12 Vict. c. 63, it was held that the plaintiff must allege in his declaration that he is the party grieved, or that he had the consent of the attorney general for taking proceedings to recover the penalty. Hollis *v.* Marshall, 2 H. & N. 755. The exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived in the declaration. Spieres *v.* Parker, 1 T. R. 141, per Alderson B.; Simpson *v.* Ready, 12 M. & W. 740; [1 Chitty Pl. 246.] But where an act of parliament in the enacting clause creates an offence and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative such proviso. Ib.; Steel *v.* Smith, 1 B. & Ald. 94; Pilkington *v.* Cook, 16 M. & W. 615; [1 Chitty Pl. 246, 386.] The venue is local, if the action be brought by a common informer; 31 Eliz. c. 5, s. 2; 21 Jac. 1, c. 4, s. 2; Barker *v.* Tilson, 3 M. & S. 429; but the issue may be ordered to be tried in any other county than that in which the venue is laid. Greenhow *v.* Parker, 6 H. & N. 882; 3 & 4 W. 4, c. 42, s. 22. But where the action is expressly given to the party grieved, the venue is transitory. Fife *v.* Bousfield, 6 Q. B. 100.

As to the time limited for bringing penal actions, see *post*, Pleas, "Limitations."

By 18 Eliz. c. 5, s. 1, made perpetual by 27 Eliz. c. 10, every informer, upon any penal statute, must sue in proper person or by attorney. An infant, therefore, cannot be a common informer. Maggs *v.* Ellis, Bull. N. P. 196. But this statute only applies to informers, and not to the party grieved.

[*Commence as ante*, 15, Form 30.]

1. *On the Gravesend Pier Act, against a Clerk, for acting as Treasurer.*

Hawkins *v.* Newman, 4 M. & W. 613.

2. *On a By-law of a Corporation (since the Municipal Act), against the Corporation, for Money arising from the Funds of the Corporation, ordered by the By-law to be paid to a Burgess.*

Hopkins *v.* Mayor &c. of Swansea, 4 M. & W. 621.

3. *On a By-law by a London Company against a Liveryman, for a Penalty for a Breach of one of the Regulations of the Company.*

Piper *v.* Chappell, 14 M. & W. 624.

4. *Against a Landlord, to recover Poor Rates under Local Statutes.*

Robinson *v.* James, 1 Dowl. N. S. 756.

(o) [As to the liability of the captain on contracts made respecting the employment, &c. of the ship, see 1 Chitty Pl. 41, note (u), and cases.]

5. *Against a Commissioner, for acting in a Matter in which he was personally interested, contrary to the Provisions of a Local Act.*

Charlesworth *v.* Rudyard, 1 Cr., M. & R. 498; 3 Dowl. 517.

6. *Against a Person, for having acted as Councillor of a Borough whilst Unqualified.* (*p*)

Simpson *v.* Ready, 12 M. & W. 736.

7. *Against an Overseer, for not making out a Burgess List.*

King *v.* Burrell, 12 Ad. & E. 460; and see, also, King *v.* Share, 3 Q. B. 31; and Hunt *v.* Hibbs, [5 H. & N. 123.]

8. *Against an Overseer, for selling Goods for the use of a Workhouse.*

Barker *v.* Waite, 1 Ad. & E. 514; and see Henderson *v.* Sherbourne, 2 M. & W. 236.

9. *Against a Guardian of the Poor, for supplying Goods for his own Profit.*

Greenhow *v.* Parker, 6 H. & N. 882.

10. *Against a Stockbroker, for acting without being admitted.*

Clark *v.* Powell, 4 B. & Ad. 846; and see Cope *v.* Rowlands, 2 M. & W. 157.

11. *For delivering Sacks of Coals in London of Deficient Weight, contrary to* 1 & 2 *W.* 4, *c.* 76.

Collins *v.* Hopwood, 15 M. & W. 459.

12. *Against an Apothecary, for Penalties for practising without a Certificate.*

Apothecaries' Co. *v.* Greenough, 1 Q. B. 799. (*q*)

13. *Against a Pound-keeper, for taking more than Four Shillings on a Distress.*

Fyfe *v.* Bousfield, 6 Q. B. 100; 2 D. & L. 481.

STOCK.

1. *Indebitatus Count for Stock sold and transferred.* (*r*)

For £—— 3 per cent. Consolidated Bank Annuities [*as the case may be*] sold and transferred by the plaintiff to the defendant.

(*p*) It is not necessary to state in what the disqualification consists. Cook *v.* Swift, 14 M. & W. 235.

(*q*) See "Apothecary," *ante*, 48.

(*r*) See law, Mortimer *v.* M'Callan, 7 M. & W. 20; 9 M. & W. 636. Shares in a joint stock banking company, foreign stock and scrip on a railway company, are not within 17th section of statute of frauds. Humble *v.* Mitchell, 11 Ad. & E. 205; Heseltine *v.* Siggers, 1 Ex. 856; Knight *v.* Barber, 16 M. & W. 66; Tempest *v.* Silver, 3 C. B. 249; Bowlby *v.* Bell, 3 C. B. 284.

2. *Against the Purchaser of Spanish Certificates, for not accepting them, whereby Plaintiff sustained a Loss on the Resale.* (*s*)

For that the defendant bought of the plaintiff fifteen new Spanish five per cent. certificates [*or* "certain foreign stock, to wit, Spanish stock"], at a price agreed upon between them [*or* "the then market price of the said certificates"], such certificates to be delivered to the defendant, and paid for by him, on the —— day of ——, A. D. ——; and although the plaintiff was always ready to deliver the said certificates to the defendant according to the terms of the said agreement [whereof the defendant had notice, and requested the defendant to accept and pay for the same], (*t*) [*allege performance of conditions precedent, as ante*, 39], yet the defendant did not, on the said —— day of ——, A. D. ——, or at any other time, accept the said certificates, or pay the plaintiff for the same, whereby the plaintiff lost and was deprived of the gains and profits which would otherwise have accrued to him from the completion of the said contract, and was obliged to and did resell the said certificates at a loss. [*Add account stated.*]

3. *For not delivering Foreign Stock.*

Heseltine *v.* Siggers, 1 Ex. 856.

SURETY. See "Guaranties," *ante*, 136.

SURGEON. See "Apothecary," *ante*, 48; "Negligence by," *post*, Torts.

TELEGRAPHIC MESSAGE. (*u*)

For not transmitting a Message correctly.

MacAndrew *v.* The Electric Telegraph Co. 17 C. B. 3.

TILLAGES. (*x*)

Indebitatus Count for Tillages left by an Outgoing Tenant.

For money payable by the defendant to the plaintiff for the relinquishment by

(*s*) Chit. jr. Contr.; Henderson *v.* Bise, 2 Stark. R. 158; Paterson *v.* Powell, 2 M. & Sc. 399; 9 Bing. 320; Sutton *v.* Tatham, 10 Ad. & E. 27.

(*t*) If there has been no tender or request, and the defendant has dispensed with them, omit this allegation, and proceed as follows from the asterisk — "whereof the defendant had notice, yet the defendant declared to the plaintiff, that he the defendant would not accept the said certificates or pay for the same, and discharged the plaintiff from tendering the said certificates to the defendant and requesting him to accept and pay for the same, &c." conclude as above.

(*u*) A provision in the charter of a telegraph company "for the sending and receiving of messages by all persons alike without favor or preference, and subject to such equitable charges and reasonable regulations as may from time to time be made by the company," is not violated by paying a commission on messages collected. Reuter *v.* Electric Telegraph Co. 6 El. & Bl. 346.

(*x*) See form for "Crops," *ante*, 117; form in case of a valuation, Ib. The

him to the defendant, at his request, of the benefit and advantage of work done and materials provided and moneys expended by the plaintiff in ploughing, harrowing, manuring, sowing, and otherwise cultivating and improving divers lands, as tenant thereof; and for [*&c. account stated*].

TOLLS. (*y*)

1. *By a Company for Rates or Tonnage for passing along a Tramroad.*

For rates and tolls payable by the defendant to the plaintiffs for the tonnage of goods carried by and for the defendant, at his request, upon the railway [*or* "tramroad"] of the plaintiffs [*add account stated*].

2. *For Stallage.* (*z*)

For stallage due from the defendant to the plaintiffs, as the proprietors of a market and market-place, and of the stallage and other profits, privileges, and emoluments thereto belonging, for and in respect of the defendant having erected, and kept in the said market and market-place, stalls and stands, for the purpose of exposing and for having exposed to sale goods and cattle therein [*add account stated*].

3. *For Tolls for Cattle sold in a Market.* (*a*)

For tolls due from the defendant to the plaintiff, as the proprietor of a market and of the tolls and duties therefrom arising, for ["cattle"] of the defendant brought into the said market and therein sold [*add account stated*].

4. *For Tolls on passing through a Turnpike.* (*b*)

For tolls payable by the defendant to the plaintiff, as farmer and collector

above form will suffice, although the tillages have been taken upon a valuation by appraisers. *Ante*, 117, note (*a*). The claim to tillages by the outgoing against the incoming tenant of a farm may be supported by express agreement, or custom of the country. See cases, Chit. jr. Contr. See special form, &c. Dalby *v.* Hirst, 1 B. & B. 224; Senior *v.* Armytage, Holt N. P. R. 197; Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89. See the 14 & 15 Vict. c. 25, as to improving the law of landlord and tenant in relation to emblements, &c.

(*y*) An indebitatus count lies for tolls after they have been actually enjoyed, without proof of any actual contract. Seward *v.* Baker, 1 T. R. 616; Mayor of Newport *v.* Saunders, 3 B. & Ad. 411; The Mayor of Carmarthen *v.* Lewis, 6 C. & P. 608. See other forms, &c. Peacock *v.* Harris, 10 East, 104; Duke of Bedford *v.* Emmett, 3 B. & Ad. 366; Mayor of Reading *v.* Clarke, 4 B. & Ad. 268. See a special count on a covenant by one railway company to pay tolls for the use of the railway of another company, South Yorkshire Ry. Co. *v.* Great Northern Ry. Co. 9 Ex. 55. For tolls due to the lord of a manor, Burne *v.* Thompson, 1 Cr. & M. 34. Counts for tolls thorough and tolls traverse, or market tolls and stallage, would be allowed together. Jenkins *v.* Treloar, 1 M. & W. 19; Bradley *v.* Newcastle, 2 El. & Bl. 427; Earl of Falmouth *v.* Penrose, 6 B. & C. 385. For toll due under a statute, Ribble Navigation Co. *v.* Hargreaves, 17 C. B 385. If more toll is exacted than ought to be taken, it may be recovered back as money had and received to the plaintiff's use. Lewis *v.* Hammond, 2 B. & A. 206; Waterhouse *v.* Keen, 4 B. & C. 200; Hall *v.* Mayor &c. of Swansea, 5 Q. B. 526.

(*z*) See form, &c. Lockwood *v.* Wood, 6 Q. B. 31. Stallage is a satisfaction to the owner of the soil for liberty of placing a stall on it; Mayor of Newport *v.* Saunders, 3 B. & Ad. 411; but it may be included in a grant under the word "toll." 6 Q. B. 31. See, also, Mayor of Carmarthen *v.* Lewis, 6 C. & P. 608.

(*a*) See other forms, Duke of Bedford *v.* Emmett, 3 B. & Ald. 366; Mayor of Reading *v.* Clarke, 4 B. & Ald. 268; Com. Dig. "Market," *ante*, 248, note (*y*).

(*b*) See a form for rent on a demise of tolls, Oldroyd *v.* Crampton, 4 Bing. N. C. 24.

of the tolls payable at a turnpike gate erected on a turnpike road, for carriages of the defendant travelling along the said road [*add account stated*].

TRADE. See "Goodwill," *ante*, 134.

TRADE MARKS. See *post*, p. 259, and Torts.

UNDERTAKER'S BILL. (*c*)

For work done and materials provided, and for coaches and horses and chattels by the plaintiff let on hire to the defendant, in and about furnishing and conducting a funeral at his request; and for [*add money paid, and goods sold and delivered, if applicable, and account stated*].

USE AND OCCUPATION. See "Landlord and Tenant," *ante*, 181 *et seq.*

VENDORS AND PURCHASERS.

Forms.—See forms for breaches of covenant for title and further assurance, 2 Chitty's Pl. 7th ed. 387; Lewis *v.* Campbell, 3 Moore, 35; Foster *v.* Pierson, 4 T. R. 617, 620; Milner *v.* Horton, M'Clel. 647; King *v.* Jones, 1 Marsh. 107; Kingdon *v.* Nottle, 1 M. & S. 355; Evans *v.* Vaughan. 4 B. & C. 261; 2 Wms. Saund. 175–183, and notes; Doe *d.* Smith *v.* Pike, 3 B. & Ad. 742; [2 Sugden V. & P. (8th Am. ed.) 576 *et seq.* notes and cases.] Law, &c. as to breach of covenant for title. Stannard *v.* Lock, 6 Ad. & E. 973. Eviction. Brooks *v.* Humfreys, 5 Bing. N. C. 55. By and against vendors and purchasers for not conveying or accepting a conveyance; forms, Dobell *v.* Hutchinson, 3 Ad. & E. 355; Price *v.* Williams, 1 M. & W. 6. See Sugden V. & P.; Chit. jr. Contr.; E. Chit. Eq. Index, tit. "Vendors." [Damages for not conveying, see 1 Sugden V. & P. (8th Am. ed.) 358, and cases in notes (*c*) and (c^1), 360, and note (p^1), 361, note (i^1); Bain *v.* Fothergill, L. R. 7 H. L. 158; Drake *v.* Baker, 5 Vroom, 358; King *v.* Buckman, 9 C. E. Green, 298; 1 Chitty Contr. (11th Am. ed.) 435, and note (*n*), 437, and note (*p*).

Indebitatus Count for the Purchase-money of an Estate sold and conveyed. (*d*)

For a messuage and lands sold and conveyed by the plaintiff to the defendant [*add a count on an account stated*].

(*c*) See forms, Green *v.* Salmon, 8 Ad. & E. 348; Lucy *v.* Walrond, 3 Bing. N. C. 841. If an executor or administrator give, or authorize orders given, for the funeral of the deceased, he will be personally liable. Brice *v.* Wilson, 8 Ad. & E. 349. And an executor, though he have assets, will be liable upon an implied promise, for the reasonable expenses of the testator's funeral. Tugwell *v.* Heyman, 3 Camp. 298; Rogers *v.* Price, 3 Y. & J. 28; Hunter *v.* Shew, 3 M. & W. 350. A husband is under a legal liability to bury his wife, and if in the husband's absence another incurs expense in doing so, he may recover a reasonable sum for so doing. Ambrose *v.* Kerrison, 10 C. B. 776; 19 L. J. C P. 135; Jenkins *v.* Tucker, 1 H. Bl. 90; [Bradshaw *v.* Beard, 12 C. B. N. S. 344.] So an infant widow is liable for the funeral of her insolvent husband. Chappel *v.* Cooper, 13 M. & W. 252; *ante*, 124, note (*o*).

(*d*) This form is given by C. L. P. Act, 1852, sch. B, 7. It may be easily adapted to the sale of copyhold or leasehold lands

2. *Special Form for the Price of a Freehold Estate actually conveyed.*

For that it was agreed by and between the plaintiff and the defendant, that the plaintiff would ["on the —— day of —— then next," *omit this if no particular time for the execution of the conveyance was agreed upon*] grant and convey the fee-simple and inheritance of, in, and to certain messuages, lands, and premises, with the appurtenances, to the defendant, his heirs and assigns, forever [*or* "would sell and cause to be conveyed the fee-simple and inheritance of the said messuage, lands, and premises, with the appurtenances, to the said defendant, to have and to hold," *&c.*], for a certain sum of money, to be paid by the defendant to the plaintiff; and the plaintiff afterwards granted and conveyed [*or* "sold and caused to be conveyed"] the fee-simple and inheritance of, in, and to the said messuages, lands, and premises, with the appurtenances, to the defendant as aforesaid [*aver performance of conditions precedent, as ante*, 39]; yet the defendant has not paid the price thereof [*add account stated*].

[2*a*. *Grantee against Grantor in a Common Deed of Warranty, for Breaches of Covenant.*

And the plaintiff says the defendant delivered to him a deed, a copy whereof is hereunto annexed; and the defendant was not seised in fee of a part of the land described as follows [*describing it*], but the same was held adversely by one L. M.; and the residue of said land was not free from incumbrances, but was subject to a mortgage to one S. T. to secure the payment of six hundred dollars; and the defendant has not warranted and defended the premises against the rightful claims of all persons, but one W. S. has a right of dower therein, and has compelled the plaintiff to assign the same to her.]

3. *Vendor against Vendee of an Estate, sold either by Auction or Private Contract, for not completing the Purchase.* (*e*)

For that the plaintiff caused to be put up to sale by public auction a certain messuage [*&c.*], subject to the following conditions of sale [*set out the material conditions constituting the contract, which may be somewhat as follows:* "that the purchaser should complete the purchase on or before the —— day of —— A. D. ——; and that the seller should deduce and make a good title to the said premises, commencing with [*&c.*], on or before the —— day of —— A. D. ——; and that the highest bidder should become the purchaser, and should pay a deposit of £——, in part payment of the purchase-money, imme-

and premises, if necessary. It has been usual to adopt the indebitatus count where everything necessary to be done on the part of the vendor has been done. In Hallen *v.* Runder, 1 Cr., M. & R. 266, the counsel said, "It has been the practice, where the possession of land sold has been given, to insert a count for land bargained and sold." Parke, B.: "There you must show an actual conveyance of the land to the defendant, and the mere act of giving possession would not be sufficient to maintain the indebitatus count. In point of practice such a count seldom occurs, and it generally could not be sustained because the deed of conveyance, which must be shown to pass the interest in the land, generally contains a release of the purchase-money."

(*e*) See forms, Philips *v.* Fielding, 2 H. Bl. 123; Hawkins *v.* Kemp, 3 East, 410; Martin *v.* Smith, 6 East, 555; Ferry *v.* Williams, 8 Taunt. 62; Horne *v.* Wingfield, 1 M. & G. 33.

diately after the sale, and the remainder on the —— day of ——, A. D. ——" [*if the sale be by private contract,* (*f*) *set out the material parts of the agreement thus:* "For that it was agreed by and between the plaintiff and defendant, that the plaintiff should sell to the defendant, and the defendant should purchase from the plaintiff, a certain messuage and lands for the sum of £——, subject to the following conditions," *state the material conditions*]; and the defendant, at such sale by auction as aforesaid, was declared to be the highest bidder, and became the purchaser of the said messuage [*&c.*], subject to the said conditions; and the defendant then paid the said deposit, and signed an agreement for payment of the remainder of the purchase-money upon the terms aforesaid [*of course this must correspond with the conditions and the facts*]; [*aver performance of conditions precedent, as ante,* 39]; (*g*) yet the defendant has not paid the remainder of the said purchase-money, whereby the plaintiff has been deprived of the profits and advantages which might and would have accrued to him from the completion of the said purchase, and has incurred great expense in preparing to complete the said conditions on his part, and in endeavoring to procure the completion of the said purchase on

(*f*) See form, &c. Williams *v.* Protheroe, 3 Y. & J. 129. It is material to attend to the distinction, whether, by the agreement, or by the conditions of sale, the conveyance of the land and the payment of the money are to be contemporaneous acts, so that a performance or readiness to perform the one, must be averred before the plaintiff can call upon the defendant to perform the other. This is generally the case when the same day is fixed for the execution of both acts. Nash *v.* Breeze, 11 M. & W. 356. But where a time is fixed for the payment of the money, but none for the conveyance of the land, the *promise* of each is the consideration for the promise of the other; and in such case neither title, nor a readiness to convey on the part of the plaintiff, need be averred. Wilkes *v.* Smith, 10 M. & W. 355, where see form of declaration applicable. So if the conveyance be not a condition precedent or concurrent with the payment, a *tender* of the conveyance need not be averred. Matlock *v.* Kinglake, 10 Ad. & E. 51. If the time for payment of the money may arrive before the time for delivering the abstract of title, plaintiff need not aver performance or readiness. Dicker *v.* Jackson, 6 C. B. 103, where see form of declaration; Sibthorp *v.* Brunel, 3 Ex. 826; Baggallay *v.* Pettit, 28 L. J. C. P. 269; [5 C. B. N. S. 637.] If the payment of the price and the execution of the conveyance are to be concurrent acts, deducing a title is necessarily a condition precedent. Thames Steam Dock Co. *v.* Brymer, 5 Ex. 696.

(*g*) The delivery of the deeds themselves will not dispense with the delivery of an abstract. Horne *v.* Wingfield, 3 M. & G. 34. If the defendant prevented a delivery in due time, aver that plaintiff was ready to deliver, but defendant *discharged* and prevented him from so doing. See *infra.* "If either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent, for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal." Sugd. See *infra,* notes; Horne *v.* Wingfield, *supra,* per Maule B. In general, the execution of the title-deeds shown in the abstract, and constituting the title, need not be proved at the trial. See Laythoarp *v.* Bryant, 1 Bing. N. C. 421, 427. As to readiness and willingness and ability to complete, see Philips *v.* Fielding, 2 H. Bl. 123; Luxton *v.* Robinson, 2 Dougl. 620; Martin *v.* Smith, 6 East, 555. Where by the conditions or agreement the vendor is not to make out his title, of course he need not prove he has done so, or offered to make it out. Ferry *v.* Williams, 8 Taunt. 62; Wilkes *v.* Smith, 10 M. & W. 355; *ante,* note (*f*). Many of the precedents contain an averment of *an offer* on the part of the plaintiff to convey; but this is not in general necessary, because on a contract for the sale of lands, unless it be otherwise stipulated, the conveyance is to be at the expense of the purchaser; *he* therefore must tender a conveyance before he can sue for the non-completion of the contract. Poole *v.* Hill, 6 M. & W. 840; Thornton *v.* Jenyns, 1 M. & G. 193, note (*a*); Laird *v.* Pim, 7 M. & W. 482. [The rule is otherwise, in most of the American states. *Post,* 255, note (*u*); 1 Chitty Contr. (11th Am. ed.) 424, and note (*t*), 425; 1 Sugden V. & P. (8th Am. ed.) 241, note (*m*); Tinney *v.* Ashley, 15 Pick. 546; Hill *v.* Hobart, 16 Maine, 164; Connelly *v.* Pierce, 7 Wend. 129; Sweitzer *v.* Hummel, 6 Serg. & R. 228; Headley *v.* Shaw, 39 Ill. 354; Standifer *v.* Davis, 13 Sm. & M. 48; Walling *v.* Kinnard, 10 Texas, 508; Winton *v.* Sherman, 20 Iowa, 295; Paul &c. *v.* Brown, 9 Minn. 157; Seeley *v.* Howard, 13 Wisc. 336; Guthrie *v.* Thompson, 1 Oregon, 353; Arledge *v.* Rooks, 22 Ark. 427; Taylor *v.* Longworth, 14 Peters, 175.]

the defendant's part, and thereby also the plaintiff afterwards was fo resell (*h*) the said tenements at a loss, and also incurred expenses, and i wise injured [*add account stated*].

4. *For not accepting a Lease according to Agreement.*

Forster *v.* Rowland, 30 L. J. Ex. 396; [7 H. & N. 103; Bond *v.* H 1 B. & S. 371; De Medina *v.* Norman, 9 M. & W. 820.]

5. *Vendor against Vendee, on a Public-house Agreement, for not ing an Assignment of the Term, and paying the Amount of t uation of Stock, &c.* (*i*)

For that the plaintiff was possessed, (*k*) for the residue of a term o of a tenement and premises, with the appurtenances, and of certain b other licenses, and household goods, fixtures, stock in trade, and effec being on the said premises; and thereupon, by an agreement made b the plaintiff and the defendant, it was agreed that [*here copy the materi of the agreement in the past tense and aver performance of conditions pr as ante*, 39;] yet the defendant [*state the breaches according to fact*], w the plaintiff has been deprived of the benefits which would have acc him from the completion of the said agreement by the defendant, and h put to great expense in preparing papers and writings, and paying b and appraisers' (*l*) charges, and other things relative to the sale and ment and valuation of the premises, and was compelled to sell and ass premises, together with the fixtures, goods, and effects, at a loss, and i wise injured [*add account for fixtures bargained and sold and deliver account stated*].

6. *Vendor against Vendee of a Term of Years, for the Premium to be paid for the Assignment of the Lease.*

For that the plaintiff was possessed of a certain messuage, land premises, with the appurtenances, for the residue of a term of yea unexpired (*m*) [*or, if the plaintiff, although he was the seller, had not t*

(*h*) See this special damage more fully stated, Horne *v.* Wingfield, 3 M. & G. 35. The proper measure of the damage is that actually sustained by the vendor in consequence of the vendee not accepting the conveyance, such as the costs he has been put to by reason of the non-completion of the contract, and the decrease of the value of the lands, if any. Where default was made by the purchaser, and the property resold at a reduced price, the vendor can recover from the defaulter, in addition to the deposit, which was forfeited by the conditions, only so much of the difference between the two prices, and of the expenses of resale as the deposit did not cover; Ockenden *v.* Henley, El., Bl. & El. 485; not the whole amount of the purchase-money.' Laird *v.* Pim, 7 M. & W. 482. See Worthington *v.* Warrington, 8 C. B. 134.

(*i*) Observe the notes to form 3. See form against the vendee of a lease by auction, for not completing, Laythoarp ant, 1 Bing. N. C. 421; and anothe Maylam *v.* Norris, 2 D. & L. 829; W Wilson, 14 C. B. 616.

(*k*) As to proof of this, *if* tr Laythoarp *v.* Bryant, *supra*. Lesse to be proved. Souter *v.* Drake, 5 E 992; Hall *v.* Betty, 4 M. & G. 410; Brashier *v.* Jackson, 6 M. & W. 549 Clay, 5 Bing. 440. It is sufficient if th tiff can procure a title at the time calls upon the defendant to comple Medina *v.* Norman, 9 M. & W. 820 bury *v.* Hatcher, 2 Y. & C. N. C. 54. an agreement by parol for an assi of a leasehold interest not exceedin years, see Barrett *v.* Rolph, 14 M 348; see, also, Pollock *v.* Stacy, 9 C 33, and notes to Spencer's case, 1 S.

(*l*) See Thurnell *v.* Balbirnie, 2 M 186; Carpenter *v.* Blandford, 8 B. &

(*m*) The averment of the kind of

title, and was only beneficially interested, state that "before and at [*&c.*], the plaintiff was well able and entitled to sell and cause to be assigned a certain messuage [*&c.*], for the residue" [*&c.*]]; and thereupon, in consideration that the plaintiff would sell and assign [*or* "sell and cause to be assigned"] to the defendant the said tenements for the remainder of the said term, the defendant agreed to pay to the plaintiff £—— for the same; and the plaintiff did sell and assign [*or* "sell and cause to be assigned"] to the defendant the said tenements for the remainder of the said term; yet the defendant hath not paid for the same [*add account stated*].

7. *For a Sum of Money agreed to be paid if Plaintiff would relinquish in Defendant's Favor a Contract between Plaintiff and a Third Person for the Sale of a House.* (*n*)

For that the plaintiff had bargained and agreed in writing with J. E. to purchase from him three freehold houses for £600; and thereupon, in consideration that the plaintiff, at the defendant's request, would sell and give up to the defendant the said bargain, and the benefit thereof, and would suffer and permit the defendant to become the purchaser of the said houses from the said J. E., the defendant promised the plaintiff to pay him for the relinquishment of the said bargain £——, on the said houses being conveyed to him instead of the plaintiff; and the plaintiff sold and gave up the bargain to the defendant, who then became the purchaser, and obtained a conveyance to him of the said houses on the terms aforesaid; and [*here aver performance of conditions precedent, as ante*, 39], yet the defendant hath not paid the same [*add account stated*].

8. *Vendor against Vendee, on an Agreement for the Sale of an Agreement for a Lease.* (*o*)

Kintrea *v.* Preston, 1 H. & N. 357.

9. *Vendee against Vendor of a Freehold Estate, for not conveying, &c.* (*p*)

For that [*proceed upon the principle of the* Form 3, *ante*, 250, *showing the putting up to sale and conditions, — or the agreement, if the sale were by private contract, — that plaintiff was the purchaser, that plaintiff paid deposit and signed agreement, &c. according to the conditions*]; and although the plaintiff [*here aver performance of conditions precedent, as ante*, 39]; yet the defendant did not convey or cause to be conveyed to the plaintiff the said

sold is material, and unless restricted, general terms will import a title in fee simple. Hughes *v.* Parker, 8 M. & W. 244; Halliwell *v.* Morrell, 1 M. & G. 367.

(*n*) See Price *v.* Seaman, 4 B. & C. 525; 2 Bing. 437.

(*o*) In an agreement to sell a lease granted by a third person, the vendor is bound at law to show the lessor's title, unless there be an express stipulation to the contrary. Hall *v.* Betty, 4 M. & G. 410; Souter *v.* Drake, 5 B. & Ad. 992. See Ogilvie *v.* Foljambe, 3 Mer. 53. But a contract for the sale of an agreement for a lease does not imply an undertaking that the proposed lessor has title to grant the lease, and in the absence of any express stipulation, it is no defence to an action upon such contract that the lessor has no title. Kintrea *v.* Preston, 1 H. & N. 357; 25 L. J. Ex. 287.

(*p*) See forms, Wilde *v.* Fort, 4 Taunt. 334; Hodges *v.* Earl of Litchfield, 1 Bing. N. C. 492. For not deducing a good title, or conveying. Rippinghall *v.* Lloyd, 5 B. & Ad. 742; Simmons *v.* Heseltine, 5 C. B. N. S. 554.

tenements according to the said conditions aforesaid [*if the action be making a good title:* "yet the defendant did not on the —— day of —— ——, (*q*) deduce or make, or cause to be made to the plaintiff a good to the said tenements"], whereby (*s*) the plaintiff has lost the bene advantages which would have accrued to him from the completion of t purchase by the defendant, and has been put to charges and expenses i tiating and agreeing for the purchase of the said tenements, and hav same conveyed, and in investigating the title thereto, and in endeavo procure the completion of the said agreement on the defendant's part, lost the use of the said money paid as a deposit, (*t*) and of money prov the completion of the said purchase [*add money had and received, i cable, and account stated*].

(*q*) If no time be fixed by the agreement for making a title, the declaration must aver that a reasonable time for doing so has elapsed. Sansom *v.* Rhodes, 6 Bing. N. C. 261.

(*r*) The vendee has a right to have the title for which he contracted, and not any good title the vendor may offer to make instead. Foster *v.* Hoggart, 15 Q. B. 155. See Stevens *v.* Austen, 30 L. J. Q. B. 212. The court will not consider whether the title is of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the defendant has or has not a legal title to convey. Boyman *v.* Gutch, 7 Bing. 379. But in a subsequent case, it has been held that "a good title" meant such a title as the court of chancery would adopt as a ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment. Jeakes *v.* White, 6 Ex. 881. But a title to an estate which is dependent on a question of fact which it is impossible to regard as reasonably certain, cannot be deemed a good and sufficient title as between vendor and purchaser; and the latter, when such is the case, is entitled to treat the title as insufficient, and recover back his deposit. Simmons *v.* Heseltine, 5 C. B. N. S. 554.

(*s*) Form, &c. Hodges *v.* Lord Litchfield, 9 Bing. 713. In that case (see 1 Bing. N. C. 492), it was held, that in an action for damages brought by the vendee against the vendor for not making a good title to an estate, the vendee cannot recover for expenses incurred in negotiating the purchase, or for having the estate surveyed. 2d. That he is entitled to recover charges incurred in investigating the title, including the searching for judgments, but not the costs of drawing and engrossing a conveyance of the estate, the same having been prematurely prepared. 3d. That the vendor, having filed a bill in equity against the vendee, for a specific performance of the contract, which was dismissed with costs, and which were paid by the vendor, the vendee could no his extra costs beyond the taxed co That the vendee could not recov incurred in investigating the titl estate after the filing the bill in 5th. That the vendee is entitled to at the rate of £5 per cent. for int his deposit money, although the chancery had ordered payment at of £4 per cent. Hanslip *v.* Padwic 615. In Sherry *v.* Oke, 3 Dowl was held that interest, paid by a upon money borrowed by him to the purchase, and kept idle pendin deavor by the vendor to clear up may be recovered as damages ag latter in an action for breach of tract. See Hanslip *v.* Padwich, the vendor without fraud is unable a title, the vendee can only rec money he has paid, with interest penses. Pounsett *v.* Fuller, 17 C. Walker *v.* Moore, 10 B. & C. 416; for the loss of his bargain; Sikes 1 B. & S. 587; Pounsett *v.* Fuller, 660;] 25 L. J. C. P. 145; otherw knew at the time he made the con he had no title. Robinson *v.* Harm 850; Hopkins *v.* Grazebrook, 6 B. [Engell *v.* Fitch, L. R. 3 Q. B. 314 Furze, 19 C. B. N. S. 96; S. C. L. 441; 1 Chitty Contr. (11th Am. ed. note (*n*), 437, and note (*p*); 1 Sug P. (8th Am. ed.) 358, and notes (*c*) 361, note (*i*[1]).] See, further, Chit. Index, "Vendors." The *auctioneer only* for the *deposit* paid on a sale by and not for interest or expenses, a be sued for money had and receive jr. Contr. tit. "Vendors;" Harr Hoggart, 1 B. & Ad. 577.

(*t*) If the contract is rescinded posit may be recovered as money received. Simmons *v.* Heseltine, N. S. 554. See Evans *v.* Robins, Ex. 465. *Contra*, if vendee make and the deposit is forfeited by t tions. Beavan *v.* M'Donnell, 9 Ex.

9a. *On an Agreement to convey Land on a Certain Day, Plaintiff to pay One Hundred Dollars Cash and give a Note for Four Hundred Dollars, secured by a Mortgage of the Land.*

And the plaintiff says the defendant made an agreement with the plaintiff, in writing, a copy whereof is hereto annexed; and on the —— day of ——, the plaintiff tendered to the defendant one hundred dollars, and also a note for four hundred dollars [*describing it*], and a mortgage of said land, to secure the payment of said note, and demanded of the defendant a conveyance of said land [*following the terms of the agreement*]. (*u*)

OTHER FORMS BY VENDEE AGAINST VENDOR.

10. *For not delivering Abstract according to Conditions of Sale.*

Smith *v.* Panner, 1 M. & G. 802.

11. *For Violation of a Contract to sell free from all Incumbrances.*

Ballard *v.* Way, 1 M. & W. 526.

12. *On an Agreement stating that Defendant had waived the Conditions of Plaintiff's delivering an Abstract.*

Seaton *v.* Booth, 4 Ad. & E. 528.

13. *For not making a Good Title, averring Plaintiff's Readiness to complete and pay the Purchase-money on having one.*

Metcalf *v.* Fowler, 6 M. & W. 830; Sansum *v.* Rhodes, 6 Bing. N. C. 261.

14. *By an Administratrix against the Vendor of a Freehold Estate, for not delivering an Abstract of Title to the Intestate, whereby he incurred Expense, &c.*

See form held good on demurrer, Orme *v.* Broughton, 10 Bing. 533; see Williams on Executors, 5th ed. 717.

15. *Vendee against Vendor of a Life Interest in Stock, sold by Auction, to recover Expenses, &c. the Title being defective, &c.*

Boyman *v.* Gutch, 7 Bing. 379.

WAGER. *Post*, Pleas in Contract, "Gaming."

(*u*) [In England, it is incumbent on the vendee to prepare the conveyance, even where the agreement is silent on the subject. Blake *v.* Hill, 6 M. & W. 835, 841; 1 Sugden V. & P. (8th Am. ed.) 241. But the rule is otherwise in most of the American states, where it is held that under a contract to convey real estate, the vendor is bound to prepare the deed of conveyance at his own expense, unless there is a stipulation to the contrary. Such is the rule in Massachusetts, Maine, Pennsylvania, Illinois, Mississippi, Ohio, Texas, Iowa, Minnesota, Wisconsin, and Oregon, Arkansas, and other states. See the authorities cited in 1 Chitty Contr. (11th Am. ed.) 424, and note (*t*), 425; 1 Sugden V. & P. (8th Am. ed.) 241, note (*m*); *ante*, 251, note (*g*).]

WAGES. See "Master and Servant," *ante*, 212.

WAREHOUSE ROOM.

For work done by the plaintiff, and for warehouse room by him provided in the stowing, keeping, and taking care of certain goods for the defendant, at his request, and for [*add account stated*].

WARRANTY.

Obs. — "Every affirmation at the time of sale of personal chattels, is a warranty, provided it appears to have been so intended." 1 S. L. C. 161; [1 Chitty Contr. (11th Am. ed.) 639, 640, and note (k^1) and cases cited; 643, notes (q) and (r) and (s) and cases cited; Benj. Sales (1st Am. ed.), § 613, and notes (k) and (m) and cases cited.] Such representation, to be binding, must be made pending the contract. Hopkins *v.* Tanqueray, 15 C. B. 130; West *v.* Jackson, 16 Q. B. 280; [1 Chitty Contr. (11th Am. ed.) 646; Vincent *v.* Leland, 100 Mass. 432; Roscorla *v.* Thomas, 3 Q. B. 234; Tuttle *v.* Brown, 4 Gray, 457; Congar *v.* Chamberlain, 14 Wisc. 258; Benj. Sales (1st Am. ed.), § 611, and note (c); Shaw C. J. in Hogins *v.* Plympton, 11 Pick. 97, 99, 100.] Thus, a representation of the soundness of a horse, made the day before a sale by auction, is no part of the contract. Hopkins *v.* Tanqueray, *ubi supra*. [See Wilmot *v.* Hurd, 11 Wend. 584; Bryant *v.* Crosby, 40 Maine, 9. Construction of a warranty of soundness of a horse for one month, seller to be notified of unsoundness within the month. Chapman *v.* Gwyther, L. R. 2 Q. B. 463.] In a sale of specific goods, the vendor warrants the existence of the goods. Coutourier *v.* Hastie, 5 H. L. Cas. 673; Hastie *v.* Coutourier, 9 Ex. 102; Risbourg *v.* Bruckner, 3 C. B. N. S. 812; [1 Chitty Contr. (11th Am. ed.) 517, note (g^1) and cases cited, 625, and note (m); Allen *v.* Hammond, 11 Peters, 63; Rice *v.* Dwight Manuf. Co. 2 Cush. 80, 86; Wilde J. in Thompson *v.* Gould, 20 Pick. 139; Benj. Sales (1st Am. ed.), § 77.] But there is no implied warranty of title from the mere contract of sale of a personal chattel, and a vendor is not liable for a bad title, unless there be fraud on his part, or an express warranty, or what is equivalent thereto by declarations or conduct. Morley *v.* Attenborough, 3 Ex. 500; [but see Eichholz *v.* Banister, 17 C. B. N. S. 708; Benj. Sales (1st Am. ed.), § 639.] And such warranty may be raised by the usage of trade, or by the nature of the trade carried on by the vendor. Morley *v.* Attenborough, *supra*. And where goods are bought in a shop professedly carried on for the sale of goods, the shopkeeper must be considered as warranting that any purchaser will have a good title to keep the goods purchased. Ib. So also if the vendor know and conceal that he has no title. Early *v.* Garrett, 9 B. & C. 928. [It is very generally held in the American states that upon all sales of personal property by one in possession, the law implies a warranty of title. 2 Kent, 478; Shattuck *v.* Green, 104 Mass. 42; McKnight *v.* Devlin, 52 N. Y. 399, 401; Hoe *v.* Sanborn, 12 N. Y. 552; 1 Chitty Contr. (11th Am. ed.) 626, note (o) and cases cited; M'Coy *v.* Artcher, 3 Barb. 323; Benj. Sales (1st Am. ed.), § 641, note (i); Whitaker *v.* Eastwick, 75 Penn St. 229. But where the goods sold are in the possession of a third party at the time of the sale, there is no such warranty, and the purchaser buys at his peril. Huntingdon *v.* Hall, 36 Maine, 501; McCoy *v.* Artcher, 3 Barb. 323; Dresser *v.* Ainsworth, 9 Barb. 619; Edick *v.* Crim, 10 Barb. 445; Long *v.* Hickingbottom, 28 Miss. 772; Scranton *v.* Clark, 39 N. Y. 220.] In general, a warranty of quality, or soundness, or goodness, or value of goods sold is not implied, however large the price given may be. Parkinson *v.* Lee, 2 East, 314; La Neuville *v.* Nourse, 3 Camp. 351; Hill *v.* Balls, 2 H. & N. 299; Taylor *v.* Bullen, 5 Ex. 779; [Mixer *v.* Coburn, 11 Met. 559; Johnston *v.* Cope, 3 H. & John.

Obs. 89; Winsor *v.* Lombard, 18 Pick. 59; Swett *v.* Shumway, 102 Mass. 369; Dean *v.* Mason, 4 Conn. 428; Seixas *v.* Woods, 2 Caines, 48; Moses *v.* Mead, 1 Denio, 378; Wright *v.* Hart, 18 Wend. 449; Cozzins *v.* Whitaker, 3 Stew. & P. 322; Taymon *v.* Mitchell, 1 Md. Ch. 496; West *v.* Cunningham, 9 Porter, 104; 1 Chitty Contr. (11th Am. ed.) 630, and notes (f^1) and (f^2); Otts *v.* Alderson, 10 Sm. & M. 476; Kingsbury *v.* Taylor, 29 Maine, 508; Benj. Sales (1st Am. ed.), § 611; Whitaker *v.* Eastwick, 75 Penn. St. 229.] A particular agent for the sale of a horse, has not thereby authority to warrant. Brady *v.* Todd, 9 C. B. N. S. 592; [Howard *v.* Seward, L. R. 2 C. P. 148; 1 Chitty Contr. (11th Am. ed.) 287, and note (*u*); Benj. Sales (1st Am. ed.), §§ 624, 625.] But where goods are ordered for a particular purpose; Jones *v.* Bright, 5 Bing. 533; Gray *v.* Cox, 4 B. & C. 108; [1 Chitty Contr. (11th Am. ed.) 631, 632, and notes (k^1) and (*m*) and cases cited; Beals *v.* Olmstead, 24 Vt. 114; Cunningham *v.* Hall, 4 Allen, 273; Whitmore *v.* The South Boston Iron Co. 2 Allen, 58; Brown *v.* Sayles, 27 Vt. 227; Hoe *v.* Sanborn, 21 N. Y. 552; Benj. Sales (1st Am. ed.), § 661 *et seq.* and notes;] or of a particular description; Wieler *v.* Schilizzi, 17 C. B. 619; Nichol *v.* Godts, 10 Ex. 191; Gardiner *v.* Gray, 4 Camp. 144; Shepherd *v.* Kain, 5 B. & Ald. 240; Simond *v.* Braddon, 2 C. B. N. S. 324; [1 Chitty Contr. (11th Am. ed.) 633, 634, and cases in notes; Jennings *v.* Gratz, 3 Rawle, 168; Jones *v.* Just, L. R. 3 Q. B. 197; Swett *v.* Shumway, 102 Mass. 365; Merriam *v.* Field, 24 Wisc. 640; McClung *v.* Kelly, 21 Iowa, 508; Hamilton *v.* Ganyard, 3 Keyes (N. Y.), 45; Benj. Sales (1st Am. ed.), § 600, *et seq.* and notes;] a warranty will be implied. But where a tradesman contracts with one person for the sale to him of an article which is to be used for a particular purpose by another, he is not, in the absence of fraud, liable to that other for an injury caused to him by a defect in the construction of such article. Longmeid *v.* Holliday, 6 Ex. 761; [George *v.* Skivington, L. R. 5 Ex. 1; French *v.* Vining, 102 Mass. 132, 136; McDonald *v.* Snelling, 14 Allen, 295; Thomas *v.* Winchester, 2 Selden, 297.] Where there is fraud, see Langridge *v.* Levy, 2 M. & W. 519. So also, where the buyer may be reasonably supposed to rely on the skill and judgment of the seller; Brown *v.* Edgington, 2 M. & G. 279; more especially in the case of *manufactured* goods, there is an implied warranty that they shall be reasonably fit for the particular purpose for which they are known by the seller to be ordered and wanted by the vendee; Shepherd *v.* Pybus, 3 M. & G. 868; [Brown *v.* Sayles, 27 Vt. 227; Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515; 1 Chitty Contr. (11th Am. ed.) 632; Benj. Sales (1st Am. ed.), 661, 652;] except when a known ascertained article is specifically ordered by the buyer, in which case *he* takes the risk of its not answering. Ollivant *v.* Bayley, 5 Q. B. 288; Chanter *v.* Hopkins, 4 M. & W. 399; [Deming *v.* Foster, 42 N. H. 165; Pease *v.* Sabin, 38 Vt. 432; Kreuger *v.* Blanck, L. R. 5 Ex. 179; Mason *v.* Chappell, 15 Grattan, 572; Pacific Iron Works *v.* Newhall, 35 Conn. 67; Brown *v.* Murphee, 31 Miss. 41; Rogers *v.* Niles, 11 Ohio St. 48; Hargous *v.* Stone, 5 N. Y. 73; Wright *v.* Hart, 18 Wend. 449; Benj. Sales (1st Am. ed.), § 657.] And a warranty that goods are of a *merchantable* quality of the denomination ordered is implied, where, at the time of sale, the vendee has no opportunity of inspecting their quality, and is ignorant thereof, and must therefore be supposed to have understood that goods of that quality would be delivered. Gardiner *v.* Gray, 4 Camp. 144; [Benj. Sales (1st Am. ed.), § 656 *et seq.*; Whitmore *v.* South Boston Iron Co. 2 Allen, 58, 59.]

Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under that denomination, though he may have bought after inspection of the bulk and without warranty. Josling *v.* Kingsford, [13 C. B. N. S. 447; Jones *v.* Just, L. R. 3 Q. B. 197; Benj. Sales (1st Am. ed.), §§ 600, 645; Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515, 519; Wolcott *v.* Mount, 7 Vroom, 262, 266.]

In contracts for the sale of provisions, by dealers in provisions, there is an implied warranty that they are wholesome; but if the vendor is not a professed dealer in such commodities no such warranty is implied. Burnby *v.* Bollett, 16 M. & W. 644; Emmerton *v.* Matthews, [7 H. & N. 586;] Bigge *v.* Parkinson, [7 H. & N. 955; Benj. Sales (1st Am. ed.), §§ 657, 663, 670, 672; Howard *v.* Emerson, 110 Mass. 320; Emerson *v.* Brigham, 10 Mass. 197;

Obs. Winsor *v.* Lombard, 18 Pick. 57; Hart *v.* Wright, 17 Wend. 267; *v.* Hart, 18 Wend. 449; Moses *v.* Mead, 1 Denio, 378; French *v.* 102 Mass. 132, 136; Hoover *v.* Peters, 18 Mich. 51; Divine *v.* McC 50 Barb. 116; Davis *v.* Murphy, 14 Ind. 158; 1 Chitty Contr. (11th A 635; Humphreys *v.* Comline, 8 Blackf. 508; Osgood *v.* Lewis, 2 H 495; 2 Kent, 479; Goldrich *v.* Ryan, 3 E. D. Smith, 324.]

"Where a buyer buys a specific article, the rule *caveat emptor* appl where the buyer orders goods to be supplied, and trusts to the judg the seller to select the goods which shall be applicable to the purp which they are intended, which is known to both parties, though the express stipulation that they shall be fit for the purpose, there is an warranty that they are fit for that purpose." Per Cockburn C. J. i *v.* Parkinson, [7 H. & N. 955; Benj. Sales (1st Am. ed.), §§ 656 Chitty Contr. (11th Am. ed.) 632.]

Where B. bargained for and bought a specific engine, which was aft erected, and a warranty given as to its power, which was broken, th answer to an action for the price, but only ground for a reductio price, or the subject of a cross-action. Parson *v.* Sexton, 4 C. B. 89

Where goods are sold by sample, there is an implied warranty that the b swers the description and quality of the sample. Parkinson *v.* Lee, 314; Parker *v.* Palmer, 4 B. & A. 387; [Benj. Sales (1st Am. ed.), § 6 note (*z*) and cases cited; Beirne *v.* Dord, 1 Selden, 95; Dickinson 7 Allen, 29; (sample and bulk having same latent defect;) Hei Hickson, L. R. 7 C. P. 438.] And a sale of goods by sample, but b ticular description, does not necessarily import a warranty, if all the stances show that it was understood as a mere expression of opinio lief. Carter *v.* Crick, 4 H. & N. 412; [Benj. Sales (1st Am. ed.), § 6 notes.] In *executory* contracts where an article is ordered from a facturer who contracts that it shall be of a certain quality, or fit for a purpose, the vendee may return it as soon as he discovers the defe vided he has done nothing more in the mean time than was necessary it a fair trial. Per Lord Tenterden C. J. Street *v.* Blay, 2 B. & A See Poulton *v.* Lattimore, 9 B. & C. 259; [Benj. Sales (1st Am. ed.), 600, 888, 896; Comstock J. in Muller *v.* Eno, 14 N. Y. 601, 602; H Northumberland, 50 N. H. 33.] A contract for 1,170 bales of g "now on passage from Singapore, and expected to arrive at Londo per R. 805 bales, per L. A. D. 365," is a warranty that such goods board. Gorrissen *v.* Perrin, [2 C. B. N. S. 681; Benj. Sales (1st A §§ 578 *et seq.* and notes; 1 Chitty Contr. (11th Am. ed.) 619, 620.]

Where goods are to be delivered according to sample, but are not ac to sample, the vendee is not bound to receive, or if he has received turn them within a reasonable time. Street *v.* Blay, 2 B. & Ad. 463 Azemar *v.* Casella, L. R. 2 C. P. 431, 677.] And the vendee has a righ he buys by sample, to inspect the whole in bulk at any proper and con time. And if the vendor refuses to show it, the vendee may rescind t tract. Lorymer *v.* Smith, 1 B. & C. 1. And where cider was sold with ranty, and turned out not to be according to warranty, the vendee w to have a right to return it, or to keep it if he pleased until the chose to send for it. The vendee and vendor lived at a distance fr other, and vendee was not bound to incur the expense of sending t cask back. Lucy *v.* Mouflet, 5 H. & N. 229. But in the case of t ranty of a specific article, which has been seen by the vendee, an wards accepted by him, though before he discovered that it was not ing to warranty, the return or offer to return will be no answer to an for the price. Street *v.* Blay, 2 B. & Ad. 460, 461. The remedy of the is by a cross-action; Ollivant *v.* Bayley, 5 Q. B. 288; Chanter *v.* H 4 M. & W. 399; Parson *v.* Sexton, 4 C. B. 899; Dawson *v.* Co C. B. 523; or by proof of the breach of warranty in reduction of da Mondell *v.* Smith, 8 M. & W. 858; Street *v.* Blay, 2 B. & Ad. 456; cannot give evidence of consequential damage. Ib.; [Benj. Sales (1 ed.), § 898; Harrington *v.* Stratton, 22 Pick. 510; Dorr *v.* Fisher, 1 275; Mixer *v.* Coburn, 11 Met. 561; Goodwin *v.* Morse, 9 Met. 278; Castner, 9 Cush. 266; Carey *v.* Guillow, 105 Mass. 18; Wells J. i

Glass Co. *v.* Morey, 108 Mass. 573; Walker *v.* Hoisington, 43 Vt. 608; Muller *v.* Eno, 14 N. Y. 597; Reab *v.* McAllister, 8 Wend. 108; Still *v.* Hall, 20 Wend. 51; Batterman *v.* Pierce, 3 Hill, 171; Butler *v.* Northumberland, 50 N. H. 33; Parker *v.* Pringle, 2 Strobh. 242.]

In instances of broken warranty, where the price has been paid, the vendee may recover it back upon the common indebitatus count for money had and received, as on a failure of the original consideration, in either of the following cases: 1st. If there be an *express* stipulation in the original agreement that the contract should be rescinded and void if the warranty be untrue. 2dly. If *both* parties subsequently *agree* to rescind the bargain; or, 3dly, in cases of *fraud*, with an offer to return the goods. See Gompertz *v.* Denton, Cr. & M. 207; Street *v.* Blay, 2 B. & Ad. 459; Edwards *v.* Chapman, 1 M. & W. 231; [Benj. Sales (1st Am. ed.), § 888, and note (*a*); 1 Chitty Contr. (11th Am. ed.) 648, 649, and notes. In Massachusetts and some other states, the purchaser may rescind the contract and return the goods in all cases of breach of warranty express or implied. Benj. Sales, § 888, note (*a*). In Dorr *v.* Fisher, 1 Cush. 271, 274, Shaw C. J. said: "To avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase-money, as in case of fraud." Foster J. in Morse *v.* Brackett, 98 Mass. 209; Boardman *v.* Spooner, 13 Allen, 361; Conner *v.* Henderson, 15 Mass. 319; Kimball *v.* Cunningham, 4 Mass. 502; Perley *v.* Balch, 23 Pick. 283; Bartlett *v.* Drake, 100 Mass. 176; Taymon *v.* Mitchell, 1 Md. Ch. 496; Hyatt *v.* Boyle, 5 Gill & J. 121; Franklin *v.* Long, 7 Gill & J. 407, 419; Rutter *v.* Blake, 2 Harr. & J. 353; Marston *v.* Knight, 29 Maine, 341; Cutler *v.* Gilbreth, 53 Maine. 176; Matteson *v.* Holt, 43 Vt. 299.] In other cases the declaration must be *special* to try the question of warranty. If the goods have been returned, the vendee can recover the whole price; if not, the difference between the value and the price. Caswell *v.* Coane, 1 Taunt. 566. Where the title fails and there is no warranty proved, the vendee may recover the price paid by him under the indebitatus count, as upon a failure of consideration. Chapman *v.* Speller, 14 Q. B. 621; Morley *v.* Attenborough, 3 Ex. 500; [Benj. Sales (1st Am. ed.), §§ 423, 633.] A special action for the breach of a warranty lies without offering to return the goods, or complaining of the breach; see Patteshall *v.* Tranter, 3 Ad. & E. 103; [Benj. Sales (1st Am. ed.), § 899, and cases in note (*r*); Vincent *v.* Leland, 100 Mass. 432; Kellogg *v.* Denslow, 14 Conn. 411: Osborne *v.* Fuller, 14 Conn. 529; Douglass Axe Manuf. Co. *v.* Gardner, 10 Cush. 88; Waring *v.* Mason, 18 Wend. 425; Comstock J. in Muller *v.* Eno, 4 Kernan, 602; Kornegay *v.* White, 10 Ala. 255; Thompson *v.* Botts, 8 Missou. 710; Taymon *v.* Mitchell, 1 Md. Ch. 496; Carter *v.* Stennet, 10 B. Mon. 250; Parker *v.* Pringle, 2 Strobh. 242; Borrekins *v.* Bevan, 3 Rawle, 23;] and without proof of special or any damage. Street *v.* Blay, 2 B. & Ad. 459.

By 25 & 26 Vict. c. 88, s. 19, it is enacted, that when any person, after 31st December, 1863, sells or contracts to sell any chattel or article with a trade-mark thereon, the sale or contract shall be deemed to have been made with a warranty or contract that such trade-mark is genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary is expressed in writing.

And by section 20, in such case when there is any description, statement, or other indication upon any cask, bottle cover, &c. of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract shall be deemed to have been made with a warranty or contract by the vendor, that no such description, statement, or other indication is in any material respect false or untrue unless the contrary is expressed in writing.

1. *Declaration for the Breach of a Warranty of the Soundn Horse.* (*x*)

For that the defendant, by warranting (*y*) a horse to be then so quiet to ride, sold the said horse to the plaintiff; yet the said horse then (*z*) sound (*a*) and quiet to ride. (*b*) [*Add any special damage be applicable, e. g. :*] And the plaintiff, in the *bonâ fide* belief that s ranty was true, afterwards sold the said horse to L. M. by warran same to be then sound and quiet to ride, and thereby the plaintiff pelled to repay (*c*) the price thereof to the said L. M. [and also to compromise an action at law which the said L. M. brought ag plaintiff on such last-mentioned warranty]; (*d*) and the plaintiff has incurred expense in causing the said horse to be examined by a v surgeon, and in keeping (*e*) and taking care of the same.] [*If the been paid to the defendant, add a count for money had and received,* (*f an account stated.*]

[1*a*. *Count for the Breach of a Warranty of a Horse* (*framed e in Assumpsit*).

That in consideration that the plaintiff would buy of the defendant

(*x*) See Obs. *supra.*

(*y*) [See Cooper *v.* Landon, 102 Mass. 58, 60.]

(*z*) This means at the time of the sale. Bailey *v.* Forest, 2 C. & K. 131.

(*a*) Meaning of the term "sound." Kiddell *v.* Burnard, 9 M. & W. 668; Holyday *v.* Morgan, 28 L. J. Q. B. 9; [Woodbury *v.* Robbins, 10 Cush. 520; Stephens *v.* Chappell, 3 Strobh. 80; Roberts *v.* Jenkins, 21 N. H. 116, 119, 120; Kornegay *v.* White, 10 Ala. 255; Brown *v.* Bigelow, 10 Allen, 244, 245; Fondren *v.* Durfee, 39 Miss. 324; Hook *v.* Stovall, 21 Geo. 69; Crouch *v.* Culbreath, 11 Rich. 9; Merrick *v.* Bradley, 19 Md. 50; Thompson *v.* Bertrand, 23 Ark. 349; Washburn *v.* Cuddihy, 8 Gray, 430; Walker *v.* Hoisington, 43 Vt. 608; Benj. Sales (1st Am. ed.), §§ 619, 620; 1 Chitty Contr. (11th Am. ed.) 654, 655, and notes and cases cited.] The substance and meaning or exact terms of the warranty must be stated. If it were a warranty, with an exception as to a particular defect, &c. the exception should be stated. See Jones *v.* Cowley, 4 B. & C. 445. See, further, Poltherd *v.* Puncheon, 2 D. & R. 10; Button *v.* Corder, 7 Taunt. 405; Gray *v.* Cox, 4 B. & C. 108; [Deming *v.* Foster, 42 N. H. 165. Meaning of the term "gentle." Bodurtha *v.* Phelon, 2 Allen, 347, 348.]

(*b*) This form is thus far given by the C. L. P. Act, 1852.

(*c*) [Special damage. Mullett *v.* Mason, L. R. 1 C. P. 559.] See this special damage stated, Clare *v.* Maynard, 8 Ad. & E. 519. The loss of a bargain in the resale cannot be recovered. Ib.

(*d*) As to recovering the costs of an action arising out of the warranty if the buyer of a horse with a warranty, relying thereon, resell him with warranty, and b thereon by his vendee, offers the his vendor, who gives no direction action, the plaintiff defending that entitled to recover the costs thereo vendor as part of the damages occ his breach of warranty. Lewis *v.* Taunt. 153; and see, particularly, Wright, 7 El. & Bl. 301; 8 El. & Bramley *v.* Chesterton, 2 C. B. Poor *v.* Davis, 30 L. J. Q. B. 257 *v.* Roper, 1 El., Bl. & El. 84. Josling *v.* Irvine, 6 H. & N. 512; Hare, 7 C. B. N. S. 145; [Reggio giotti, 7 Cush. 166; Armstrong *v* Wend. 535.] But he cannot rec costs if by reasonable examinati article he could have discovered of warranty before the resale. W Chamberlain, 7 Scott, 598.

(*e*) This expense may be recove horse was tendered to the defend a reasonable time after the unsoun discovered, otherwise not. Caswell 1 Taunt. 566; Ellis *v.* Chinnock, 169; Chesterman *v.* Lamb, 2 Ad. But in any event the keep can be only to the time when a fair opp reselling occurs. M'Kenzies *v.* Ha & M. 436, per Littledale J.; [Sha Reggio *v.* Braggiotti, 7 Cush. 16 Chitty Contr. (11th Am. ed.) 658. horse is returned, the measure o is the price paid for him; if he i turned, it is the difference between value and the price given. Caswell *ubi sup.*

(*f*) This count will be allowed special one. Cahorn *v.* Burford, 13 136.

at the price of $——, to be paid by the plaintiff to the defendant for the same, the defendant promised the plaintiff that the said horse was then sound; and the plaintiff bought the said horse of the defendant and paid him the said $—— for the same; yet at the time of the making of the said promise by the defendant the said horse was not sound, whereby the said horse was of no use or value to the plaintiff, and the plaintiff has lost the expense incurred by him in keeping and feeding the said horse and attempting to cure the same.] (*g*)

2. *On a Warranty on a Sale of Goods by Sample.* (*h*)

For that the defendant sold to the plaintiff (ten quarters of barley) by producing to him a pretended sample thereof and warranting that the said barley was equal in quality and description to such sample; yet the said barley was not then equal in quality or description to the said sample, whereby the plaintiff lost divers gains and profits which would otherwise have accrued to him, as also the price which he paid the defendant for the same. [*Add count for money had and received, and on an account stated.*]

3. *On a Warranty that Manufactured Goods were fit for the Purpose for which they were bought.* (*i*)

For that the defendant, by warranting that certain copper was fit and proper for sheathing a ship of the plaintiff, sold the same to the plaintiff for such purpose, yet the said copper was not fit and proper for the said purpose; (*k*) and the plaintiff, after having used the said copper for the said purpose, incurred great expense in having the same removed from his ship, and causing the same to be sheathed with other and fit and proper copper.

4. *On a Warranty of the Quality of Goods sold by Description.*

For that the defendant, by warranting a cargo of Aracan rice "to arrive" to be fair average Necrensie rice, the plaintiff bought from the defendant, and the defendant sold to the plaintiff the said cargo; and although the plaintiff has performed all conditions precedent on his part, and all events have hap-

(*g*) [Count on an implied warranty on the sale of a barge that it was reasonably fit for use; Shepherd *v.* Pybus, 3 M. & G. 868; on a warranty that a ship sold was copper-fastened; Shepherd *v.* Kain, 5 B. & Ald. 240; on a warranty of the soundness of a yacht; Stucley *v.* Baily, 1 H. & C. 405; on a warranty that the carcass of a pig offered for sale was fit for human food; Burnby *v.* Bollett, 16 M. & W. 644; on a warranty that a cow was free from disease, claiming damages for loss of other cows infected by the cow warranted. Mullett *v.* Mason, L. R. 1 C. P. 559.]

(*h*) See *ante*, Obs., and a form on a warranty that wheat sold was equal to report and sample. Russell *v.* Nicolopulo, 8 C. B. N. S. 363. See, also, Parkinson *v.* Lee, 2 East, 314; Parker *v.* Palmer, 4 B. & Ald. 387. There is an *implied* warranty to the effect stated above, unless the contract be reduced into writing, and the sample be not referred to; Meyer *v.* Everth, 4 Camp. 22; Gardiner *v.* Gray, Ib. 145; Tye *v.* Fynmore, 3 Camp. 462; in which case, if the sale be by sample, the remedy would lie in tort for the deceit. It would be incorrect in the above case to lay a promise that the goods should be of a particular quality, or good and merchantable. Ib.; Laing *v.* Fidgeon, 4 Camp. 169; 6 Taunt. 108.

(*i*) See *ante*, Obs.; Shepherd *v.* Pybus, 3 M. & G. 868. See forms, Jones *v.* Bright, 5 Bing. 533; Gray *v.* Cox, 4 B. & C. 108. Bargain and sale of a ship does not imply any contract that she is seaworthy or in a serviceable condition. Barr *v.* Gibson, 3 M. & W. 390; M. & P. on Shipping, 32, 3d ed.

(*k*) The *purpose* must be specially pointed out, and the above cause of action could not be given in evidence under a count alleging generally that the copper was bought under a warranty that it was reasonably fit *for use*, with breach of that warranty. Shepherd *v.* Pybus, 3 M. & G. 868.

pened and occurred, and all periods have elapsed, to entitle the plaintiff to performance of the defendant's contract, and to enable the plaintiff to maintain this action; yet, although the said cargo consisted of Necrensie rice, the said rice was not fair average Necrensie rice, whereby the said rice was of less value to the plaintiff than it otherwise would have been, and he has been obliged to resell the same at a loss, and has incurred great expense in and about ascertaining the quality of the said rice, and in and about warehousing the same. (*l*)

5. *For selling Pictures as Canaletti's which were not so.*

Power *v.* Barham, 4 Ad. & E. 473.

6. *On the Warranty of a Horse, on an Exchange of Horses.* (*m*)

For that in consideration that the plaintiff would deliver to the defendant a certain horse of the plaintiff, and also pay to the defendant £——, in exchange for a certain horse of the defendant, the defendant then warranted that the said last-mentioned horse was then sound; and the plaintiff then delivered to the defendant the said first-mentioned horse, and paid him the said sum of money; yet the said horse of the defendant at the time of the making of his said promise was not sound, whereby the same became and was of no use or value to the plaintiff, and thereby [*&c.; state special damage, as in* Form 1, *ante*, and *conclude as there directed*].

7. *Upon a Warranty of a Vendor of Goods sold to the Plaintiff, that the Defendant had Power to sell them.* (*n*)

For that the defendant, by warranting that he then had lawful right and title to sell and dispose of certain goods, sold the same to the plaintiff; yet the defendant had not lawful right or title to sell or dispose of the said goods, whereby the plaintiff was obliged to deliver up the same to E. F., who had the lawful right and title thereto, and the said goods were lost to the plaintiff, and he has been deprived of the benefits and profits he would otherwise have derived and acquired from the same. [*Conclude as directed in* Form 1.]

WHARFAGE. See "Carriers," *ante*, 97.

Against a Wharfinger, for losing Goods delivered to him to be shipped by a Particular Vessel.

2 Chit. on Pl. 259, 7th ed.

(*l*) The allegation of damage must be according to the facts. [See forms; Wieler *v.* Schilizzi, 17 C. B. 619; sale of manure by warranty; Dingle *v.* Hare, 7 C. B. N. S. 145; sale of a cargo of rice; Vernede *v.* Weber, 1 H. & N. 311; Simond *v.* Braddon, 2 C. B. N. S. 324; on a warranty that a cargo of corn had been shipped in good and merchantable condition; Dickson *v.* Zizinia, 10 C. B. 602; on a warranty on a sale of seed barley, charging special damages by liabilities to sub-purchasers. Randall *v.* Raper, El., Bl. & El. 84; Carter *v.* Crick, 4 H. & N. 412.]

(*m*) See a form, Fairmaner *v.* Bell, Bing. 574; and form 1, *ante*, 259; [Webster *v.* Hodgskins, 25 N. H. 128, 142; warranty of soundness is not *implied* in the exchange of horses. See La Neuville Nourse, 3 Camp. 351; Emanuel *v.* Dan... 299.

(*n*) See *ante*, Obs.; Chit. jr. Contr.; Bagley *v.* Attenborough, 3 Ex. 500; Allen Hopkins, 13 M. & W. 94; Keeble *v.* Hickeringill, 8 Ad. & E. 554; Lee *v.* Shore, 1 B. & C. In cases of actual *fraud*, case would be more appropriate form of action.

WITNESS.

ess. — A witness cannot in general recover compensation for his loss of time, although an express promise be given him that he shall be paid for it; Willis *v.* Peckam, 1 B. & B. 515; [Dodge *v.* Stiles, 26 Conn. 463;] even in the case of a merchant coming from abroad as a witness; Moor *v.* Adam, 5 M. & S. 156; and see Lonergan *v.* The Royal Exchange Assurance Co. 7 Bing. 729; as also in the case of an attorney attending upon a subpœna. Collins *v.* Godefroy, 1 B. & Ad. 950. But "there is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him." Per Maule J. Webb *v.* Page, 1 C. & K. 23. Strictly no conduct money need be tendered to a witness in town in a town cause; Jacob *v.* Hungate, 3 Dowl. 456; although the usual practice is, in town causes, if the witness reside within the bills of mortality, to pay or tender to him one shilling. But if the cause is an assize cause, or the witness live beyond the bills of mortality, he must be paid or tendered his reasonable expenses of going to, staying at, and returning from the place of trial. Betteley *v.* McLeod, 3 Bing. N. C. 407; [2 Chitty Contr. (11th Am. ed.) 873 *et seq.* and notes.] A witness, though he refuse to give evidence because his expenses were not previously tendered, may sue for his reasonable expenses; Collins *v.* Godefroy, 1 B. & Ad. 950; but the attorney in the cause is not personally liable though he issues the subpœna. Robins *v.* Bridge, 3 M. & W. 114. Nor is an attorney, being in the position of an agent for his client, without an express undertaking on his part, liable for the charges or expenses of a skilled witness retained by him, in pursuance of his general instructions, to make surveys, researches, calculations, or experiments, with a view to examination as a witness in his client's cause. The client in such a case is *primâ facie* liable. Lee *v.* Everest, 2 H. & N. 285; 26 L. J. Ex. 334. The party in the cause is liable for expenses, if reasonable, where a witness has received a subpœna to attend; Pell *v.* Daubeny, 5 Ex. 955; 20 L. J. Ex. 44; but not for more than has been actually expended, though that may not amount to one shilling per mile. Hunter *v.* Liddell, 16 Q. B. 402; 20 L. J. Q. B. 426. The conduct money received with a subpœna may be recovered back by the person paying it, in an action for money had and received, where the attendance of the witness becomes unnecessary and he has incurred no expenses under the subpœna. Martin *v.* Andrews, 7 El. & Bl. 1; 26 L. J. Q. B. 39. See, also, Hale *v.* Bates, 28 L. J. Q. B. 14. [But see Leighton *v.* Twombly, 9 N. H. 483.] For not attending upon a subpœna, see *post*, Actions for Wrongs, tit. "Witness."

1. *By a Witness for his Expenses.*

For expenses necessarily incurred by the plaintiff in attending as a witness the defendant, at his request, to give evidence upon the trial of a certain ion wherein the defendant was [plaintiff *or* defendant]. [*Add a count for ney paid and on an account stated.*]

Against a Witness for not appearing at a Trial pursuant to his Agreement and without a Subpœna.

Yeatman *v.* Dempsey, 7 C. B. N. S. 628; 9 C. B. N. S. 881.

WORK AND MATERIALS.

Obs. — See, in general, Chit. jr. Contr.; Roscoe on Evid. tit. "Work." See the common *indebitatus* count, *ante*, 33; and as to when it lies, *ante*, 28, Obs. See the usual *indebitatus* counts for Attorneys, Surgeons, and Apothecaries, *ante*, 59, 49; Auctioneers, &c. *ante*, 62; Carriers, *ante*, 97; a Servant's salary or wages, *ante*, 207; Undertakers, &c. *ante*, 249.

Where the plaintiff was to be paid an entire sum on the *completion* of the work, and the defendant has wrongfully *discharged* the plaintiff from completing work agreed to be performed; or where, although the contract contains no particular clause as to payment, the plaintiff claims, not only the price and value of the work and materials *actually* done and provided, but also *damages* for the loss of the profits he would have acquired had the defendant allowed him to finish the work agreed for, the declaration should be special, see *ante*, tit. "Master and Servant," 208, note (*g*); Hulle *v.* Heightman, 2 East, 145. It is also proper to declare specially where the plaintiff was to be paid by a bill of exchange, and the bill would not, if given, have been due when the writ was issued. *Ante*, 234, "Sale of Goods." And it is often prudent to declare specially on a written agreement to perform work, &c. although the common count would be sufficient. There may be a special count on an agreement, and the common count for *extra* work. As to which, see Pepper *v.* Burland, Peake's R. 103; Wilmot *v.* Smith, 3 C. & P. 453; Lovelock *v.* King, 1 M. & R. 60; [2 Chitty Contr. (11th Am. ed.) 823, 824, and notes.]

Where there is a special contract to perform work, &c. in a particular manner, and the plaintiff has done work, &c. but has departed from the contract in regard to the description or quality of the work or materials, he is entitled to recover to the extent of the real value of the work and materials actually done and provided, and the benefit whereof the plaintiff has received (not the sum fixed by the contract), but must *not* declare in such case specially *upon the contract*. See Chit. Contr.; Allen *v.* Cameron, 1 Cr. & M. 832. In Chapel *v.* Hicks, 2 Cr. & M. 214, which was an action on a special contract, for work done under the contract, and for work, labor, and materials generally, it was held that the defendant may give in evidence that the work has been done improperly, and not agreeably to the contract; and the plaintiff in that case will only be entitled to recover the real value of the work done and the materials supplied; and Lord Lyndhurst C. B. said: "If the plaintiff has not performed the work in the manner which by the contract he agreed to do, he cannot recover on the contract, but must recover on the counts in his declaration for the work which he has done. Suppose, on a contract to build a house of Baltic timber, the contractor builds it of timber of a different description, upon what principle is he entitled to recover, except for the work, labor, and materials? It cannot be consistent with reason that a party who has not performed his contract should recover the full amount for which he has stipulated, and that the other party should be driven to a cross-action against him for not performing the work according to the contract." And see Baillie *v.* Kell, 4 Bing. N. C. 638; [2 Chitty Contr. (11th Am. ed.) 825, and notes; Blodgett *v.* The Berlin Mills Co. 52 N. H. 215.]

In general, where the contract is to *complete* an article, *no* remuneration is recoverable for partial work done. Sinclair *v.* Bowles, 9 B. & C. 92; [Story Bailments (2d ed.), 441 *b*; Hill *v.* Millburn, 17 Maine, 316; St. Albans Steamboat *v.* Wilkins, 8 Vt. 54; Kettle *v.* Harvey, 21 Vt. 301; Faxon *v.* Mansfield, 2 Mass. 147; Morton J. in Olmstead *v.* Beale, 19 Pick. 528; Brown *v.* Vinal, 3 Met. 53[illegible]; McCarren *v.* McNulty, 7 Gray, 139; Sloan *v.* Hayden, 110 Mass. 141, 14[illegible]; Clark *v.* Smith, 14 John. 326; Jenkins *v.* Camp. 13 John. 94; Pierce *v.* Schenk, 3 Hill, 28; Cobb *v.* West, 4 Duer, 38; Young *v.* White, 5 Watts, 460; Knox J. in Wade *v.* Haycock, 25 Penn. St. 383.] But a shipwright may recover to the extent of partial repairs done to a ship, though he was employed (generally) to put it in thorough repair. Roberts *v.* Havelock, 3 B. & Ad. 404; Cousins *v.* Paddon, 2 Cr., M. & R. 547; Fitt *v.* Cassanet, 4 B. & G. 898, 902. In the case of a contract to make an article with materials the property of or to be provided by the workman, if the *specific article* ordered

Obs. has not become the *property* of the person who employed the workman, by having been appropriated to the use of, or set apart and accepted by, the employer, or treated by both parties as his property, the price of work and materials cannot be recovered upon the common count; and the declaration should be specially framed for not *accepting* the article, stating that the plaintiff was to manufacture it, and did so, and was ready to deliver it, &c. See forms, *ante*, 237-239; and cases collected Chit. jr. Contr.; Atkinson v. Bell, 8 B. & C. 277; Carruthers v. Payne, 5 Bing. 270; Maberley v. Shepperd, 10 Bing. 99; Elliott v. Pybus, 10 Bing. 512; Alexander v. Gardner, 1 Bing. N. C. 671. A contract for goods of the value of £10 or upwards must be in writing, and signed by the party charged, although the goods are to be made, &c. at a future time. 9 Geo. 4, c. 14, s. 7. As to a parol agreement for additions, see Hoadley v. Maclain, 10 Bing. 482. [Where a contract stipulates that no extra work shall be paid for unless ordered in writing, the price of extra work done without such order cannot be recovered; Russel v. Viscount Sa da Bandiera, 13 C. B. N. S. 149; and the mere want of writing gives no claim in equity. Kirk v. Bromley Union, 2 Phil. 640. The want of the previous order cannot be supplied by an order given subsequently to performance. Lamprell v. Billericay Union, 3 Ex. 283. Where by the contract the architect was to certify the proper sum to be paid for work and extras, and his decision was to be final, it was held that his certificate that a sum was due precluded the defendant from raising the question whether there was a sufficient order in writing. Goodyear v. Mayor of Weymouth, 1 H. & R. 67; 35 L. J. C. P. 12. Form of count for extra work provided to be done under the contract according to a written order, Lamprell v. Billericay Union, 3 Ex. 283; count, averring waiver of the writing; Rigby v. Mayor of Bristol, 29 L. J. Ex. 359; count on a contract under seal to build a ship, with a stipulation that no alterations should be made unless ordered in writing, averring a discharge of the stipulation, and claiming for alterations; Thames Iron Works & Shipbuilding Co. v. Royal Mail Steam Packet Co. 13 C. B. N. S. 358; count under a contract for work to be paid for upon the architect's certificate, charging that the architect neglected to certify in collusion with and by procurement of the defendant. Batterbury v. Vyse, 2 H. & C. 42.]

1. *Special Form for Work done under an Agreement.* (*o*)

For that by an agreement made between the plaintiff and the defendant, the plaintiff agreed to make for the defendant [a three-horse power portable threshing machine, to be worked by a four-horse engine, to thresh from twenty to twenty-five quarters of wheat in a day; to put up the new machine at Tanholt, where an old one then stood, in a complete workmanlike manner, and to take down, at the plaintiff's own expense, the old one then standing at Tanholt, the defendant to deliver the old machine at the plaintiff's yard at P., and also to fetch the new one to T., the old one to be taken by the plaintiff at £20, and the defendant to pay to the plaintiff £30 in exchange for the new one, and the new machine to be put down in a complete working state in two months from the date of the agreement]; and although the plaintiff has performed all conditions precedent on his part, and all events have happened, and all times have elapsed, to entitle the plaintiff to a performance of the defendant's contract, and to enable the plaintiff to maintain this action, of which the defendant had notice, and the defendant was requested by the plaintiff to pay him the sum of £30, according to the said agreement, yet the defendant has not paid the same. [*Add account stated.*]

(*o*) See form, &c. Varley v. Manton, 9 Bing. 363. [Declaration against company for work done in getting up a company Savin v. The Hoylake Ry. Co. L. R. 1 Ex. 9.]

2. *For discharging the Plaintiff from completing Work according to Agreement.* (*p*)

For that, in consideration that the plaintiff agreed with the defendant to perform and complete certain work for the defendant, that is to say [*state the material terms*], the defendant promised the plaintiff to permit him to perform and complete the said work on the terms aforesaid; and the plaintiff did commence and in part perform the said work upon the terms aforesaid, and has always been ready and willing to perform and complete the whole of the said work upon the said terms, whereof the defendant always had notice; yet the defendant would not permit the plaintiff to proceed with or complete the said work, and wrongfully and absolutely discharged and hindered and prevented the plaintiff from performing and completing the residue of the said work, whereby the plaintiff has lost the profits which would otherwise have arisen and accrued to him from the completion of the said work, and the price and value of the work by him so done. [*Add account stated.*]

3. *Against a Workman, for employing Bad Materials and Workmanship.* (*q*)

For that, in consideration that the plaintiff employed the defendant as a [*wheelwright*], to make a [*cart*] for the plaintiff at a certain price, the defendant promised the plaintiff that the said [*cart*] should be made of good and proper materials, and in a workmanlike and proper manner; and although the defendant, under color of the said employment, made for and delivered to the plaintiff a [*cart*] as and for a [*cart*] made of good and proper materials, and in a workmanlike and proper manner, and the plaintiff paid the defendant for the same; yet the said [*cart*] was not made of good or proper materials, or in a workmanlike or proper manner, whereby the same was of no use to the plaintiff, and he has incurred expenses in repairing the same, and hath been deprived of the use thereof for a long time. [*Add count for money had and received, and on an account stated.*]

4. *From discharging Plaintiff from fitting up a Brewery and Offices.* (*r*)

Pontifex *v.* Wilkinson, 2 C. B. 346.

[5. *For not building and delivering a Ship by a certain Day according to a Contract.*

That it was agreed by and between the plaintiff and the defendant, that the defendant should build for the plaintiff a new iron ship, in accordance with a specification then agreed on between them, and should deliver the said ship

(*p*) See *ante*, Obs.; [Paulding *v.* Mayor of Dover, 10 Ex. 753; Linegar *v.* Pearce, 9 Ex. 417.]

(*q*) There is an implied warranty to the effect stated in this form. See *ante*, "Warranty," Obs. [See form in Elsee *v.* Gatward, 5 T. R. 143; Times Fire Ass. Co. *v.* Hawke, 1 F. & F. 406; Rigge *v.* Burbidge, 15 M. & W. 598.]

(*r*) [Count for discharging the plaintiff from completing a contract to make and deliver goods. Cort *v.* Ambergate Ry. Co. 17 Q. B. 127. On a contract for manufacturing goods and delivering them at a certain place, for not accepting them. Bull *v.* Robison, 10 Ex. 342. Count for preventing the plaintiff from completing a contract to build houses. Hitching *v.* Groom, 5 C. B. 515.]

finished to the plaintiff on or before the —— day of ——, A. D. ——, and that the plaintiff should pay to the defendant for the said ship the sum of $——, by the following payments, that is to say [*state terms of payment*]; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part; yet the defendant did not deliver the said ship finished as aforesaid to the plaintiff on or before the said —— day of ——, A. D. ——, whereby the plaintiff was deprived of the profits which he would otherwise have gained from the use of the said ship. (*s*)]

(*s*) [A like count. Fletcher *v.* Tayleur, 17 C. B. 21. Count for a breach of a covenant to do certain work in a specified time, and in a workmanlike manner. Northampton Gas Light Co. *v.* Parnell, 15 C. B. 630. For not making part of a machine by a time agreed upon, whereby the plaintiff was unable to deliver the machine according to a contract. Portman *v.* Middleton, 4 C. B. N. S. 322. On a bond conditioned for the performance of a contract to execute railway works according to a specification. The South Eastern Ry. Co. *v.* Warton, 6 H. & N. 520.]

PLEAS IN CONTRACT.

I. IN ABATEMENT. (a)

Obs. — A plea in abatement does not admit or deny the cause of action, but shows facts which defeat the present action; and in doing so it must point out the plaintiff's error and show him how it may be corrected. Pleas of abatement for misnomer are now abolished, 3 & 4 W. 4, c. 42, s. 11. See *ante*, 2 (z). The general rule is that where the contract is joint (not joint and several), all the parties must be joined. Eccleston *v.* Clipsham, 1 Wms. Saund. 153. But who are to be parties depends upon the construction of each particular contract. Where the legal interest and cause of action of the covenantees are several they should sue separately, though the covenant be joint in terms, but the several interest and the several ground of action must clearly appear. Sorsbie *v.* Park, 12 M. & W. 154; Foley *v.* Addenbrooke, 4 Q. B. 197; [Thompson *v.* Hakewill, 19 C. B. N. S. 713;] Haddon *v.* Ayers, 1 El. & El. 118; Keithley *v.* Watson, 3 Ex. 716; [1 Chitty Pl. 10, and notes; 2 Chitty Contr. (11th Am. ed.) 1340, 1341; Hall *v.* Leigh, 8 Cranch, 51; Evans *v.* Sanders, 10 B. Mon. 291;] but where the interest of the covenantees is joint, although the covenant is in terms joint and several, the action must be brought in the names of all the covenantees so as to follow the nature of the contract. Pugh *v.* Stringfield, 3 C. B. N. S. 2; [1 Chitty Contr. (11th Am. ed.) 1340, 1343; 1 Chitty Pl. 9, and notes; Thompson *v.* Hakewill, 19 C. B. N. S. 713; Capen *v.* Barrows, 1 Gray, 579; Haughton *v.* Bayley, 9 Ired. 337; Sweighart *v.* Berks, 8 Serg. & R. 308; Evans *v.* Sanders, 10 B. Mon. 291; Wright *v.* Post, 3 Conn. 142; Calvert *v.* Bradley, 16 How. (U. S.) 580.]

Before the C. L. P. Act, 1860, a misjoinder of plaintiffs was fatal, but now by s. 19 of that act "The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover: provided always, that the defendant, although unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the court or a judge." This section does not apply when it appears on the face of the proceedings that the action ought to have been brought by some of the plaintiffs only. Bellingham *v.* Clark, 1 B. & S. 332. The amendment may be made before the trial; C. L. P. Act, 1852, s. 34; and at the trial in the same way as an amendment of a variance under 3 & 4 W. 4, c. 42, s. 23 (C. L. P. Act, 1852, s. 35), which it appears should be made during the trial and before verdict. See Robson *v.* Doyle, 3 El. & Bl. 396.

The non-joinder of a person who should be a plaintiff is, in actions on contracts where there is no amendment, a ground of nonsuit under the general issue; Chanter *v.* Leese, 4 M. & W. 295; 5 M. & W. 698; [1 Chitty Pl. 14 468;] except in actions of detinue; Broadbent *v.* Ledward, 11 Ad. & El. 209; or in the case of executors; Cabell *v.* Vaughan, 1 Wms. Saund. 291, K.; see Jones *v.* Smith, 1 Ex. 831; and in an action of contract by the assignees of a bankrupt the proper mode of taking advantage of the non-joinder of another assignee is by a traverse that the plaintiffs are assignees *modo et formâ* and

(a) See forms of commencement and conclusion, *ante*, 16, 17 *et seq.*

Obs. not by plea in abatement. Jones *v.* Smith, 1 Ex. 831. If the objection appears on the face of the pleadings, the defendant may demur or bring error, or move in arrest of judgment. [1 Chitty Pl. 14, 468.] But practically the defendant seldom resorts to either of these remedies, as an amendment may now be made in cases of non-joinder as well as in the case of misjoinder, *supra*, and C. L. P. Act, 1852, ss. 34, 35, unless the defendant has given notice under s. 35. C. L. P. Act, 1852 s. 36. As to amendments of this kind, see R. G. Hil. T. 1853, 2, 6.

The misjoinder of a defendant in an action on contract is fatal unless the name is struck out before verdict. Robson *v.* Doyle, 3 El. & Bl. 396; Wickens *v.* Steel, 2 C. B. N. S. 488; [1 Chitty Pl. 51.] It is a variance, and is, therefore, a defence under a plea in denial. Elliot *v.* Morgan, 7 C. & P. 334. But may now be amended in actions on contract by striking out the name of the misjoined defendant either before or at the trial, if it shall appear that injustice will not be done by such amendment; C. L. P. Act, 1852, s. 37; even where the misjoined defendant has suffered judgment by default. Greaves *v.* Humphreys, 4 El. & Bl. 851. See Johnson *v.* Goslett, 18 C. B. 728. If the judge at the trial refuse to strike out the name of a misjoinded defendant, on the ground that he is not satisfied that the misjoinder was not made for the purpose of obtaining an undue advantage, the court has no power to review his decision. Holden *v.* Ballantyne, 29 L. J. Q. B. 148. As to the costs to which a defendant who has been struck out is entitled, see Redway *v.* Webber, 32 L. J. C. P. 84.

The non-joinder of a defendant in actions of contract can only be taken advantage of by plea in abatement. Price *v.* Shute, 1 S. L. C. 492; Eccleston *v.* Clipsham, 1 Wms. Saund. 154, n. 1: Cabell *v.* Vaughan, Ib. 291, *b*, *f*, and *g*; [1 Chitty Pl. 53, 468; Shelton *v.* Banks, 10 Gray, 401; Edler *v.* Thompson, 13 Gray, 91; Kendall *v.* Weaver, 1 Allen, 277.] By 3 & 4 W. 4, c. 42, s. 8, "no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is *resident within the jurisdiction* of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea." By section 9, "to any plea in abatement in any court of law for the non-joinder of another person, the plaintiff may reply that such person has been *discharged by bankruptcy and certificate*, or under an act for the relief of *insolvent* debtors." And section 10 enacts, "that in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, *commence another action* against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that *all* the original defendants are liable, but that *one* or more of the persons named in such plea in abatement or any subsequent plea in abatement, *are not liable* as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, *against the other defendant or defendants who shall appear to be liable*, and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any such *defendant who shall have so pleaded in abatement* shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."

The plea must be accompanied by an affidavit, see *post*, 270, form 2, and notes; and the plea must be pleaded within four days, exclusive of the delivery of the declaration. Ryland *v.* Wornland, 5 Dowl. 581. Upon this plea the writ of summons and the declaration may be amended without any order. C. L. P. Act, 1852, s. 38. See Rice *v.* Shute, 1 S. L. C. 493, and notes.

1. *Plea that a Person jointly liable with the Defendant is not sued with him.* (*b*)

Commencement as ante, 16.] That the said promise was (*c*) [*or* "promises were"] made by the defendant jointly with G. H., (*d*) who is still living, and who at the time of the commencement of this suit was and still is resident within the jurisdiction of this court, and not by the defendant alone. [*Conclude as ante*, 16 *and* 17; *add affidavit of truth, as infra.*]

[1*a*. *Form prescribed by Massachusetts Practice Act, as an Answer in Abatement.*

And the defendant comes and says that if he is indebted to the plaintiffs for the goods mentioned in their bill of particulars, he is indebted to them jointly with one G. H., who is still alive, and ought to be sued with him in the writ, and therefore he ought not to be held to answer to the plaintiffs' writ.]

2. *Affidavit of Truth of Plea in Abatement.* (*e*)

In the ——.

Between { A. B. . . . . plaintiff, and C. D. (*f*) . . . defendant.

I, C. D., of Fleet Street, in the city of London, the defendant in this cause, (*g*) make oath and say, that the plea (*h*) hereunto annexed is true in

(*b*) This plea may be pleaded to part of plaintiff's demand, and a plea in bar to the residue may be pleaded with it; if that be the state of facts, and defendant do not so plead, the plaintiff will succeed. Hill *v.* White, 6 Bing. N. C. 26; and see 2 Wms. Saund. 220. A new assignment would, it seems, be improper. Ib. The commencement must pray judgment of the writ and declaration, otherwise it is bad. See *ante*, 16, note (*h*).

(*c*) If the action were for a *debt*, the form is "that the said alleged debt was [*or* debts were] contracted by the defendant jointly with one G. H., who is still living [*&c. as above*]." Or if the action is upon a bill or note, "that the said acceptance of the said bill, *&c.*" as the case may be, "was made by, *&c.*"

(*d*) The plea must give truly the names of *all* the parties liable, and of no others. If a party liable be omitted, the plea will not be supported. Godson *v.* Good, 6 Taunt. 587; Crellin *v.* Brook, 14 M. & W. 11. And a plea in abatement of the non-joinder of co-contractors, resident within the jurisdiction of the court, alleging that the contract was made with the defendant and such resident co-contractors, and also with other co-contractors resident without the jurisdiction of the court, is bad, for 3 & 4 W. 4, c. 42, s. 8, requires the defendant to state in his plea that *all* are resident within the jurisdiction, and to verify the residence of all by affidavit. Joll *v.* Curzon, 4 C. B. 249.

(*e*) A plea in abatement must always be verified by affidavit. 4 Ann. c. 16, s. 11. And in the case of such a plea for non-joinder of a person who should be a co-defendant, "the place of residence of such person shall be stated with convenient certainty in an affidavit verifying" the plea; 3 & 4 W. 4, c. 42, s. 8; see, also, Obs. *ante*, 268; it must state place of residence and not merely place of business. Maybury *v.* Mudie, 5 C. B. 283. The plea is a nullity, and the plaintiff may sign judgment unless there be this affidavit, and so also if the affidavit be such as amounts to no affidavit. Davidson *v.* Chilman, 1 Bing. N. C. 297; Lovell *v.* Walker, 9 M. & W. 299. Or it may be set aside for irregularity. Maybury *v.* Mudie, 5 C. B. 283; Fletcher *v.* Lechmere, 2 Dowl. N. S. 848. But the irregularity may be waived by the plaintiff taking a step or treating it as regular. Graham *v.* Ingleby, 1 Ex. 651. The affidavit can be made by a third person. Anon. 1 Chit. R. 58.

(*f*) Be accurate as to the title of the cause. An affidavit intituled "E. P. and *Mary Ann* his wife, defendants," the declaration being "E. P. and Ann Mary his wife, defendants," was held bad. Poole *v.* Pembrey, 1 Dowl. 693, and see Fletcher *v.* Lechmere, 2 Dowl. N. S. 848; 5 M. & G. 267.

(*g*) The affidavit must give the deponent's addition, though he be the defendant and so described. Lawson's case, 1 Cr. & M. 481; Poole *v.* Pembrey, 1 Dowl. 693. And his residence. Wheatly *v.* Golney, 9 Dowl. 1019.

(*h*) "Affidavit," instead of the word

substance and fact; (*i*) [*add, in the case of an affidavit of the truth of a plea of non-joinder, as required by* 3 & 4 W. 4, c. 42, s. 8 (*see ante*, 268, Obs.), "and that the said G. H. mentioned in the said plea resides at No. ——, in —— street, in the parish of ——, in the county of ——" (*k*)].

Sworn (*l*) [*&c.*] C. D.

3. *Replication that the Defendant is solely liable.* (*m*)

Commencement, ante, 17.] That the said promises [*as in the plea*] were not made by the defendant jointly with the said G. H. as alleged. [*Conclude as ante*, 17.]

4. *Replication that the Party not sued is resident out of the Jurisdiction of the Court.*

Commencement, ante, 16.] That the said G. H. was not, at the time of the commencement of this suit, resident within the jurisdiction of this court, as alleged. [*Conclude as ante*, 17.]

5. *Replication to a Plea of Non-joinder, that the other Contractor is a Certificated Bankrupt.* (*n*)

Commencement, ante, 16.] That after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, G. H. became a bankrupt within the true intent and meaning of the statutes in force concerning bankrupts, and was discharged from the said causes of action by bankruptcy and certificate. [*Conclude as ante*, 17.]

6. *Plea that a Bill of Exchange was accepted by the Defendant jointly with Another.*

Bleakley *v.* Jay, 13 M. & W. 464.

7. *Plea by Assignee of a Lease, that the Lease vested in Another jointly with the Defendant.*

Heap *v.* Livingstone, 11 M. & W. 896; 1 D. & L. 334.

"plea," has been held bad. Garratt *v.* Hooper, 1 Dowl. 28.

(*i*) This form should be adhered to; affidavit that "the plea is true," insufficient. Onslow *v.* Booth, Stra. 705.

(*k*) The residence stated must be the residence at the time of plea pleaded. White *v.* Gascoyne, 3 Ex. 36.

(*l*) If the affidavit is sworn before the declaration is delivered, the plaintiff may treat the plea as a nullity. Bower *v.* Kemp, 1 Dowl. 281; 1 Cr. & J. 287; Johnson *v.* Popplewell, 2 Cr. & J. 545. But an affidavit sworn in Liverpool on the day the declaration was delivered in London, was held not to be a nullity. Lang *v.* Comber, 4 East, 340. See Baskett *v.* Barnard, 4 M. & S. 332. The plea is not a *nullity*, though perhaps irregular, if the affidavit be sworn before defendant's attorney. Horsefall *v.* Matthewman, 3 M. & S. 154.

(*m*) As it appears to be doubtful whether the C. L. P. Act, 1852, applies to a plea in abatement, it would not be sufficient merely to take issue upon the pleas (see the statute). It is better to enter a *cassetur breve*, if it be probable the plea can be sustained; and no costs are payable on such *cassetur*. And see *ante*, 17, note (*k*).

(*n*) By 3 & 4 W. 4, c. 42, s. 9, it is enacted "that to any plea in abatement in any court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors."

8. *Plea of the Non-joinder of a Co-executor as a Defendant.* (*o*)

Commencement, ante, 16.] That the said J. L. made his last will in writing, and thereby appointed the defendant and one T. L. executors thereof, and after his death, and before the commencement of this suit, the said T. L. and the defendant duly proved the said will, and took upon themselves the execution thereof, and administered divers goods and chattels which were of the said J. L. at the time of his death, (*p*) and T. L. is still living and resident within the jurisdiction of this court. [*Conclude as ante,* 16 *and* 17, *and affidavit of the truth of the plea, as ante,* Form 2.]

9. *Plea of the Coverture of Plaintiff.* (*q*)

Commencement, ante, 16.] That the *plaintiff,* at the commencement of this suit, was and yet is married to one G. H., who is still living [*conclude as ante,* 16 *and* 17; *add affidavit of truth,* Form 2].

[9*a*. *Form of Answer in Abatement under Massachusetts Practice Act.*

And the defendant comes and says that when the plaintiff's writ was sued out, the plaintiff was a married woman, and that E. F. her husband was then alive, and therefore he ought not to be held to answer to the plaintiff's writ.]

10. *Plea of the Coverture of Defendant.* (*r*)

Commencement, ante, 16, *in person, and not by attorney.* (*s*)] That at the commencement of this suit she was and still is married to one E. F., who is still living [*conclude as ante,* 16 *and* 17; *add affidavit of truth* (*not of residence*), (*r*) *as ante,* Form 2].

(*o*) See Cabell *v.* Vaugham, 1 Wms. Saund. 291, note (*h*); see, also, 2 Williams on Executors.

(*p*) This is the proper form. See a form, Ryalls *v.* Bramall, 1 Ex. 734.

(*q*) The plaintiff's coverture *after* the contract was made, and at any time before final judgment, can only be pleaded in abatement; Milnes *v.* Milnes, 3 T. R. 627; Dalton *v.* Midland Counties. Ry. Co. 13 C. B. 474; Morgan *v.* Cubitt, 3 Ex. 612; Walker *v. v.* Golling, 11 M. & W. 78; [Hayden *v.* Attleborough, 7 Gray, 338; 1 Chitty Contr. (11th Am. ed.) 226; Parker *v.* Way, 15 N. H. 51; Lyman *v.* Ellery, 7 Vt. 508;] her coverture at the time of the contract may be pleaded in bar. Milnes *v.* Milnes, *supra; ante,* Obs. 148; [1 Chitty Pl. 464.] If a husband sue alone when his wife ought to be joined, the objection should be taken by plea in abatement. Wallis *v.* Harrison, 5 M. & W. 142; Howard *v.* Oakes, 3 Ex. 136; [1 Chitty Pl. 37.] If a wife sue alone on a *deed* made to her when sole, the plea must be in abatement; though this may be pleaded in bar, if the plea go on to show that the husband has by some operative act vested the interest in himself. Bendix *v.* Wakeman, 12 M. & W. 97; Guyard *v.* Sutton, 3 C. B. 153. A plea of coverture to an action for the escape of a debtor is a plea in abatement. Morgan *v.* Cubitt, 3 Ex. 612. See *post,* "Coverture." The wife of an alien enemy cannot maintain an action in her own name on a contract made before or during coverture. De Wahl *v.* Braume, 1 H. & N. 178; 25 L. J. Ex. 343. Marriage *pendente lite* does not abate the suit. C. L. P. Act, 1852, s. 141; see Obs. *ante,* 147; see the Divorce Acts, 20 & 21 Vict. c. 85, and Obs. *ante,* 147. As to outlawry of plaintiff, see Somers *v.* Holt, 8 Dowl. 506.

(*r*) The defendant's coverture at the time of the contract may be pleaded in bar. See form, *post,* "Coverture;" marriage *after* the contract must be pleaded in abatement; Milnes *v.* Milnes, 3 T. R. 631; an affidavit of the residence of the defendant is not necessary in this plea, as it is not within 3 & 4 W. 4, c. 42, s. 8; Jones *v.* Smith, 3 M. & W. 526; but there must be an affidavit of truth, or the plaintiff may sign judgment. Lovell *v.* Winstanley, 9 M. & W. 209. See notes to last form.

(*s*) As to suing in person and not by attorney, see *ante,* 16, note (*g*).

[10*a*. *Form of Answer in Abatement; Coverture of Defendant.*

And the defendant comes and says that when the plaintiff's writ was sued out, she was and still is a married woman, and that J. H. her husband was then alive, and therefore she ought not to be held to answer to the plaintiff's writ.]

11. *Replication that Defendant is not married.* (*t*)

Commencement, ante, 17.] That the defendant is not married to G. H. in the plea mentioned, as alleged [*conclude as ante*, 17].

12. *Plea, another Action pending for the same Demand.* (*u*)

Commencement, ante, 16.] That before the commencement of this suit, the plaintiff issued a writ of summons out of the court of queen's bench against the defendant in an action for the same identical causes of action in the declaration in this suit mentioned, as by the record (*x*) and proceedings thereof remaining in the said court appears, and the parties in this and the said former suit are the same parties, and the said former suit is still depending in the said court [*conclude as ante*, 16 *and* 17, *and add affidavit of truth, as ante*, Form 2].

13. *Plea by an Attorney; Privilege of being sued in another Court.* (*y*)

In the ——.

On [*&c.*]

C. D. ats. A. B. } The defendant, by —— his attorney, (*z*) says, that at the commencement of this suit, the defendant was and still is one of the attorneys of the court of Q. B. [*or* C. P." *or* "exchequer of pleas"]

(*t*) If plaintiff admit the coverture, but rely on any exception to the general rule, as that the husband is transported, &c. he must reply specially, *post*, Pleas in Bar, "Coverture." "Felony."

(*u*) The law on this subject will be found in Com. Dig. Abatement, H. 24; Bac. Ab. Abatement, M.; [1 Chitty Pl. 469, and note (*p*); 2 Chitty Contr, (11th Am. ed.) 1169, 1170, and notes;] Harley *v.* Greenwood, 5 B. & Ald. 101; Biggs *v.* Cox, 4 B. & C. 920. The pendency of another action for the same demand in a superior court at Westminster (not an inferior court, as the borough court of Liverpool; Laughton *v.* Taylor, 6 M. & W. 695), may be pleaded in abatement (not in bar). If a foreigner against whom an action of contract is pending in his own country, is sued in this country by the plaintiff for the same demand, proceedings will not be stayed. Cox *v.* Mitchell, 7 C. B. N. S. 55; [1 Chitty Pl. 469, and note (*p*).] The pendency of an ejectment in a superior court is not a bar to the plaintiff proceeding in the county court. Williamson *v.* Bissil, 31 L. J. C. P. 131. Judgment recovered may be pleaded *in bar*; *post*, "Judgment recovered;" and *semble*, if the plaintiff has settled with any other party jointly liable with the defendant, that would be a good plea in bar also. King *v.* Hoare, 13 M. & W. 494; [1 Chitty Pl. 48, note (*m*), 49, note (*u*).] The pendency of an action against a person jointly liable is not a good plea in abatement. Henry *v.* Goldney, 15 M. & W. 494. See Newton *v.* Blunt, 3 C. B. 675. The bankruptcy of the plaintiff will not abate the action. C. L. P. Act, 1852, s. 142. See Drake *v.* Beckham, 11 M. & W. 315; Rogers *v.* Spence, 13 M. & W. 571. If defendant has *non prossed* the plaintiff in the first action, he cannot plead it in abatement in the second. Pepper *v.* Whalley, 3 Dowl. 579. In answer to the above plea the plaintiff may deny the former suit. Colson *v.* Selby, 1 Esp. R. 452.

(*x*) This averment, if traversed, is satisfied by producing a record of a writ only; but if it has not been served, the court will not allow it to be made available to support this plea. Kirby *v.* Siggers, 2 Dowl. 659, 813.

(*y*) Form, &c. Lewis *v.* Kerr, 2 M. & W. 226. See *ante*, 9, as to actions by an attorney. This is still a good plea notwithstanding 1 Vict. c. 56, s. 4, provides that an attor-

(*z*) This may be pleaded by attorney; Hunter *v.* Neck, 3 M. & G. 181; and ought not to be pleaded in person. Groom *v.* Wortham, 2 Dowl. N. S. 657.

at Westminster, and during all that time has prosecuted and defended suits and pleas in the said court for subjects of our lady the queen as their attorney, and the defendant and all other attorneys of the said court ought, by an ancient custom of such court, from time immemorial used and approved of, to be free from being compelled, and have not at any time been used to be compelled, to answer any plea in any action personal, pleas of freehold, felony, and appeals only excepted, before any justice or minister of our lady the queen, or any judge of any court, except before the justices of the said court of Q. B. [*or* "C. P." *or* "exchequer of pleas"]; (*a*) and this the defendant is ready to verify; (*a*[1]) wherefore he prays judgment if the court here will or ought to take cognizance (*b*) of the said plea [*add affidavit of truth of plea,* (*c*) *as ante,* Form 2.]

14. *Replication, that the Defendant is an Attorney of the Court in which he is sued.* (*d*)

South Staffordshire Ry. Co. *v.* Smith, 5 Ex. 473; 19 L. J. Ex. 356.

15. *Plea, that Plaintiff is an Alien Enemy.*

See *post,* "Alien."

II. PLEAS IN BAR.

Observations on the Plea of Nunquam Indebitatus.

The abolition of special demurrers does not extend the effect of the general issue so as to make that admissible now which would not have been so before the passing of the C. L. P. Act, but only prevents a pleading which would otherwise have been bad, for instance, as amounting to the general issue, from being bad on that ground; it is, therefore, still necessary to consider the effect of the general issue.

Formerly it was usual, in declaring on the common counts, to allege that the defendant *promised to pay;* and the promise alleged or the matter of fact from which the alleged promise might be implied by law was put in issue by the plea of non assumpsit. But this is no longer the case, for now "That he

ney admitted in one court may practice in the others. If the attorney has waived his privilege, that should be replied. Prior *v.* Smith, 6 Dowl. 299. An attorney sued jointly with an unprivileged person loses his privilege of being sued in his own court; Rastrick *v.* Beckwith, 7 M. & G. 905; 2 D. & L. 624; Robarts *v.* Mason, 1 Taunt. 254; see Ramsbottom *v.* Harcourt, 4 M. & S. 585; and an attorney of two courts may be sued in either at the option of the plaintiff. Walford *v.* Fleetwood, 14 M. & W. 449; 14 L. J. Ex. 271. But he has no privilege as against the crown. Kirkham *v.* Whaley, 1 Ld. Raym. 27. So also an attorney cannot have his privilege against a foreign attachment in London. Ridge *v.* Hardcastle, 8 T. R. 417. An attorney is not exempt from being sued under the county courts acts, by reason of his privilege. 12 & 13 Vict. c. 101, s. 18. He has no privilege as to venue. Yeardley *v.* Roe, 3 T. R. 573.

(*a*) There need not be an allegation, that the defendant is *not* an attorney of the court in which the action is pending — that he is may be replied. Percival *v.* Cook, 5 M. & W. 293; Walford *v.* Fleetwood, 14 M. & W. 449; South Staffordshire Ry. Co. *v.* Smith, 5 Ex. 473.

(*a*[1]) [See *ante,* 273, note (*z*).]

(*b*) See Chatland *v.* Thornley, 12 East, 544.

(*c*) A plea of privilege cannot be distinguished from a plea in abatement, and must therefore be accompanied by an affidavit of verification. Davidson *v.* Wakins, 3 Dowl. 129; Davidson *v.* Chilman, 1 Bing. N. C. 281.

(*d*) See, also, as to the conclusion of this replication, Groborn *v.* Ingleby, 2 Ex. 463; and C. L. P. Act, 1852, s. 67.

never was indebted as alleged" is given in sched. B to the C. L. P. Act, 1852, as the plea applicable to the common counts for money payable, such as those numbered from 1 to 14 in that schedule.

By Reg. Gen. T. T. 1853, r. 11, the plea of *nil debit* is not allowed in any action.

By Reg. Gen. T. T. 1853, r. 6, it is provided that "To causes of action to which the plea of 'never was indebted' is applicable as provided in schedule B of the C. L. P. Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of 'never was indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises."

"That he did not promise as alleged" is the plea given as applicable to other declarations on simple contract, such as for "breach of promise of marriage," "warranty of a horse," or "for not loading pursuant to a charter-party;" and in these cases "did not warrant," "did not agree," or any other appropriate denial would be unobjectionable. C. L. P. Act, 1852, schedule B, 37.

A defendant may either traverse generally such of the facts contained in the declaration as might have been traversed by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse. C. L. P. Act, 1852, s. 76.

Reg. Gen. T. T. 1853, r. 6, provides that "In all actions on simple contract, except as hereinafter excepted, the plea of non assumpsit or a plea traversing the contract or agreement alleged in the declaration shall operate only as a denial in fact of the express promise, contract, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law. *Exempli gratiâ:* In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach, and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Thus, in an action on a warranty of a horse, this plea will not deny that it was unsound (Smith *v.* Parsons, 8 C. & P. 199); nor enable the defendant to set up as a defence that there was to be reference by consent to a veterinary surgeon. Watson *v.* Denton, 7 C. & P. 85; and see Ellis *v.* Chinnock, 7 C. & P. 169.

In an action on a policy of assurance, the defendant may under this plea deny that it was effected on plaintiff's behalf, and the payment of the premium by him. Sutherland *v.* Pratt, 11 M. & W. 296; Redmond *v.* Smith, 7 M. & G. 457; Hallett *v.* Dowdall, 18 Q. B. 2; see *post*, "Insurance."

"In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach." Reg. Gen. T. T. 1853, r. 6.

Thus it would deny that defendant received the goods in the *character* of a common carrier, and for the *purpose* of being carried, &c. (Webb *v.* Page,

5 M. & G. 199); also the property of the plaintiff in the goods, and whether he as consignor or consignee be the person to sue. Gilbart *v.* Dale, 5 Ad. & E. 545. It would also deny any qualification of the common law contract, such as that the plaintiff agreed to watch the goods. Brind *v.* Dale, 2 M. & W. 775.

"In every species of actions on contracts, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. R. G. T. T. 1853, r. 8.

"In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* and never indebted is inadmissible." R. 7; see *post*, Pleas, "Bills of Exchange."

The objects of thus restricting the operation of the general issue are threefold: 1st, by separating questions of law from questions of fact, to prevent as much as possible the former being submitted to a jury (per Lord Abinger C. B. in Gutsole *v.* Mathews, 1 M. & W. 502); 2dly, to prevent parties being taken by surprise at the trial, an object which is gained by compelling defences which a plaintiff could not be reasonably supposed to anticipate, to be placed on the record in the form of special pleas; (*e*) and 3dly, to diminish the expense of trials, by reducing disputes between litigants to single points, and thus, by throwing off, as it were, the extraneous facts, relieving parties from the necessity of bringing witnesses to prove what was never intended to be disputed.

The first object is much advanced by the rule requiring that all matters must be pleaded "which show the transaction to be void or voidable in point of law. on the ground of fraud or otherwise, *ex. gr.* illegality of consideration either by common law or statute." See *post*, tit. "Illegal Consideration." What amounts to a defence of illegal consideration is a question much more fit to be decided by the court on demurrer than to be submitted to a jury. See instance, Hibblewhite *v.* M'Morine, 5 M. & W. 462.

The second and third objects are gained by requiring matters in confession and avoidance, as well as those in discharge, to be pleaded; the examples under this head, given in the rules themselves, are:

"Infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences." R. 8.

See those various titles, *post*.

As the operation of *non assumpsit* is less extensive when applied to a special count than "never was indebted" is to an *indebitatus* count, it will be proper to advert concisely to the difference between those counts. The points which have been decided as to *non assumpsit*, when pleaded to the common counts, will in general be applicable to the substituted plea of "never was indebted."

A *special* count in contract usually contains:

First. An *inducement* or statement of prefatory matter, tending to explain,

(*e*) See per Lord Abinger, in Isaac *v.* Farrer, 1 M. & W. 70; and per Park J. in Barnett *v.* Glossop, 1 Bing. N. C. 636.

and sometimes forming the foundation for, the contract; as, in an action on a guaranty for the debt of another, that the latter was indebted, &c. See *ante*, 136 *et seq.*

Secondly. The statement of the *contract*, that is, of the *consideration* and the defendant's *promise* thereon (as that, in *consideration* plaintiff *would forbear* to sue E. F., defendant *promised* to be answerable, &c.).

Thirdly. The allegation of the *plaintiff's* performance of *conditions precedent*, or of his readiness, &c. to perform his part of the bargain in case of a concurrent consideration, &c. *Ante*, 39, note (*u*).

Fourthly. The statement of the defendant's *breach* of contract.

Fifthly. The consequent damage, if special, to the plaintiff.

The common *indebitatus* count only contains three allegations:

First. That plaintiff sues for money payable, showing a past or executed consideration.

Secondly. A statement of what it is payable for.

Thirdly. The amount claimed.

It will be convenient to consider the effect of pleading the general issue to these counts separately.

And first as to the *special count.*] — 1. The inducement, when existing antecedently to and independently of an *express* contract, is not put in issue by *non assumpsit.*

Thus, in Shilcock *v.* Passman, 7 C. & P. 289, where the declaration stated that the plaintiff was a prisoner in execution for less than £20, and, in consideration that plaintiff would employ defendant (an attorney) to obtain his discharge under the statute, the defendant promised to use due diligence to do so, Alderson B. held that the prefatory allegations were not in issue.

In Da Pinna *v.* Polhill, 8 C. & P. 78, where the declaration stated that the plaintiff had composed an opera, and that, in consideration that the plaintiff would sell his copyright in it, the defendant undertook to buy it; breach, that he refused so to do, and plea of the general issue; Tindal C. J. held, that under this plea the defendant could not show that the plaintiff did not sell by deed (if that were necessary), or that he did not compose the opera, or that he had not the right of selling it. Bennion *v.* Davison, 3 M. & W. 179; Bell *v.* Welsh, 9 C. B. 154.

In the case of a guaranty of an existing debt in consideration of forbearance, where there is an inducement that the third party was indebted, this latter fact would be admitted under *non assumpsit;* see plea denying it, *post*, "Guaranty."

2. *The contract*, that is, the *consideration* as alleged in the declaration, and the *promise* made in consequence, are both denied by *non assumpsit* or a plea traversing the contract or agreement alleged in the declaration.

It may therefore be shown under that plea, to an action on a guaranty, that the writing produced in evidence to prove it does not support the same consideration as that set out in the declaration. Raikes *v.* Todd, 8 Ad. & E. 854. "If you disprove the consideration laid, you of course disprove the contract," per Lord Denman, Ib.; and see Beach *v.* White, 12 Ad. & E. 670. In Lyall *v.* Higgins, 4 Q. B. 528, where the declaration stated that the plaintiff *had engaged* C. as collecting clerk, and that in consideration that plaintiff would

employ him as such, defendant guarantied his fidelity, a plea was held bad which stated that, before the defendant's agreement with the plaintiff, the plaintiff was *bound* to employ C. under another agreement to that effect with him, which latter agreement was subsisting at the time of defendant's promise, and therefore that there was no consideration for the defendant's guaranty.

If a consideration which existed in all its integrity, as stated in the declaration at the time of the promise, *afterwards* fails, either wholly or in part (where the promise is entire), it would seem to be proper to plead such a defence in confession and avoidance. See Chanter *v.* Leese, 4 M. & W. 295; 5 M. & W. 698; Head *v.* Baldrey, 6 Ad. & E. 459; Franklin *v.* Miller, 4 Ad. & E. 599: Skeate *v.* Beale, 11 Ad. & E. 983. So that the plaintiff has not performed the alleged consideration (Gibson *v.* Harris, 8 C. & P. 378), unless where there is an averment in the declaration that the plaintiff performed the consideration, in which case a traverse of that averment would let in evidence that he only *partially* performed it. *Ante*, 119, note (*f*). Matter of *cross-action* must, however, be distinguished from failure of consideration. See Francis *v.* Baker, 10 Ad. & E. 642.

Under this plea the defendant may show that the policy declared on was not caused to be made by or on behalf of the plaintiff (Sutherland *v.* Pratt, 11 M. & W. 296; Redmond *v.* Smith, 8 Scott N. R. 250); or that the plaintiff did not pay the premium nor promise the defendant to observe the terms and conditions of the policy. But a defence that the plaintiff has no interest must be specially pleaded. Miles *v.* Campbell, 2 Y. & C. 389.

Misdescription of contract.] — The *contract as stated* is denied by *non assumpsit* or plea traversing the contract or agreement, and therefore any defence grounded on the fact that the *real contract* between the parties varies from that set out may be given in evidence under such plea. Thus, if the plaintiff misdescribes the terms, or mistakes the meaning of the contract on which he sues, *non assumpsit* or a plea traversing the contract is the proper plea to let in the objection; as where the declaration complained of the breach of an absolute agreement on the part of the defendant to buy a house and pay for the fixtures, and the contract really was that the plaintiff was to execute an assignment of the lease, and put the defendant in possession on his paying for the fixtures, which the plaintiff was not ready or willing to do, the proper plea would be the general issue. Nash *v.* Breeze, 11 M. & W. 352. The case of Kemble *v.* Mills, 1 M. & G. 757, further illustrates this principle; in that case a condition, which, according to the true construction of the agreement between the parties, was a condition *precedent*, was described as a *concurrent* condition, and the court held that this might be objected under *non assumpsit*. So, upon an issue denying the agreement, the defence is admissible, that a document was signed without any intention of making a present contract, but that it was to be conditional only upon the happening of an event which has not occurred. Pym *v.* Campbell, 6 El. & Bl. 370; Furness *v.* Meek, 27 L. J. Ex. 34. See Evans *v.* Bremridge, 25 L. J. Ch. 334.

Term of contract omitted.] — So, where the whole of the contract is not stated, that may be objected on *non assumpsit* or a plea traversing the contract. Smith *v.* Dixon, 7 Ad. & E. 8. Thus, in an action for not paying for goods by giving bills with security, the defendant under this issue may show

a custom of trade that such security was only given when it was demanded before the goods were delivered. Whittaker *v.* Mason, 2 Bing. N. C. 359. And so in an action against a carrier for losing goods, defendant may show that when he received them it was agreed that the plaintiff should accompany and watch the goods. Brind *v.* Dale, 2 M. & W. 775; and see per Littledale J. Williams *v.* Byrne, 7 Ad. & E. 183. In an action on a policy of insurance, the defendant may show under the general issue that by a *contemporaneous* memorandum it was agreed that the policy should include only capture in case of war, and that the capture complained of was not of that description. Heath *v.* Durant, 12 M. & W. 438; Mounsey *v.* Perrott, 2 Ex. 522.

Debt payable on request.] — The defence that the goods, &c. were sold on a credit which had not expired when the action was commenced, is properly admissible under *non assumpsit* or a traverse of the contract. See Hayselden *v.* Staff, 5 Ad. & E. 159; Broomfield *v.* Smith, 1 M. & W. 542.

Inconsistent contract.] — Defendant can show that a material term has been omitted (Stephen on Plead. 152), or a contract inconsistent with the contract declared on. Thus, in Morgan *v.* Pebrer, 3 Bing. N. C. 457, where the defendant pleaded to a count for money paid, that it was paid by the plaintiff (a stock-broker) for the defendant on stock-jobbing differences; and that the original agreement between the parties was, that the defendant should deposit bonds with the plaintiff to cover such differences, which the plaintiff might sell to repay himself after notice to the defendant, with an averment that the plaintiff had done so without such notice, Tindal C. J. observed, "What is the plea in effect but saying, you ought not to have declared in an *indebitatus* contract, because you have entered into another contract inconsistent with it? In other words, as to the contract declared on, defendant says *non assumpsit.*" So, where, in *assumpsit* by a purchaser against the vendor for not delivering a proper abstract of title, the declaration alleged that the sale was subject to a condition that the vendor should deliver an abstract showing a good title, and assigned for a breach the non-delivery of such abstract, the defendant was held entitled to show under this plea that it was agreed as part of the contract that the defendant should deliver an abstract commencing with a *particular deed only.* The plea demurred to particularly stated that the terms of the agreement there set up were part of the contract declared on. Sharland *v.* Leifchild, 4 C. B. 529; Heath *v.* Durant, 12 M. & W. 438; see Weedon *v.* Wood bridge, 13 Q. B. 462. Where the defence set up is quite consistent with the contract alleged in the declaration, it should be pleaded. Where it is a denial of the contract declared on by the statement of a contract inconsistent with it, it is admissible under these general pleas. Ib.; see, also, Parker *v.* Palmer, 4 B. & Ald. 387; Sieveking *v.* Dutton, 3 C. B. 331.

3. *Condition precedent, non-performance of.*] — This would seem not to be denied under *non assumpsit*, whenever the consideration for the promise is executory. In Gibson *v.* Harris, 8 C. & P. 378, where the plaintiff declared that, in consideration that the plaintiff *would* assign certain shares, so that the agreement might be produced in chancery, and *would* accept £70, plaintiff promised, &c. and averments accordingly, Lord Abinger C. B. held that under *non assumpsit* the defendant could not insist that any part of the consideration was unperformed. If the defendant relies on the non-performance

of a condition precedent not set out in the declaration, he may set it out in his plea, and deny that it has been performed. See *post*, Pleas, "Condition Precedent;" see Coulson *v.* Attwood, 26 L. J. Ex. 244.

But where the consideration is executed, as is always the case in *indebitatus* counts, the plea of *non assumpsit* denies the performance of any condition precedent that it may be necessary for the plaintiff to prove he has performed, before he can sustain the action. Alexander *v.* Gardner, 1 Bing. N. C. 661; Groundsell *v.* Lamb, 1 M. & W. 352; *post*, 281. See *ante*, "Misdescription of Contract," and "Inconsistent Contract." But a stipulation in the nature of a defeasance of the liability to damages, unless a required notice was given (*per cur.* Weedon *v.* Woodbridge, *ubi sup.*), was held admissible under *non assumpsit*.

In Walmsley *v.* Matthews, 3 M. & G. 133, the plaintiff declared on a contract, that in consideration that he had entered his horse for a race, and paid a certain subscription towards the stakes, the defendant promised to pay over the stakes to him if a certain horse won, and it was held that under *non assumpsit* the defendant could not show that there was a dispute as to whether the horse was qualified, and that one of the conditions was, that disputes should be referred to a committee, who had not yet made any decision.

Facts whence promise implied.] — Sometimes, even in a special count, the plaintiff is unable to prove any *express* promise on the part of the defendant like that which he has set out in his declaration, but he can prove facts from which the law will *imply* such a promise; for instance, if he proves that the defendant is a carrier, and that he delivered goods to be conveyed by him, the law will imply a promise on the part of the defendant to deliver them safely. *Ante*, 94, Obs. In such cases *the matters of fact from which the promise is to be implied* are, by the express terms of the R. G. T. T. 1853, denied by *non assumpsit;* and in the above instance one of such matters of fact is the delivery of goods *of the plaintiff*, and therefore his *property* in the goods was held in the above instance to be denied by *non assumpsit*. Gilbart *v.* Dale, 5 Ad. & E. 545, per Coleridge J. So in Wallis *v.* Broadbent, 4 Ad. & E. 877, where a landlord sued a tenant on an implied promise, arising from his holding over a farm after a lease had expired, to hold on the terms of the lease (see *ante*, 189), it was held that the lease being one of *the matters of fact from which the promise was to be implied*, was denied by *non assumpsit*, and that it could not be produced to prove such promise unless properly stamped.

In an action against an attorney for negligence, the fact of the defendant being an attorney is one of the matters of fact from which his promise to transact the business skilfully would be implied by law; it is therefore denied by *non assumpsit*. Aldis *v.* Gardner, 1 Car. & K. 564. Upon the same principle a defence that the promise declared on was only to be deduced from a judge's order, and that that order was afterwards set aside, being in effect merely a circuitous mode of asserting that no promise was to be deduced from the order, may be given in evidence under this plea. Wade *v.* Simeon, 2 C. B. 548.

Statutory disability. — Statute of Frauds. — Stamp.] — Sometimes, by the operation of the express provisions of a statute, the plaintiff is prevented from *proving* the matters of fact from which the promise is to be implied, though

they may exist in reality; thus, there may have been a contract for the sale of land, or of goods of a greater value than £10, and nothing given to bind the bargain, or a contract which was not to be performed within a year; in these cases, as the plaintiff has not *evidence* sufficient to show that there was such a contract, unless he produces a writing satisfying the statute of frauds, he is prevented from getting through his case, and the plea, therefore, of *non assumpsit*, or any other denying the contract, will be sufficient to let in this defence. Buttermere *v.* Hayes, 5 M. & W. 460; Eastwood *v.* Kenyon, 11 Ad. & E. 441; Tricker *v.* Thomlinson, 1 M. & G. 772; Reade *v.* Lamb, 6 Ex. 130; [Gibson *v.* Holland, L. R. 1 C. P. 1; Noble *v.* Ward, L. R. 1 Ex. 117; L. R. 2 Ex. 135; Vanderberg *v.* Spooner, L. R. 1 Ex. 316; Wilkinson *v.* Evans, L. R. 1 C. P. 407; Newell *v.* Radford, L. R. 3 C. P. 52.] See Leroux *v.* Brown, [12 C. B. 801. But see 1 Chitty Pl. 506, note (*u*).]

Upon this principle, any objection that the writing necessary to evidence the contract declared on is *not stamped*, or is insufficiently stamped (Mason *v.* Bradley, 11 M. & W. 590), that a transfer of a ship was not in accordance with the merchant shipping acts (see Benyon *v.* Creswell, 12 Q. B. 899), may be taken under the general issue or other plea denying the contract, for in such cases the plaintiff's case is stopped *in limine*, and he is unable to *prove* the contract at all. Calvert *v.* Baker, 4 M. & W. 417; Morgan *v.* Ruddock, 4 Dowl. 311. See Young *v.* Geiger, 6 C. B. 541.

Breach. — Damages.] — The breach of the contract is not denied under *non assumpsit*. Pleading Rules, T. T. 1853, r. 6. In Smith *v.* Parsons, 8 C. & P. 199, which was an action for the breach of a warranty of ownership of a horse, Tindal C. J. held that under this plea the defendant could not show that the horse was sound. In such case there should be a denial of the breach in the terms in which it is alleged, and the plea should not be applied to any special damage laid as resulting from such breach. Porter *v.* Izott, 1 M. & W. 381; Warre *v.* Calvert, 7 Ad. & E. 143; see distinction between denial of a contract and excuse for breach, Lara *v.* General Apothecaries' Co. 26 L. J. Ex. 225. A plea to damages only is bad. Reindel *v.* Schell, 4 C. B. N. S. 97.

Common counts.] — The plea of never was indebted operates as a denial of those matters of fact from which the liability of the defendant arises (r. 6); for example, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

Goods sold.] — Thus, to a count for goods sold, it denies that there was such a sale and delivery as would create a legal debt, as that the goods were sold on a credit which had not expired at the commencement of the suit (Broomfield *v.* Smith, 1 M. & W. 574); because that negatives the existence of a present debt, which is the meaning of the words "money payable" at the commencement of the common count (Place *v.* Potts, 8 Ex. 705); that defendant, an undisclosed foreign principal, by the course of dealing, never incurred any liability (Smyth *v.* Anderson, 7 C. B. 21, 42); that the goods do not fulfil a condition under which they were bought, such as good quality (Dicken *v.* Neale, 1 M. & W. 556); that they were useless (Dawson *v.* Collis,

10 C. B. 523; that a machine was manufactured by the plaintiff for the defendant under a condition that if it did not work nothing should be paid for it, and that it could not be made to work, and was useless to the defendant (Groundsell *v.* Lamb, 1 M. & W. 352); that it was a conditional sale (Lamond *v.* Davall, 9 Q. B. 1030); non-delivery of all the goods contracted for. Skeate *v.* Beale, 11 Ad. & E. 985. If the goods have been kept and appropriated by the defendant, a new implied contract to pay arises, on which the plaintiff may recover, as on a *quantum meruit*. Cousins *v.* Paddon, 2 Cr., M. & R. 547; Fitt *v.* Cassanet, 5 Scott N. R. 902. The adultery of the wife, in an action against a husband for goods supplied to her, may be shown under this plea as negativing his implied authority to her to contract in his name. Symes *v.* Goodfellow, 2 Bing. N. C. 532. But where there has been a sale in point of fact, the defendant cannot show that the plaintiff had no title to the goods at the time of the sale. Walker *v.* Mellor, 11 Q. B. 478.

Work and Materials.] — The principles regulating the effect of the general issue to an *indebitatus* count for goods sold (*ante*, 281) equally apply to an *indebitatus* count for the price or value of work and materials. It may be shown under the general issue, that the work was done unskilfully (Hill *v.* Allen, 2 M. & W. 283; Bracey *v.* Carter, 12 Ad. & E. 373; Mondel *v.* Steel, 8 M. & W. 858; Cox *v.* Leech, 1 C. B. N. S. 617; Long *v.* Orsi, 18 C. B. 610); but the plaintiff could still recover under a new implied contract for the value of any work, &c. that the defendant adopted (see *ante*, 281); or that the remuneration was not to be in money (Collingbourne *v.* Mantell, 5 M. & W. 289); that the work was not to be paid for until the certificate of a surveyor had been obtained, which had not been done (Milner *v.* Field, 5 Ex. 829); or that no remuneration should be claimed *except* for disbursements or money out of pocket (see Jones *v.* Reed, 5 Dowl. 216; Jones *v.* Nanny, 1 M. & W. 333); or that the work was done by an unqualified person in plaintiff's name. Parker *v.* Riley, 3 M. & W. 230. So the defendant may show that he supplied the plaintiff's men with beer to reduce the rate of wages for the work (Granger *v.* Raybould, 9 C. & P. 229); or that he did the work himself for the plaintiff (Turner *v.* Diaper, 2 M. & G. 241); or supplied materials for it. Newton *v.* Foster, 12 M. & W. 772. To an *indebitatus* count for wages or salary, any defence which establishes that before the money became due the plaintiff was properly discharged from his service, may be shown under this plea (Turner *v.* Robinson, 6 C. & P. 15; Ridgway *v.* Hungerford Market Co. 3 Ad. & E. 171); unless, however, the dismissal actually took place, the question of misconduct cannot be gone into under the general issue. Cooper *v.* Whitehouse, 6 C. & P. 545. So the defendant may show that the plaintiff cohabited with him as his mistress, as that tends to negative a contract of service (Bradshaw *v.* Haywood, 1 C. & M. 591); or that the defendants, being a corporation, did not contract under seal, or with the formalities required by the act of incorporation. Cope *v.* Thames Haven Ry. Co. 3 Ex. 841; Frend *v.* Dennett, 4 C. B. N. S. 576.

Money had and received.] — In an action for money had and received, the plea of never was indebted will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff (R. G. T. T. 1853, r. 6), such as the

the money was received not entirely for the plaintiff's use, but that defendant might reimburse himself a debt out of it (Solly *v.* Neish, 2 Cr., M. & R. 355; Owen *v.* Challis, 6 C. B. 115); or that it was received for the use of a third person (Clarke *v.* Dignam, 3 M. & W. 478); or that defendant had a lien on it (Williams *v.* Vines, 6 Q. B. 355); or any facts which show that the contract made was not one to pay on request. Brownrigg *v.* Rae, 5 Ex. 489.

Account stated.] — Never was indebted, to a count upon an account stated, denies that the parties came to an account, and that the defendant was indebted to the plaintiff thereon (Jacobs *v.* Fisher, 1 C. B. 178); the defendant may therefore prove, under this plea, that he was not in reality indebted because there are errors in the account (Thomas *v.* Hawkes, 8 M. & W. 140; Wilson *v.* Wilson, 14 C. B. 616); or that the items were such that he was not primarily, but only collaterally liable (Gould *v.* Coombs, 1 C. B. 543); but not that a subsequent account was in his favor. Fidgett *v.* Penny, 1 Cr., M. & R. 108.

To any of the common counts defendant may show that the plaintiff and defendant were partners (Payne *v.* Hales, 5 M. & W. 598; Brown *v.* Tapscott, 6 M. & W. 123; Worrall *v.* Grayson, 1 M. & W. 166); it is a defence when one firm is suing another, that either of the parties is a member of both firms. *Post*, "Partners;" Chitty on Contracts. See *post*, "Account stated." As to the effect of non-joinder and misjoinder of plaintiffs, see *ante*, Pleas, "Abatement."

Payment.] — Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. R. G. T. T. 1853, r. 14. See *post*, "Payment." As to where, from goods being sold for ready money and paid for at the time, or where, from the state of dealings between the parties, no debt arises, and therefore a plea of payment is unnecessary, see Bussey *v.* Barnett, 9 M. & W. 312; Littlechild *v.* Banks, 7 Q. B. 739; 18 Q. B. 722, per Lord Campbell; note to Coldham *v.* Showler, 3 C. B. 320; Smith *v.* Winter, 12 C. B. 487; Baker *v.* Heard, 5 Ex. 959; [1 Chitty Pl. 504.]

Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered. C. L. P. Act, 1852, s. 75. Where to a general count a general traverse is pleaded, the issue may be treated distributively; and if the plaintiff succeeds in part only, and recovers less than his demand, the defendant has a right to have the verdict entered for him as to the residue, and to have his costs, if any, allowed of his successful defence to any distinct part of the plaintiff's claim. Treherne *v.* Gardner, 8 El. & Bl. 161; Paterson *v.* Harris, [1 B. & S. 336.] See, further, Day's Common Law Procedure Act, 70, and Gray on Costs.

S. 74 of the C. L. P. Act, 1852, enacts that "Whereas certain causes of action may be considered to partake of the character both of breaches of contracts and of wrongs, and doubts may arise as to the forms of pleas in such

actions, and it is expedient to preclude such doubts; any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong."

By r. 8, H. T. 1853, the defendant shall not be at liberty to waive his plea, or enter a *relictâ verificatione* after demurrer, without leave, unless by consent. If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit. C. L. P. Act, 1852, s. 52. The power of the courts or judges to set aside pleadings tending to embarrass is limited to such as are at once embarrassing and irregular, informal, or tricky, and contrary to the rules and practice of pleading, and does not extend to such as merely put the opposite party to difficult, expensive, and needless proof. Welland Ry. Co. *v.* Blake, 6 H. & N. 410. See, further, Day's Common Law Procedure Act, 48, 49. It seems that if an act of parliament gives a party a general form of declaration, and enacts that it shall only be necessary to prove certain matters in support of it, the plea of the general issue requires the plaintiff to prove all such matters. Edinburgh Ry. Co. *v.* Hibblewhite, 6 M. & W. 707; Brighton Ry. Co. *v.* Wilson, 6 Bing. N. C. 135; *post*, Pleas, "Public Company." See Welland Ry. Co. *v.* Blake, 6 H. & N. 410, in which case the company was incorporated by a colonial act.

1. *Plea of Nunquam Indebitatus to the whole Declaration.*

The defendant, by ——, his attorney, (*f*) [*or* "in person"] says, (*g*) that he (*h*) never was indebted as alleged. (*i*)

2. *The like to Part of a Declaration.* (*k*)

As to the [*first*] count (*l*) [*or* "as to the causes of action so far as they relate to the sum of £——," *or* "except as to the sum of £—— parcel of the money claimed"], says that he never was indebted.

3. *The Similiter.*

Ante, 20, Form 2.

4. *Non Assumpsit.*

That he did not promise as alleged. (*m*)

[For this class of cases the Massachusetts Practice Act prescribes the following forms of answer:—

(*f*) *Ante*, 19, note (*o*).

(*g*) If the form is not restricted in the commencement, it will be taken as pleaded to the whole declaration.

(*h*) See the form where one defendant only pleads, others being sued, *ante*, 20.

(*i*) This is the form given by C. L. P. Act, 1852, sch. B, and is applicable to declarations like those numbered 1 to 14 in that schedule.

(*k*) See other forms, *ante*, 20, variations and see notes (*f*) and (*g*), *supra*.

(*l*) A plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or admitting some part or parts thereof to deny all the rest, or to deny any one or more allegations. C. L. P. Act, 1852, s. 1.

(*m*) This is the form given by C. L. P. Act, 1852, sch. B, 37, and is applicable to declaration on simple contracts, not on bills or notes, numbered 19 to 22. In that schedule "did not warrant," "did not agree," or any other appropriate denial would be unobjectionable. Ib.

Money had and received. — And the defendant comes and upon his personal knowledge denies that he received the money mentioned in the plaintiff's bill of particulars, or any part thereof.

[*Or, if the case be so,*] admits that he received the money mentioned in the plaintiff's declaration, but denies that he received it to the plaintiff's use.

And the defendant comes and says, upon his personal knowledge, that he received the money mentioned in the plaintiff's bill of particulars, but upon his information and belief he denies that he received the same or any part thereof to the plaintiff's use.

And the defendant comes and upon his personal knowledge denies that he has received to the plaintiff's use the money mentioned in the plaintiff's bill of particulars, except the sum of fifty dollars.

Statute of Limitations. — And the defendant comes and answers that the cause of action mentioned in the plaintiff's writ did not accrue within six years before the suing out of the plaintiff's writ.

Payment. — And the defendant comes and answers that he has paid the plaintiff the sum of —— dollars, which was the full amount of the account stated in the plaintiff's bill of particulars.

If there are several items, add: And he annexes hereto a bill of particulars of said payment.

Account annexed. — Goods sold and delivered. — And the defendant comes and answers as follows, viz. As to the first ten items of the plaintiff's bill of particulars, upon his personal knowledge he denies that the plaintiff sold and delivered the same to the defendant.

As to the eleventh item, upon his personal knowledge he denies that the price was to be more than ten dollars.

Work. — As to the twelfth item, he is ignorant personally, and by information and belief, whether the plaintiff performed the day's labor there charged or not, and also of the price thereof, if any, so that he can neither admit nor deny the plaintiff's allegation, but leaves the plaintiff to prove the same.]

Non est Factum.

In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. R. 10. And by r. 11, "all matters in confession and avoidance shall be pleaded specially as above directed in actions on simple contracts." This plea, properly speaking, does not amount to the general issue; it merely denies the execution and effect of the deed as set out. If that be proved, the plaintiff must recover, as the plaintiff's other allegations and the breach are admitted. This alleged effect of the deed, as well as its execution, are put in issue by this plea. North *v.* Wakefield, 13 Q. B. 536; Fazakerly *v.* M'Knight, [6 El. & Bl. 795;] 26 L. J. Q. B. 30. The necessity for profert and oyer is now abolished, but by C. L. P. Act, 1852, s. 56, a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out.

It puts the plaintiff upon proof of the execution of the instrument as described in the declaration, and of such collateral circumstances (such as, in the case of a company executing a deed, that they have complied with the private act) necessary to give the execution validity. Hill *v.* Manchester &c. Co. 5 B. & Ad. 866. It admits the *breach* alleged in the declaration. As to an alteration, see *post*, 298.

Where the defence is, that the damage on a bond arose from something *extra* on the contract, this may be set up on *non est factum*. Warre *v.* Calvert. 7 Ad. & E. 143.

Declaration against W. F., sued as W. B. Plea, *non est factum*. Proof of execution in the name of W. B. by defendant, and that he was known by the name of W. B., held no variance; and that if it were, it should have been pleaded specially. Williams *v.* Bryant, 5 M. & W. 447.

It seems doubtful whether an inconsistent contract can be set up on *non est factum*. Trott *v.* Smith, 12 M. & W. 688.

The plaintiff must, at the trial, on *non est factum* pleaded, produce the instrument duly stamped; and as it is now no longer necessary to call the attesting witness except to those instruments to which attestation is still necessary (17 & 18 Vict. c. 125, s. 26), such as wills and instruments under powers, &c. the execution may be proved in any manner. See Taylor on Evidence, 3d edit. § 1638. Frequently the necessity of proof is dispensed with by the defendant's admission of the execution of the instrument, on the plaintiff taking out, as he should do, a summons calling on defendant to admit such execution.

If the defendant (in court) does not plead *non est factum*, the execution of so much of the deed as is expounded on the record is admitted; but if the plaintiff wishes to avail himself of any other part of the deed, he must prove it in the usual way. Williams *v.* Sills, 2 Camp. 519.

Upon *non est factum*, the defendant may rely upon a material variance between the deed and the description of it in the declaration (Smith *v.* Scott. 6 C. B. N. S. 770); but in ordinary cases of variance not material to the *merits*, the judge will allow an amendment at the trial, under C. L. P. Act, 1852, s. 222, and C. L. P. Act, 1860, s. 36. As to obtaining inspection, see Chitty Arch.

Plea, non est Factum.

That the alleged deed is not his deed. (*n*)

III. GENERAL ISSUE BY STATUTE.

Obs. — There are several statutes which allow the general issue to be pleaded in certain cases, and at the same time enact that special defences may be given in evidence under that plea.

Thus by the 21 Jac. 1, c. 4, s. 4, "In any action against the form of any *penal law*, it shall be lawful for the defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been a good and sufficient matter in law to have discharged the defendants

(*n*) The plea should describe the instrument by the same name by which it is designated in the declaration.

Obs. against the said action." An action of debt for penalties for not setting out tithes was held within this enactment: Lord Spencer *v.* Swannell, 3 M. & W. 160; and it applies to subsequent statutes, and therefore was allowed to be pleaded to an action of debt on the 11 Geo. 2, c. 19, s. 4, for double value of goods fraudulently removed by a tenant; Jones *v.* Williams, 4 M. & W. 375; and also to an action on the 22 Geo. 2, c. 46, s. 14, against a deputy clerk of the peace for practising as an attorney; Faulkner *v.* Chevell, 5 Ad. & E. 213; but it only applies to *informers*, and not to actions brought by the *party grieved;* Fyfe *v.* Bousfield, 2 D. & L. 481; S. C. 6 Q. B. 100; and an action for pound breach under 2 W. & M. c. 5, is not within it. Castleman *v.* Hicks, 1 Cr. & M. 266; S. C. 2 M. & R. 422.

By 21 Jac. 1, c. 12, s. 5, "Magistrates, mayors, constables, churchwardens, or overseers, and their deputies and others acting in aid of them, may, when sued in case of trespass for doing anything concerning their office, plead the general issue and give the special matter in evidence."

By 5 & 6 Vict. c. 97, s. 3, "So much of any clause or provision in any act or acts commonly called public local and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed." This does not apply to subsequent statutes. Boden *v.* Smith, 6 C. B. 7. An act for establishing a local court of requests was held within this enactment, though the act contained a clause making it a public act. Cock *v.* Gent, 12 M. & W. 234. See, as to what acts are local and personal, Shepherd *v.* Sharp, 24 L. J. Ex. 29. In error, 25 L. J. Ex. 254. See, also, Carr *v.* The Royal Exchange Assurance Co. 31 L. J. Q. B. 93; [1 B. & S. 956.]

The plea of *nil debet*, as we have seen, *ante*, 275, is now abolished in all cases, and although there is no exception made in favor of cases where the general issue by statute is given, it is conceived that it would still be a proper mode of pleading the general issue by statute.

In Week *v.* Argent, 16 M. & W. 817, it was held that whereas by the 5 & 6 Vict. c. 122, s. 40, the general issue might be pleaded, and that act and the special matters given in evidence in defence of an action on a security given by a bankrupt with intent to persuade a creditor to forbear opposing his certificate; that *non assumpsit* (by statute) might be pleaded under this enactment on an action on a bill or note, notwithstanding Reg. Gen. H. T. 4 W. 4 (which made *non assumpsit* inadmissible to bills and notes), on the ground that the 5 & 6 Vict., subsequently to the Reg. Gen., authorized the pleading of the general issue, which in that action could only be *non assumpsit*.

As all the actions to which the plea of not guilty by statute was given by 21 Jac. 1, c. 4, s. 4, were either tort in the common sense of the word, or offences against a penal statute, it would seem that not guilty by statute would be a good plea in any of those cases. It has been decided in Coppin *qui tam v.* Carter, 1 T. R. 462, that not guilty to an action of debt on a penal statute is not such a nullity as warrants judgment to be signed for want of a plea; and indeed it would rather seem from that case that this was a good plea. In Langley *v.* Haynes, Mo. 302, such a plea was held good.

A plea formed on the authority of Beaver *v.* Mayor of Manchester, 26 L. J. Q. B. 311; [8 El. & Bl. 44,] would perhaps, in most cases, avoid any doubt, and give the defendant the full benefit of plea, not guilty by statute; as Erle J. there said, "Why should not all the public have the same advantage given them by the common law procedure act as, by certain acts of parliament, is already given to particular individuals and classes.

It appears to be the general practice now, to plead not guilty by statute in all cases where general issue by statute is allowed to be pleaded.

The general issue by statute lets in not only defences given by the statute, but also those which would have arisen at common law; Ross *v.* Clifton, 11 Ad. & E. 631; S. C. 9 Dowl. 1033; and Langford *v.* Woods, 7 M. & G. 629; and likewise defences resting partly on the statute and partly at common law; Ib.; and Maund *v.* Monmouthshire Canal Co. 1 Cr. & M. 606; and it extends also to new assignments. Mason *v.* Newland, 9 C. & P. 574. Special pleas, taking defences which by the statute might be given in evidence under the

Obs. above plea, will not be allowed along with it. Legge *v.* Boyd, 1 M. & G. 902; S. C. 9 Dowl. 59; and see Williams *v.* Jones, 11 Ad. & E. 643; Eagleton *v.* Gutteridge, 11 M. & W. 465.

Plea of the General Issue by Statute.

By statute. (*o*) — That he is not guilty.

IV. ACCORD AND SATISFACTION.

Obs. — Accord and satisfaction must be specially pleaded. R. G. T. T. 1853, r. 8. Accord is an agreement between the contending parties to give and accept something in satisfaction and discharge of the cause of action. Bac. Abr. tit. Accord and Satisfaction. There cannot be a good accord and satisfaction of the whole of a liquidated debt by payment by the debtor of a part, unless there be a good consideration for giving up the remainder; Evans *v.* Powis, 1 Ex. 601, 606; Cooper *v.* Parker, 14 C. B. 118; 15 C. B. 822; Fitch *v.* Sutton, 5 East, 230; [Seymour *v.* Minturn, 17 John. 169; Geiser *v.* Kershner, 4 Gill & J. 305; Hardey *v.* Coe, 5 Gill, 189; Brooks *v.* White, 2 Met. 283; Wheeler *v.* Wheeler, 11 Vt. 60; Bailey *v.* Day, 26 Maine, 88; Lee *v.* Oppenheimer, 32 Maine, 254; Eve *v.* Mosely, 2 Strobh. 203; Walen *v.* Kirby, 99 Mass. 1, 3; Twitchell *v.* Shaw, 10 Cush. 48; Tuttle *v.* Tuttle, 12 Met. 554; Warren *v* Skinner, 20 Conn. 557; Hays *v.* Davidson, 70 N. Car. 573; Bryan *v.* Foy, 69 N. Car. 45; McKenzie *v.* Culbreath, 66 N. Car. 534; Mitchell *v.* Sawyer, 71 N. Car. 70; Bliss *v.* Swartz, 7 Lansing, 186; Miller *v.* Holden, 18 Vt. 337; Fellows *v.* Stevens, 24 Wend. 294; Vance *v.* Lukenbill, 9 B. Mon. 249; Ryan *v.* Ward, 48 N. Y. 204; Clifton *v.* Litchfield, 106 Mass. 34; 1 Chitty Contr. (11th Am. ed.) 62, 63;] but this is different where there is an unliquidated demand of pecuniary damages. See notes to Cumber *v.* Wane. 1 S. L. C.; [Wilkinson *v.* Byers, 1 Ad. & E. 106; Sibree *v.* Tripp, 15 M. & W. 23; McDaniels *v.* Lapham, 21 Vt. 223; Donohue *v.* Woodbury, 6 Cush. 148, 150, 151; Palmerton *v.* Huxton, 4 Denio, 166; Hiern *v.* Carren, 11 Sm. & M. 361; Stockton *v.* Frey, 4 Gill, 406.] An agreement may be accepted in satisfaction of an existing cause of action; Flockton *v.* Hall, 14 Q. B. 380; 16 Q. B. 1039; but the *agreement* itself must be accepted in satisfaction and not only the performance of it. Evans *v.* Powis, 1 Ex. 601; [2 Chitty Contr. (11th Am. ed.) 1123, 1124, and notes; Babcock *v.* Hawkins, 23 Vt. 561; Goodrich *v.* Stanley, 24 Conn. 613; Bigelow *v.* Baldwin, 1 Gray, 254; Woodward *v.* Miles, 24 N. H. 289; Perkins *v.* Lockwood, 100 Mass. 249; Billings *v.* Vanderbeck, 23 Barb. 546.] Upon a mere simple contract a *negotiable* security may be a satisfaction of a claim for a larger amount. Sibree *v.* Tripp, 15 M. & W. 23; [Conkling *v.* King, 10 Barb. 372; Sanders *v.* Branch Bank, 13 Ala. 353; Brooks *v.* White, 2 Met. 233; Boyd *v.* Hitchcock, 20 John. 76; Lee *v.* Oppenheimer, 32 Maine, 353; Bliss *v.* Swartz, 7 Lansing, 186.] So also the payment of a smaller sum than due, and abandoning a plea of infancy, whether true or

(*o*) By Reg. Gen. T. T. 1853, r. 21, "in every case in which the defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of parliament, he must insert in the margin of the plea the words 'by statute,' together with the year or years of the reign in which the act or acts of parliament upon which he relies for that purpose were passed, and also the chapter and sections of each of such acts, and shall specify whether such acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the *nisi prius* record." The plea itself so pleaded in its effects and consequences remains altogether unaltered by this rule. Bartholomew *v.* Carter, 3 M. & G. 125. In Edwards *v.* Hodges, 15 C. B. 477, the court allowed the defendant to amend a plea of not guilty by statute by inserting in the margin statutes necessary to justify the trespass complained of after verdict for the defendant, and a rule *nisi* to set it aside. Upon affidavit that the plaintiff cannot discover the statute, the court will order the defendant to point it out, or else that the words "by statute" be struck out of the margin of the plea. Coy *v.* Lord Forrester, 8 M. & W. 313; S. C. 9 Dowl. 770.

false. Cooper *v.* Parker, *ubi supra;* [2 Chitty Contr. (11th Am. ed.) 1129.] Accord and satisfaction by a stranger on behalf of the defendant and adopted by him will be a bar. Belshaw *v.* Bush, 11 C. B. 191. See Alexander *v.* Strong, 9 M. & W. 733; Jones *v.* Broadhurst, 9 C. B. 193; Randall *v.* Moon, 12 C. B. 261; [Lewis *v.* Jones, 4 B. & C. 506, 514; Brooks *v.* White, 2 Met. 283; Boyd *v.* Hitchcock, 20 John. 76; Kellogg *v.* Richards, 14 Wend. 116; Sanders *v.* Branch Bank, 13 Ala. 353.] So, also, accord and satisfaction to one of several creditors is good; Wallace *v.* Kelsall, 7 M. & W. 264; [Smith *v.* Lovell, 10 C. B. 6, 23; Homer *v.* Wood, 11 Cush. 62; Clark *v.* Dinsmore, 5 N. H. 136; Anderson *v.* Highland Turnp. Co. 16 John. 87;] and from one of several debtors. Nicholson *v.* Revill, 4 Ad. & E. 675.

An accord with satisfaction generally is a good plea in all actions where damages only are to be recovered. Bac. Abr. Accord and Satisfaction, B.; Cooper *v.* Parker, *ubi supra;* Walters *v.* Smith, 2 B. & Ad. 889; Wilkinson *v.* Byers, 1 Ad. & E. 106.

Accord, without performance or satisfaction, is no answer to a vested right of action; Crisp *v.* Griffiths, 2 Cr., M. & R. 649; Allies *v.* Probyn, 2 Cr., M. & R. 408; Bayley *v.* Homan, 3 Bing. N. C. 915; Phillips *v.* Aflalo, 4 M. & G. 856; [2 Chitty Contr. (11th Am. ed.) 1122, note (*n*) and cases cited;] still less is an *agreement* for an accord. Smart *v.* Chell, 7 Dowl. 781. In Gifford *v.* Whittaker, 6 Q. B. 249, a plea to an *indebitatus* count, which stated that plaintiff was to pay himself out of some of defendant's moneys which he was to receive, and that through his own default he received nothing, was held bad as being neither an accord nor a satisfaction. See another instance, Griffiths *v.* Owen, 13 M. & W. 58.

But an agreement subsequent to and inconsistent with the agreement declared on is a good defence, if made *before breach* of the latter; Rippingale *v.* Lloyd, 5 B. & Ad. 742; Taylor *v.* Hillary, 1 Cr., M. & R. 741; S. C. 7 C. & P. 30: where see form of plea; and see, also, *post*, title "Rescinded Contract;" provided such subsequent agreement be made on a new consideration. Collingburne *v.* Mantell, 5 M. & W. 289.

Accord and satisfaction after *covenant* broken is a good plea; Blake's case, 6 Co. 44; but not before breach. May *v.* Taylor, 6 M. & G. 262, note (*a*).

As to pleading accord and satisfaction to a *specialty* demand, see Preston *v.* Christman, 3 Wils. 86; Kaye *v.* Waghorn, 1 Taunt. 428; Drake *v.* Mitchell, 3 East, 251; Scholey *v.* Mearns, 7 East, 147; Worthington *v.* Wigley, 3 Bing. N. C. 454. See *post*, tit. "Payment." To a *specialty* claim defendant cannot plead a *parol* agreement by which the deed was abandoned. West *v.* Blakeway, 2 M. & G. 729.

See, in general, [2 Chitty Contr. (11th Am. ed.) 1102, 1103, 1122 *et seq.;*] Cumber *v.* Wane, 1 S. L. Ca. 288.

1. *Plea of Accord and Satisfaction after Breach.* (*p*)

That he delivered to the plaintiff, and the plaintiff accepted (*q*) and received n the defendant* [*here mention the thing given in satisfaction*] (*r*) in satision† and discharge of the plaintiff's claim.

[1*a*. *Form of Answer of Accord.*

nd the defendant comes and says he delivered to the plaintiff one wagon,

) If the accord and satisfaction were writ, the plea should be altered accord-. See *post*, "Payment after Action." tt *v.* Swinburne, 8 Ad. & E. 573.]

The acceptance, as an act of the will, e party receiving, must be clearly l, the jury cannot *infer* it from the of business between the plaintiff and ant. Hardman *v.* Bellhouse, 9 M. & .

"It is not required that the chattels should be of equal value" (with the debt), "for the party receiving it is always taken to be the best judge of that in matters of uncertain value. Andrew *v.* Boughey, Dyer, 72 *a;*" per Lord Denman C. J. in Thompson *v.* Percival, 5 B. & Ad. 932; [Douglass *v.* White, 3 Barb. Ch. 621; Watkinson *v.* Inglesby, 5 John. 386; Eaton *v.* Lincoln, 13 Mass. 424; Dewey J. in Brooks *v.* White, 2 Met. 285, 286.]

which the plaintiff received in full satisfaction of the note mentioned in the plaintiff's writ.]

2. *That a Bond has been taken in Satisfaction.* (*s*)

As in last form to the asterisk.] — The bond of the defendant in the penal sum of £——, conditioned for the payment by the defendant to the plaintiff of £——, and interest in satisfaction [*&c. as in last form from the* †].

3. *Plea to a Note, Satisfaction by Work, Goods sold, and Money lent, under an Agreement to that effect.*

That after the said note became due, by agreement between the plaintiff and the defendant, the defendant did work, and provided materials for the same for the plaintiff; and sold and delivered goods and chattels to the plaintiff, and lent moneys to him in satisfaction and discharge of the principal and interest due on the said note, and the interest to become due until the same should be paid off and satisfied; and the plaintiff accepted such work and materials, goods and chattels, and moneys lent, in such satisfaction and discharge as aforesaid. (*t*)

4. *Plea to Money paid for Defendant's use, that he became liable thereto as Defendant's Surety, and that he deposited Goods with the Plaintiff with a Power of Sale to cover his Liability, and that Plaintiff sold the same in Satisfaction of the Demand.* (*u*)

As to the sum of £——, parcel, &c. the defendant says that the plaintiff, before this suit, became surety for the defendant, at his request, to E. F. for £——; and that the defendant deposited with the plaintiff certain goods of the value of £——, and it was agreed between them, that, if the plaintiff should pay the said sum of £—— for the defendant, he the plaintiff should sell such goods, and apply the proceeds in satisfaction and discharge of the money he should have so paid for the defendant; and the plaintiff as such surety paid the same for the defendant, and sold the said goods and applied the proceeds

(*s*) *Post*, "Deed." This defence must be specially pleaded where the bond is given *after* the original debt has been contracted. See Weston *v.* Foster, 2 Bing. N. C. 693. *Aliter*, where the bond is given at the time such debt accrues; in the latter instance, the specialty security excludes the implied promise, and the general issue suffices. Ib.; Mathew *v.* Blackmore, 1 H. & N. 762. As to merger of a debt in a higher security, see 3 M. & G. 213; Yates *v.* Aston, 4 Q. B. 182. When promissory note not merged in subsequent warrant of attorney, Bell *v.* Banks, 3 M. & G. 264. See the pleadings and law where a bill or note has been taken in *satisfaction* of the debt. Sard *v.* Rhodes, 1 M. & W. 153. The plaintiff could not reply that the bond or bill was unpaid. *Post*, "Bill taken."

(*t*) [Plea of accord and satisfaction by delivering goods; Hall *v.* Poyser, 13 M. & W. 600; by a set-off of mutual debts; Wallace *v.* Kelsall, 7 M. & W. 264; Learmouth *v.* Grandine, 4 M. & W. 658; by delivering goods to a third party for the plaintiff; Stead *v.* Poyer, 1 C. B. 782; by an agreement to refer certain matters to arbitration and performance of the agreement; Williams *v.* London Commercial Exchange Co. 10 Ex. 569; by the settlement of a former action for the same cause on payment of the debt and costs; Power *v.* Butcher, 10 B. & C. 329; Ross *v.* Jaques, 8 M. & W. 135; by paying a smaller sum and withdrawing a defence to an action and paying costs; Cook *v.* Parker, 14 C. B. 118; 15 C. B. 822; by delivering possession of a house and a payment of money; Lavery *v.* Turley, 6 H. N. 239; by delivery of other negotiable instruments, in an action on a bill of exchange James *v.* Williams, 13 M. & W. 828; by acceptance of other goods in place of those contracted for; Gabriel *v.* Dresser, 15 C. B. 622; to an action for breach of condition bond; Field *v.* Robins, 8 Ad. & E. 90.]

(*u*) See a similar plea, Ross *v.* Mears, C. B. 227. See, also, a form by delivery possession of a house and paying money, Lavery *v.* Turley, 6 H. & N. 239.

thereof received by him upon such sale in satisfaction and discharge of the said sum of £——, parcel, &c.

5. *Plea of a Guaranty of a Third Person, given in Satisfaction of the Debt sued on.*

Pope *v.* Andrews, 9 C. & P. 564; and see Alexander *v.* Strong, 9 M. & W. 734; 2 Dowl. N. S. 256.

6. *Plea that the Defendant was indebted to Plaintiff and a Third Person, and that he gave them jointly a Warrant of Attorney for their Debts in full Satisfaction.*

That whilst the defendant was indebted to the plaintiff as alleged, and before this suit, the defendant was also indebted to one T. W., and the defendant then, at the request of the plaintiff and the said T. W., signed, *sealed*, and as his *act and deed* delivered to them, a warrant of attorney to confess judgment, bearing date on [*&c.*], directed to certain persons therein named, as and then being attorneys of her majesty's court of queen's bench at Westminster respectively, or to any other attorney of the same court, and thereby empowered them [*&c. set out the warrant of attorney and the defeasance*], and the defendant then, at the request of the plaintiff and T. W., delivered to them, and they then accepted and received of and from the defendant, the said warrant of attorney in full satisfaction and discharge of the moneys then owing to them, and of all causes of action in respect thereof.

7. *Plea of Satisfaction to one of three Plaintiffs.*

Wallace *v.* Kelsall, 7 M. & W. 264. (*x*)

8. *Plea that Plaintiff and E. F. were indebted to Defendant, and Agreement that such Debt should be set off against the Debt sued for, Defendant paying the Difference.*

That after the plaintiff's claim became due, and before this suit, one E. F. and the plaintiff were indebted to the defendant in £——, and it was agreed by and between the defendant, E. F., and the plaintiff, that the defendant should abandon all claim against the plaintiff and E. F. for the said debt so due as aforesaid, and that the same should be set off against an equal amount of the debt due from the defendant to the plaintiff in the declaration mentioned, and that the defendant should pay to the plaintiff the difference, and that the causes of action in the declaration mentioned should thereupon be satisfied and discharged; and the defendant in pursuance of the said agreement abandoned all claim for the said debt against the said plaintiff and the said E. F. or either of them; and the said respective debts were set off against each other as aforesaid, and the defendant paid to the plaintiff, and the plaintiff received from him the said difference upon the terms aforesaid; and all claims and causes of action in the declaration mentioned were thereupon satisfied and discharged.

(*x*) It was held in that case that authority from the other plaintiffs to make the settlement need not be averred or proved.

9. *That Plaintiff was indebted to one T. J., and Agreement that Defendant should pay T. J. the Debt sued for, Plaintiff's Debt to T. J. and Defendant's Debt to Plaintiff being respectively extinguished.* (*y*)

That the plaintiff, after the cause of action herein pleaded to had accrued, and before this suit, was indebted to T. J., and T. J. was indebted to the plaintiff, and thereupon it was agreed by and between the plaintiff, the defendant, and the said T. J., that an account should be stated by and between the said T. J. and the plaintiff, and that the plaintiff should be accredited in such account with the sum due from the defendant to the plaintiff herein pleaded to, and should be allowed the same in such account as though the same were a debt due from the said T. J. to the plaintiff; and that the said T. J. should accept the defendant instead of the plaintiff as his debtor, and that all claims and causes of action of the plaintiff against the defendant in respect thereof should be thereby discharged and satisfied; and that as to such sum so to be allowed in such accounts, all claims and causes of action of the said T. J. against the plaintiff in respect thereof should be thereby discharged and satisfied; and in pursuance of such agreement an account was had and stated by and between the said T. J. and the plaintiff as aforesaid, and the plaintiff was accredited in such account as aforesaid, and the plaintiff was allowed by the said T. J. the amount of the sum due from the defendant to the plaintiff as aforesaid, as though the same had been a debt due and owing from the said T. J. to the plaintiff, and the said account was then finally stated and settled in pursuance of the said agreement, and the said T. J. then accepted the defendant as his debtor on the terms aforesaid, and the plaintiff then accepted such premises in full satisfaction and discharge of the causes of action herein pleaded to. (*z*)

10. *Plea that Defendant was indebted to one F. F., and Agreement that Plaintiff should accept F. F. as his Debtor, in lieu of Defendant.* (*a*)

That after the plaintiff's claim became due, and before this suit, one F. F. was indebted to the defendant in £——; and it was then agreed by and between the plaintiff, the defendant, and F. F., that the defendant should relin-

(*y*) In Cochrane *v.* Green, 9 C. B. N. S. 448, a similar plea was held bad for not showing that the plaintiff agreed to discharge the defendant.

(*z*) Where a plea averred a set-off on account of a debt due from plaintiff to defendant, and then alleged that an account and settlement of that debt and of the debts in the declaration was accepted by plaintiff in accord and satisfaction, it was held sufficient in the replication to allege merely that plaintiff was not indebted in manner and form, &c. Learmouth *v.* Grandine, 4 M. & W. 658.

(*a*) See the cases, [2 Chitty Contr. (11th Am. ed.) 912–914, 1371–1381, and notes; Griswold *v.* Griswold, 7 Lansing, 72; Helms *v.* Kearns, 40 Ind. 124.] Although the general rule of law is that a debt cannot be assigned, yet where there is a defined and ascertained debt due from A. to B., and a debt of the same or a larger amount due from C. to A., and it is agreed between them that C. shall be B.'s debtor instead of A.; B. may maintain an action against C. Fairlie *v.* Denton, 8 B. & C. 395. See per Buller J. Tatlock *v.* Harris, 3 T. R. 180. See Crowfoot *v.* Gurney, 9 Bing. 372; and Liversidge *v.* Broadbelt, 4 H. & N. 603. But the debt must be extinguished so as to amount to a satisfaction of it. Cuxon *v.* Chadley, 3 B. & C. 591. The acceptance by a creditor of the separate liability of one of several persons jointly liable is a sufficient consideration for the discharge of the others from their joint liability, and may be pleaded in accord and satisfaction. Lyth *v.* Ault, 7 Ex. 669; 21 L. J. Ex. 217, where see form. See Cochrane *v.* Green, 9 C. B. N. S. 448; Pott *v.* Lomas, 6 H. & N. 529.

quish his said claim against F. F. for the said £——, and that F. F. should pay the same to the plaintiff instead of the defendant, and that the plaintiff should accept F. F. as his debtor in lieu of the defendant, and in satisfaction and discharge of the claim in the declaration mentioned; and the defendant then relinquished his claim against F. F., and the plaintiff accepted F. F. as his debtor, and F. F. then agreed to become and became debtor to the plaintiff according to the said agreement.

11. *Plea that the Contract was made with an Agent of the Plaintiff against whom Defendant had a Set-off, and that Defendant credited the Agent with the Amount of the Cause of Action, which Plaintiff accepted in Satisfaction.*

Stewart *v.* Aberdein, 4 M. & W. 211.

[12. *Plea of Accord and Satisfaction by giving a Bill of Exchange.*

That he satisfied and discharged the plaintiff's claim by indorsing and delivering to the plaintiff a bill of exchange, dated the —— day of ——, A. D. ——, drawn by the defendant on [and accepted by] J. K., whereby the defendant required the said J. K. to pay to the defendant or order $——, —— months after date, which said bill the defendant so indorsed and delivered to the plaintiff, and the plaintiff accepted and received in satisfaction and discharge of the plaintiff's claim.

13. *Plea of Accord and Satisfaction by Indorsing to the Plaintiff a Promissory Note.*

That he satisfied and discharged the plaintiff's claim by indorsing and delivering to the plaintiff a promissory note, dated the —— day of ——, A. D. ——, made by J. K., whereby the said J. K. promised to pay to the defendant or order $——, —— months after date, which said note the defendant so indorsed and delivered to the plaintiff, and the plaintiff accepted and received in satisfaction and discharge of the plaintiff's claim.

14. *Plea of Accord and Satisfaction by Payment of a Smaller Sum by a Third Party.*

That the plaintiff's claim was satisfied and discharged by J. K. paying to the plaintiff at the defendant's request, out of the proper moneys of the said J. K., a sum of money which, by agreement between him and the plaintiff and the defendant, the said J. K. so paid, and the plaintiff accepted and received in satisfaction of the plaintiff's claim.]

REPLICATION. (*b*)

(*b*) By taking issue on the plea, the accord and satisfaction are denied. See Baintidge *v.* Lax, 9 Q. B. 819.

ACCOUNT.

Obs. — The defendant may plead in bar that he never was bailiff or receiver; that he has fully accounted; Baxter *v.* Hozier, 5 Bing. N. C. 288; or anything that shows he never was accountable. Rickets *v.* Loftus, 14 Q. B. 482; Gorely *v.* Gorely, 1 H. & N. 144; [Wheeler *v.* Horne, Willes, 208; Beer *v.* Beer, 12 C. B. 60.] But he cannot pay money into court. Bull. N. P. 128. The C. L. P. Act, 1852, s. 70, applies only where the money is paid in in satisfaction of the cause of action. Bishop of London *v.* M'Niel, 9 Ex. 490. Actions of account must be commenced and sued within six years. 19 & 20 Vict. c. 97, s. 9; forms, Beer *v.* Beer, 12 C. B. 60; Baxter *v.* Hozier, 5 Bing. N. C. 288; see *ante*, 38.

ACCOUNT STATED.

Never indebted, to a count upon an account stated, denies that the parties came to an account, and that the defendant was *indebted* to the plaintiff thereon; Jacobs *v.* Fisher, 1 C. B. 178; see Wilson *v.* Wilson, 14 C. B. 616; *ante*, 283; the defendant may therefore prove on this plea, that he was not in reality indebted, because there were errors in the account; Thomas *v.* Hawkes, 8 M. & W. 140; or because the items were such that he was not primarily, but only collaterally, liable; Gould *v.* Coombs, 1 C. B. 543; or that the cause of action arose out of unadjusted partnership transactions: Worrall *v.* Grayson, 1 M. & W. 166; or that there never was any consideration; Clarke *v.* Webb, 1 Cr., M. & R. 29; French *v.* French, 2 M. & G. 644; but not fraud or illegality of consideration, nor that a *subsequent* account was in his favor. Fidget *v.* Penny, 1 Cr., M. & R. 108. In that case an account was stated between the parties, and the balance was in favor of the plaintiff, and subsequently another account was stated, and the balance was in favor of the defendant. The plaintiff afterwards sued upon the first account stated, and the defendant pleaded non assumpsit. It was held that under this plea he could not avail himself of the defence on the second account stated. Either payment or set-off would be the proper defence under such circumstances. See Sinclair *v.* Baggaley, 4 M. & W. 314. On the same principle, the defendant cannot, under the general issue, give in evidence an admission by the plaintiff before action brought that the balance of accounts was in favor of the defendant. Evans *v.* Downes, 2 Jur. 1066, C. P. 1838.

Where the particulars are not framed so as to show that the plaintiff proceeds on an independent cause of action in the account stated, *ante*, 35, note (*l*), it is usual to plead the special matter of defence only to the count on the original debt, and to plead merely never indebted to the count on the account stated; and it seems that this is sufficient; for the plaintiff can in such case prove no *second* or additional debt on the latter count, and the defendant has answered *the one debt* proved. See Eicke *v.* Nokes, 1 M. & R. 359; 4 M. & Sc. 585. Where, however, there has been really an account stated between the plaintiff and the defendant, (as to which see *ante*, 32, Obs. 8,) and the particulars are so framed as to enable the plaintiff to recover on it independently of the other claims, as to which see *ante*, 35, note (*l*), it would be safer to plead any special defence which may exist to the items forming the consideration for the account stated specially to that count. See Arthur *v.* Dartch, 9 Jur. 118, Ex.; Mee *v.* Tomlinson, 4 Ad. & E. 262; Rawlinson *v.* Shand, 5 M. & W. 468; Foot *v.* Baker, 5 M. & G. 335, note (*b*); Rayner *v.* Wright, 3 Q. B. 922.

See form of plea that an account was stated of and concerning a specialty debt not then due; Hopkins *v.* Logan, 7 Dowl. 361; but *qu.* whether such a plea does not amount to never indebted? And see Lord Falmouth *v.* Thomas, 1 Cr. & M. 89.

See *ante*, 33, Obs. 8.

ACTION PENDING. See *ante*, 273.

ADMINISTRATORS. See "Executors," *post*.

ADULTERY. See "Sale of Goods," *post*.

AGENT.

Obs. — See "Attorneys," "Sale of Goods," "Work," &c. In all actions on simple contract, non assumpsit, or a plea traversing the contract or agreement alleged, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law; *e. g.* in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. Reg. Gen. T. T. 1853, r. 6. In an action against an agent for not accounting, the general issue would deny that the defendant ever was such an agent as alleged, also the retainer and the promise, but would admit the request to account, and the neglect to do so; so in an action for not using due care in selling, it would deny the receipt of the goods for the purpose alleged, the retainer, and the promise, but not the sale, or the want of due care in selling. In an action by an agent on the indebitatus counts, never indebted denies the retainer, contract, the work done, money expended, &c. and the reasonableness of the charges, and that the work was done so as to be of any use. Cousins *v.* Paddon, 2 Cr., M. & R. 547; Bracey *v.* Carter, 12 Ad. & E. 373. See *ante*, 282. To declaration against factor for selling without orders; plea that sale was made after notice to reimburse defendant for advances, no defence. Smart *v.* Sanders, 3 C. B. 380, 403; 5 C. B. 895. [But the cases do not agree upon this. See Parker *v.* Brancher, 22 Pick. 40; Frothingham *v.* Everton, 12 N. H. 239; Porter *v.* Patterson, 15 Penn. St. 229; Marfield *v.* Goodhue, 3 Comst. 62; Blot *v.* Boiceau, 3 Comst. 87; Weed *v.* Adams, 37 Conn. 350; Field *v.* Farrington, 10 Wallace, 141. A factor who makes advances on goods consigned to him, may maintain an action, before the goods are sold, to recover the money advanced, unless there is an agreement to the contrary. Upham *v.* Lafavour, 11 Met. 174.] Broker is liable for loss caused by fraud of undisclosed principal. Royal Exchange Assurance Corporation *v.* Moore, 11 W. R. 592. [Secret limitation of authority. See Baines *v.* Ewing, L. R. 1 Ex. 320.]

See the forms of declaration, *ante*, 38. The following forms may suffice on this head. See other pleas, *post*, "Master and Servant." (*c*)

1. *Pleas* (*to Form* 2, *ante*, 39). — 1*st. That Defendant did not sell the Goods.*

2*d. That he was not required to account.*

3*d. That he rendered an Account of the Sale.*

That he did not sell the goods in the declaration mentioned, as alleged.

(*c*) Where a defendant on the face of a written agreement has contracted as principal, he may, by an equitable plea to an action against him, show that he signed as agent for a third party, and that the plaintiff verbally agreed that he should not be responsible as a principal. Wake *v.* Harrop, 6 H. & N. 768; 1 H. & C. 202; where see the form of plea. [Promoters of non-existing company are personally liable. Kelner *v.* Baxter, L. R. 2 C. P. 174; Scott *v.* Ebury, L. R. 2 C. P. 255; Riley *v.* Pakington, L. R. 2 C. P. 536.]

That the plaintiff did not request the defendant to render to the plaintiff an account of the sale or of the moneys arising therefrom, or to deliver up to the plaintiff such of the goods as remained unsold, as alleged.

That after the sale of the said goods in that count mentioned, and before this suit, he, upon request, rendered to the plaintiff a true and just account of the sale of the goods, and of the moneys arising therefrom, and delivered to the plaintiff such of the goods as remained unsold [*of course the traverse will depend on the form of the allegation denied*].

2. *Pleas* (*to Form* 3, *ante*, 40) *that Defendant used due Care in selling.*

That he did use due care and diligence in endeavoring to sell and selling the said [sugar] for the plaintiff.

3. *Pleas* (*to Form* 4, *ante*, 40).—1*st. That Plaintiff did not order Defendant to sell at the Price mentioned.*
2*d. That Defendant could not obtain the Price.*
3*d. That Defendant sold Part at such Price.*
4*th. That Defendant used due Care in trying to obtain the Price.*
5*th. That Plaintiff consented to delay the Sale, and then allowed Defendant to sell for the Best Price.*

That the plaintiff did not order or direct the defendant as alleged.

That he could not, by using due care and diligence, have obtained for the said sugar a higher price than the same was sold at.

So far as the same relates to part, to wit, forty-five hogsheads of the sugar therein mentioned, and the causes of action in respect thereof, the defendant says that he did, within a reasonable time after he was so ordered and directed, sell and dispose thereof at the price at which he was so ordered and directed to sell, in obedience to such order and direction.

That he did use due care and diligence in obeying the said order and direction.

That after he was so ordered and directed as in that count mentioned, and before he was able, using due care and diligence in that behalf, to obey such order and direction, he, with the assent and by the authority of the plaintiff, abstained from selling the same sugar, and then, and before this suit, with the assent and by the authority and command of the plaintiff, sold and disposed thereof at the best price which he, using due care and diligence in that behalf, could then obtain for the same.

4. *Plea to a Count for Money had, &c. that the Defendant received it as Plaintiff's Agent, and that it was stolen from him.*

That the said money was received by him the defendant as the agent and servant of the plaintiff, and for his use and by his permission to be kept by the defendant as such agent and servant in his possession and custody for the plaintiff, until the defendant could pay over the same to the plaintiff; and the defendant further saith, that after he had so received the said money as aforesaid, and before the same or any part thereof was demanded of him by the

plaintiff, and whilst the sum was so in his the defendant's possession and custody as aforesaid, and before the defendant could or might pay over the same to the plaintiff, and before any default in that behalf on the part of the defendant, and before this suit, the said money was unlawfully and feloniously taken, stolen, and carried away, by persons to him unknown, from the defendant as such agent and servant as aforesaid, without his default, and although he then took due and reasonable and proper care of the same.

ALIEN.

Obs. — The position of aliens in this country is very much improved by 7 & 8 Vict. c. 66. By s. 4, alien friends may hold every species of personal property except chattels real, "with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom." They can become naturalized, so as to "enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy and transmit," with certain exceptions. S. 6.

An alien friend may enter into contracts, and maintain actions thereon. Bac. Abr. Alien, D.; Co. Litt. 1296. But an action will not lie either by or in favor of an alien enemy; Brandon *v.* Nesbitt, 6 T. R. 23; and no contract made with an alien enemy in time of war can be enforced in a British court of judicature, although the plaintiff do not sue until the return of peace, and although the plaintiff be a British-born subject resident in the enemy's country; Willison *v.* Patteson, 7 Taunt. 439; and an alien, carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, is considered as an alien enemy, and as such is disabled from suing. Albretcht *v.* Sussman, 2 V. & B. 323. So a British subject voluntarily domiciled in an enemy's country cannot sue in British courts; M'Connell *v.* Hector, 3 B. & P. 113; even though he be naturalized in a neutral state; O'Mealey *v.* Wilson, 1 Camp. 482; but this does not appear to be so unless it be shown that he *adheres* to the enemy. Roberts *v.* Hardy, 3 M. & S. 533. A natural-born subject, domiciled in a friendly foreign country, may trade with an enemy's country. Bell *v.* Reid, 1 M. & S. 726; Houriet *v.* Morris, 3 Camp. 303.

Where the contract is *made* with an *alien enemy*, it is thereby illegal, and the plea should be pleaded in *bar;* but if the cause of action has accrued before the plaintiff became an alien *enemy*, the right of action being only suspended, the plea should be in *abatement*. Flindt *v.* Waters, 15 East, 260. See Harman *v.* Kingston, 3 Camp. 153.

If the defendant is under terms to plead, a plea of alien enemy will not be allowed. Shepeler *v.* Durant, 14 C. B. 582.

The wife of an alien enemy cannot maintain an action in her own name on a contract made either before or during coverture. De Wahl *v.* Braune, 1 H. & N. 178.

If real estates are devised to British-born subjects upon trust for the benefit of aliens, the trust will in equity be executed for the benefit of the crown. Barrow *v.* Wadkin, 24 Beav. 327.

Plea in Abatement, that the Plaintiff is an Alien Enemy. (*d*)

Commencement as ante, 16.] That the plaintiff is an alien enemy, born in the kingdom of ——, of alien parents, and was not nor is a subject of our lady the queen by naturalization, denization, or otherwise, and is residing in this kingdom without the license, safe conduct, or permission of our said lady the queen. [*Conclude as ante*, 17.]

(*d*) See form, Alcenius *v.* Nygren, 4 El. & B. 217; and see Casseres *v.* Bell, 8 T. R. 1. If the plaintiff became an enemy *after* commencement of the suit, the plea should be pleaded to the further maintenance of the action. See Alcenius *v.* Nygren, *ubi supra;* Le Bret *v.* Papillon, 4 East, 502.

ALTERATION OF A WRITTEN CONTRACT.

OBS. — Where the action is founded on a written document, which is set out in the declaration, the general issue, or any plea denying the making of the document in question, will let in the defence that it has been rendered unavailing by any alteration which avoids it under the stamp laws. Mason *v.* Bradley, 11 M. & W. 590. So it may be shown under such a plea that the instrument has been rendered void at common law (without reference to the stamp acts) by any alteration which causes a *variance* between the instrument produced in evidence and that described in the declaration, for such a plea says in effect that the defendant did not execute *the* document declared on; Cook *v.* Coxwell, 2 Cr., M. & R. 291; but if the plaintiff declare upon the document in its unaltered form (or even in its altered form, provided the alteration were not such as to avoid it under the stamp laws; Parry *v.* Nicholson, 13 M. & W. 778; and the defendant wishes to contend that the alteration, whether previous or subsequent to execution, vitiated it *at common law*, then he must plead the alteration specially. Hemming *v.* Trenery, 7 Ad. & E. 114; Davidson *v.* Cooper, 13 M. & W. 342; Croockewit *v.* Fletcher, 1 H. & N. 893. See form, *post*, "Bills."

The alteration of a written contract in a material or immaterial part by either of the parties to it without the consent of the others; Pigot's case, 11 Rep. 27; Shepherd's Touchstone, 69; or by a stranger in a material part, Ib., renders it void. Davidson *v.* Cooper, 11 M. & W. 778; 13 Ib. 343; Master *v.* Miller, 4 T. R. 320; 5 Ib. 367; 1 S. L. C. 776. As to what alterations by strangers vitiate the writing, see Waugh *v.* Bussell, 5 Taunt. 707; Prew *v.* Burton, 1 Cr. & M. 533. As to the alteration of a charter-party, Croockewit *v.* Fletcher, 1 H. & N. 893. As to alteration of bills of exchange, see *post*, "Bills," Obs. [It has recently been held in the court of queen's bench, that a promissory note which did not express any time for payment, but to which, while it was in the possession of the payee, he had added, without the assent of the maker, the words "on demand," was not thereby vitiated; inasmuch as the alteration only expressed the legal effect of the note as originally framed, and was therefore immaterial. Aldous *v.* Cornwell, L. R. 3 Q. B. 573. This decision is in harmony with the general current of authority. Falmouth *v.* Roberts, 9 M. & W. 469; Nichols *v.* Johnson, 10 Conn. 192; Hunt *v.* Adams, 6 Mass. 519; Smith *v.* Crooker, 5 Mass. 538; Hatch *v.* Hatch, 9 Mass. 307; Granite Railway Co. *v.* Bacon, 15 Pick. 239; Langdon *v.* Paul, 20 Vt. 217; Adams *v.* Frye, 3 Met. 103; Pequawket Bridge *v.* Mather, 8 N. H. 139; Blair *v.* Bank of Tennessee, 11 Humph. 84; Thornton *v.* Appleton, 29 Maine, 298; Bassett *v.* Bassett, 55 Maine, 125; Pope *v.* Chaffee, 14 Rich. Eq. 69; Skelton *v.* Deering, 10 B. Mon. 405; Carr *v.* Welch, 46 Ill. 88; Burnham *v.* Ayer, 35 N. H. 351; Ames *v.* Colburn, 11 Vt. 390. As to discharge of guarantor by alteration of guaranty, see Bank of Hindostan *v.* Smith, 36 L. J. C. P. 241. It has been held in several cases in the United States, that an alteration by a stranger, though material, if made without the procurement or connivance of either party, will not avoid the instrument. Nichols *v.* Johnson, 10 Conn. 192; Boyd *v.* McConnell, 10 Humph. 68; Lee *v.* Alexander, 9 B. Mon. 25; Newell *v.* Mayberry, 3 Leigh, 250; Wheelock *v.* Freeman, 13 Pick. 165; Mills *v.* Starr, 2 Bailey, 359; Rees *v.* Overbaugh, 6 Cowen, 746; Medlin *v.* Platte County, 8 Misso. 235; Boston *v.* Benson, 12 Cush. 61; Bigelow *v.* Stephen, 35 Vt. 521. And so, even if the alteration is made with the consent of the party claiming under the instrument, provided there be no intent to defraud; Thornton *v.* Appleton, 29 Maine, 298; Adams *v.* Frye, 3 Met. 103; Smith *v.* Dunham, 8 Pick. 246; Willard *v.* Clark, 7 Met. 435: Rollins *v.* Bartlett, 20 Maine, 319; Marshall *v.* Gangler, 10 Serg. & R. 164; and provided, also, that the original contents or tenor of the instrument can be ascertained; Waring *v.* Smyth, Barb. Ch. 119; Lee *v.* Alexander, 9 B. Mon. 25; or can be proved. Boyd *v.* McConnell, 10 Humph. 68. But where a party, claiming under a written instrument, wilfully alters it in a material part without the consent of the other party, he cannot afterwards avail himself of it. Babb *v.* Clemson, 3 Serg. & R. 419; Richmond Manuf. Co. *v.* Davis, 7 Blackf. 412; Boston

Obs. Benson, 12 Cush. 61; Burnham *v.* Ayer, 35 N. H. 351; Davis *v.* Coleman, 7 Ired. (Law) 424; Mills *v.* Starr, 2 Bailey, 359; Newell *v.* Mayberry, 2 Leigh, 250; Nunnery *v.* Colton, 1 Hawks, 222; Williams *v.* Starr, 5 Wisc. 534.]

If the alteration is made by mistake or accident; Raper *v.* Birbeck, 15 East, 17; Wilkinson *v.* Johnson, 3 B. & C. 428; Novelli *v.* Rossi, 2 B. & Ad. 757; see Baines *v.* Woodfall, 6 C. B. N. S. 657; or if the seal had been torn from a deed by a child; Argoll *v.* Cheney, Palm. 403; [see Powers *v.* Ware, 2 Pick. 451, 458–460;] or if the deed be destroyed by accident; Bolton *v.* The Bishop of Carlisle, 2 H. Bl. 259; or by accident and time; Read *v.* Brookman, 3 T. R. 151; and see per Lord Ellenborough, Hendy *v.* Stephenson, 10 East, 60; an action can still be brought on it in its original form. The instrument will not in general be vitiated where all the parties consent to an alteration. [Stewart *v.* Preston, 1 Florida, 10; Wilkes *v.* Caulk, 5 Harr. & J. 36; Boston *v.* Benson, 12 Cush. 61; Wright *v.* Wright, 7 N. J. (Law) 175; Camden Bank *v.* Hall, 14 N. J. (Law) 533; Lewis *v.* Payn, 8 Cowen, 71; Wilson *v.* Henderson, 9 Sm. & M. 375. As to the respective provinces of the court and of the jury, the burden of proof and the presumptions, in regard to alterations, see 2 Chitty Contr. (11th Am. ed.) 1163, and note (*e*) and cases cited; Hunt *v.* Gray, 6 Vroom, 237; Haydon *v.* Goodnow, 36 Conn. 164; Leake Contracts, 433.] See *post*, "Rescinded Contract."

1. *That a written Contract was altered and made void.*

[That the said contract was made in writing and signed by the defendant; and afterwards, and whilst the said contract in writing was in the possession and custody of the plaintiff, it was rendered void by being materially altered without the consent or knowledge of the defendant, that is to say, by [*here state the alteration made, as* affixing a seal by and near the signature of the defendant as and for the seal of the defendant, or altering the words twenty shillings per bushel into thirty shillings per bushel, *or as the case may be, so as to show the materiality of the alteration. If the declaration shows that the contract was in writing, the first allegation may be omitted.*] (*a*)]

2. *Replication that the Deed was altered by inserting the Amount.*

Fazakerly *v.* M'Knight, 6 El. & Bl. 795.

AMBASSADOR.

— An ambassador of a foreign state, accredited to and received by the queen, having no real property in England, and having done nothing to forfeit the privileges of ambassadors, cannot be *sued* in this country for a debt while he remains ambassador. The Magdalena Steam Navigation Co. *v.* Martin, [2 El. & El. 94.] And a secretary of legation, acting in the absence of his ambassador as chargé-d'affaires, is entitled to all the privileges of his ambassador (Taylor *v.* Best, 14 C. B. 487, where all the law is collected); and this privilege is not forfeited by his engaging in mercantile transactions. Taylor *v.* Best, 14 C. B. 487. See 7 Anne, c. 12. But where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let off in lodgings, his goods in that house, not being necessary for the convenience of his ambassador, are liable to be distrained for poor rates. Novello *v.* Toogood, 1 B. & C. 554.

[For a like plea, see Mollett *v.* Wackerbarth, 5 C. B. 181. Plea that the agreement was altered by affixing a seal so as to make it purport to be a deed of the defendant. Davidson *v.* Cooper, 11 M. & W. 778; 13 M. & W. 343; that a charter-party was altered by the insertion of material words; Croockewit *v.* Fletcher, 1 H. & N. 893. Other forms, see Stobart *v.* Dryden, 1 M. & W. 615; Harden *v.* Clifton, 1 Q. B. 523.]

Obs. By s. 29, "Whenever in proceedings to obtain an attachment of debts under the act above mentioned it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him and state the nature and particulars of his claims upon such debt."

By s. 30, "After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the judge may think fit to call before him; or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount due from such garnishee, according to the provisions of the common law procedure act, 1854; and he may bar the claim of such third person, or make such other order as he shall think fit, upon the terms, in all cases, with respect to the lien or charges (if any) of such third person, and to costs, as he shall think just and reasonable."

By s. 31, "The provisions of the common law procedure act, 1854, so far as they are applicable, shall apply to any order and the proceedings thereon made and taken in pursuance of the herein next before mentioned powers under this act."

What may be attached. — The object of the act is, that where a person is not able to pay his creditors by reason of not being paid what is owing to him, if judgment is obtained against him, debts due to him should be attached to relieve him from the burden of the judgment. Kennet *v.* The Westminster Improvement Commissioners, 11 Ex. 349. But the debt attached must not be a merely gratuitous payment, or one that cannot be enforced; Innes *v.* The East India Co. 17 C. B. 351; nor a debt of which the judgment debtor, before judgment, has made a *bonâ fide* assignment; Hirsch *v.* Coates, 18 C. B. 757; and where by the terms of a bond the property, and not the commissioners who executed it, is charged with its payment, and the agreement which was entered into between the commissioners and the bondholders only gave a limited right to recover, it was held that it was not such a debt as could be attached, because the compelling immediate payment would give a preference over the other bondholders, contrary to the agreement. Kennet *v.* The Westminster Improvement Commissioners, 11 Ex. 349. See Johnson *v.* Diamond, 11 Ex. 73. An executor of a judgment creditor who has not revived the judgment or entered a suggestion according to the C. L. P. Act, 1852, s. 129, does not come within the meaning of the act. Baynard *v.* Simmons, 24 L. J. Q. B. 253. But it appears doubtful whether money in the hands of the judgment debtor's bankers merely as such can be attached; Seymour *v.* Corporation of Brecon, 29 L J. Ex. 243; and where the plaintiff sued in the county court on a judgment in the superior court, and has obtained an order for payment by instalments, some of which have been paid, it was held that he could not take advantage of the act. Jones *v.* Jennet, 25 L. J. Ex. 319, *hæsitante*, Bramwell B. But on a joint judgment against several, a debt due to one or more judgment debtors may be attached; Mills *v.* Mynn, 28 L. J. Q. B. 324; so where judgment is recovered against an executor, a debt due to the testator's estate may be attached; Burton *v.* Roberts, 6 H. & N. 93; 29 L. J. Ex. 484; even though there is a decree in chancery for the administration of the estate. Ib.; Fowler *v.* Roberts, 2 Giff. 226. The proceeds of a call under the winding-up acts to provide for a debt of the company may be attached to answer a judgment against the creditor; In re The Warwick & Worcester Ry. Co.; In re Pritchard, *ex parte* Turner, 2 De G., F. & J. 354; but a judgment creditor cannot without leave attach moneys in the hands of a receiver of the court of chancery who has been directed to pay them to the judgment debtor. De Winton *v.* Mayor &c. of Brecon, 28 Beav. 200. A verdict in an action of contract for unliquidated damages without judgment cannot be attached; Jones *v.* Thomson, El., Bl. & El. 63; Dresser *v.* Johns, 6 C. B. N. S. 429; and a judgment creditor who has taken his debtor under a *ca. sa.*, cannot attach his debt. Jauralde *v.* Parker, 6 H. & N. 431. But the fact of a debtor having been taken in execution, does not prevent his debt being attached. Marples *v.* Hartley, Hartley *v.* Shemwell, 1 B. & S. 1.

The effect of the order of attachment. — The debt due to the judgment debtor is bound in the hands of the garnishee from the service of the *ex parte* order

Ons. attachment, subject to the provisions of the bankrupt acts for the distribution of the bankrupt's property. Holmes *v.* Tutton, 5 El. & Bl. 65; Tilbury *v.* Brown, 30 L. J. Q. B. 46; [Wood *v.* Dunn, L. R. 1 Q. B. 77; S. C. L. R. 2 Q. B. 73.] A garnishee order cannot be reviewed by the admiralty court. The Olive, 1 Swab. 423; 5 Jur. N. S. 445. The garnishee cannot substitute a different mode of discharging his debt to that already existing between the judgment creditor and the judgment debtor; Turner *v.* Jones, 1 H. & N. 878; but if he pays the debt before service of the order, he is protected. Cooper *v.* Brayne, 27 L. J. Ex. 446. As to the practice, see Chit. Pr. As to foreign attachments in the lord mayor's court, see Locke on the Law and Practice of Foreign Attachment, Ashley's Practice of the Lord Mayor's Court. The custom of the city of London in reference to foreign attachment cannot be pleaded as a custom on a plaint being entered in the mayor's court to attach a debt due to the defendant from a third person on the bare fact of the debtor being found within the jurisdiction, although none of the parties are either citizens or resident in the city, and neither the original debt nor that of the garnishee accrued within the city, for such a custom has been held to be bad. Cox *v.* The Mayor &c. of London, 32 L. J. Ex. 65, affirmed in error. A foreign attachment operates only upon the moneys in the hands of the garnishee between issuing the attachment and the entry of the pleas of the garnishee; Webster *v.* Webster, 31 L. J. Ch. 655; and a creditor who, after the debtor's death, obtains a foreign attachment against part of the assets, gains no priority over the fund attached as against the other creditors of the deceased. Redhead *v.* Walton, 29 Beav. 521. Execution executed upon a foreign attachment is a good plea in bar of the further maintenance of the action in an action against the garnishee. Webb *v.* Hurrell, 4 C. B. 287. Service of notice of attachment out of the lord mayor's court does not excuse the holder of goods so attached from delivering them to the true owner. Pillot *v.* Wilkinson, [2 H. & C. 72; 3 H. & C. 345.]

1. *Plea to a Declaration against Garnishee.* (*e*)

In the ——.

E. F. } The —— day of ——, A. D. ——.
sta. } The said E. F., by ——, his attorney, says, that he never was
A. B. } indebted to the said C. D., as alleged.

2. *Plea that Plaintiff (the Judgment Creditor) took the Judgment Debtor in Execution.* (*f*)

That before the issuing of the said writ of attachment in the declaration mentioned, the plaintiff sued out a writ of execution called a *capias ad satisfaciendum*, to take the body of the said A. B. [*the judgment debtor*], to satisfy the plaintiff the sum recovered by the said judgment and interest, and before the issuing of the said writ of attachment, caused the said A. B. to be taken in execution to satisfy him the sum recovered by the said judgment and interest.

3. *Plea of Payment to a Judgment Creditor of the Plaintiff.* (*g*)

That after the accruing of the plaintiff's claim herein pleaded to, A. B. recovered a judgment against the plaintiff in the court of ——, at Westminster, for the sum of £——, and was a judgment creditor of the plaintiff, within the meaning of the C. L. P. Act, 1854, to that amount, and afterwards and in pursuance of the said act, A. B., as such judgment creditor, made an *ex parte*

(*e*) This form is given by R. G. M. V. 1854.

(*f*) See form, Jauralde *v.* Parker, 30 L. Ex. 237.

(*g*) See form, Lockwood *v.* Nash, 18 C. B. 536.

application to Sir ——, one of the judges of the court of ——, upon affidavit duly made, stating that such judgment had been recovered and still remained unsatisfied [*or*, "to the amount of £——"]; and that the defendant was indebted to the plaintiff, and was within the jurisdiction of the said court: whereupon it was duly ordered by the said Sir ——, that all debts due, owing, or accruing from the defendant to the plaintiff should be attached to answer the said judgment debt, and that the defendant should appear before the said Sir —— to show cause why he should not pay the said A. B. the debt due from the defendant to the plaintiff, or so much thereof as would satisfy the said judgment debt; and such order was duly served on the defendant [*follow the terms of the order as to service*]; and the defendant paid into court the amount due from him to the plaintiff, being the claim herein pleaded to, in pursuance of the said order [*or* "and the defendant did not pay into court the amount due from him to the plaintiff, or any part thereof, and did not dispute the said debt"]; whereupon it was duly ordered by the said Sir —— that execution should issue to levy the amount due from the defendant to the plaintiff [*follow the terms of the order*]; and such last mentioned order was duly served on the defendant, and thereupon the defendant paid the said amount to the said A. B., being the amount of the plaintiff's claim herein pleaded to [*or*, "and such execution issued, and the said amount was levied thereunder being the amount of the plaintiff's claim herein pleaded to"].

4. *Plea of Foreign Attachment in the Lord Mayor's Court.*

Webb *v.* Hurrell, 4 C. B. 287.

ATTAINDER. See *post*, "Felony."

ATTORNEYS.

Obs. — In an action of *indebitatus assumpsit* upon an attorney's bill of costs, the defence that the bill ought to have been, but was not, delivered signed a month before action, must be pleaded specially, *post*. Never indebted puts in issue that the plaintiff was an attorney, the retainer of the plaintiff by the defendant, that the services were in fact rendered, and the reasonableness of the charges; Jones *v.* Nanny, 1 M. & W. 333; Hill *v.* Allen, 2 M. & W. 283; *ante*, 282; and under that plea neither party is bound by the allocatur of the master in the taxation of the bill. Beck *v.* Cleaver, Dowl. 111. It may be shown on never indebted, that the plaintiff's work was utterly worthless by reason of his incompetency or neglect, &c. See Hill *v.* Allen, 2 M. & W. 284; Hill *v.* Featherstonehaugh, 7 Bing. 569; Shaw *v.* Archer, 9 Bing. 287; Cox *v.* Leech, 1 C. B. N. S 617; Long *v.* Orsi, 18 C. B. 610; [2 Chitty Contr. (11th Am. ed.) 813 *et seq.*;] or that he agreed to do the business for costs out of pocket, paying the amount into court; Jones *v.* Nanny, 1 M. & W. 333; Jones *v.* Reade, 5 Dowl. R. 216; or that the work was done by an unqualified person in plaintiff's name. Parker *v.* Riley, 3 M. & W. 230. Maintenance and champerty must be specially pleaded. Findon *v.* Parker, 11 M. & W. 675. See *post*.

Where the defence is, that the business was done in preparing and enforcing an illegal agreement, there must be a special plea. Potts *v.* Sparrow, 1 Bing. N. C. 594. See Tabram *v.* Warren, 1 Tyr. & Gr. 153. In H. B. Roberts *v.* Barber, which was an action by an attorney for his bill of costs for bringing an action and preparing a deed of assignment at the defendant's request, it

Obs. was proposed to show that the deed, which was an assignment of goods from one Snell to the defendant, was fraudulently antedated for the purpose of gaining a priority over a *bonâ fide* execution against Snell's goods, and that the action was an action of trespass brought by the defendant, on the strength of this deed, against the sheriff for seizing under the execution against Snell. Pearson objected that these facts were inadmissible under *non assumpsit*, but Tindal C. J. held that as they went to show that plaintiff's services were entirely useless, they might be given in evidence under that plea, and he left it to the jury to say whether the plaintiff was aware of the facts when he prepared the deed, &c.: verdict for the defendant. M. S. C. P. London Sittings after T. T. 1841. In an action against an attorney for negligence, *non assumpsit* would put in issue the fact of the plaintiff being an attorney, Aldis *v.* Gardner, 1 C. & K. 564, the promise, and the retainer. The denial of the negligence must be specially pleaded. See the law respecting attorneys, *ante*, Obs. 55; [2 Chitty Contr. (11th Am. ed.) 810 *et seq.*;] Chit. Arch. Pr.

Never indebted, *ante*, 284; Non assumpsit, *ante*, 284.

1. *Plea to an Action on an Attorney's Bill, that the Plaintiff had taken out no Certificate.* (*h*)

Commencement as ante, 9. (*i*)] That this action is brought for the recovery of fees, rewards, and disbursements for business, matters, and things done by the plaintiff for the defendant as an attorney [*or* "solicitor"], in carrying on certain causes, suits, and proceedings (*k*) in the superior courts at Westminster, without having previously obtained a stamped certificate then in force, contrary to the form of the statute in such case made and provided.

2. *Plea that the Bill was not delivered a Month before Action.* (*l*)

Commencement as ante, 9. (*m*)] That this action was commenced after the passing of an act of parliament made and passed in the session of parlia-

(*h*) By 6 & 7 Vict. c. 73, s. 26, "No person who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid." The 23 & 24 Vict. c. 127, s. 26, imposes a penalty for wrongfully acting as an attorney or solicitor. This defence must be specially pleaded. Hill *v.* Sydney, 7 Ad. & E. 956. This is an issuable plea. Wilkinson *v.* Page, 1 D. & L. 913. If the certificate is not in force at the time the business is done, the attorney is not entitled to tax his costs. In re Duke of Brunswick and Crowl, 4 Ex. 492.

(*i*) As to answering the account stated, see *ante*, 294.

(*k*) *Or* "suing," *or* "prosecuting," *or* "defending," *as the case may be.*

(*l*) See forms, Taylor *v.* Hodgson, 10 L. J. Q. B. 310; Engleheart *v.* Moore, 4 D. & L. 60; 15 M. & W. 548. This defence must be specially pleaded. Lane *v.* Glenny, 7 Ad. & E. 83; Robinson *v.* Rowland, 6 Dowl. 271; and it is an issuable plea; Wilkinson *v.* Page, 1 D. & L. 913; 6 M. & G. 1012. By 6 & 7 Vict. c. 73, s. 37, "No attorney or solicitor, nor any executor, administrator, or assign of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assign of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the

(*m*) As to answering the account stated, see *ante*, 294.

ment holden in the sixth and seventh years of the reign of her majesty Queen Victoria, intituled, "An act for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales," and is maintained for the recovery of fees, charges, and disbursements * for business done by the plaintiff as an attorney [*or* "solicitor"] for the defendant. And the plaintiff did not, one calendar month before the commencement of this suit, deliver to the defendant, being the party to be charged therewith, or send by the post to, or leave for him at his (*n*) counting-house, office of business, dwelling-house, or last known place of abode, a bill of such charges, fees, and disbursements, subscribed with the proper hand of the plaintiff either with his own name or with the name or style of any partnership of which he was at any time a member, or inclosed in or accompanied by any letter subscribed in like manner referring to any such bill as by the said statute is required.

3. *Plea that the Plaintiff was never admitted, or that he was not enrolled, as an Attorney.* (*o*)

As in last form to the asterisk.] — on account of prosecuting, carrying on, and defending by the plaintiff for the defendant of certain actions, suits, and proceedings in courts of law and in equity in the plaintiff's own name [*or* "in the name of a certain other person"] without being admitted [*or* "enrolled"] (*p*) as required by the said statute. (*q*)

proper hand of such attorney or solicitor (or, in case of partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assign of such attorney or solicitor, to be inclosed in or accompanied by a letter subscribed in like manner, referring to such bill." The same section provides, "That it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, &c. in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or inclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bonâ fide* compliance with this act." It is sufficient to deliver a signed bill to one of several joint contractors. Mant *v.* Smith, 4 H. & N. 324. As to the heading and contents of the bill, Haigh *v.* Ously, 7 El. & Bl. 578; Pigot *v.* Cadman, 1 H. & N. 837; Pilgrim *v.* Hirschfeld, 3 N. R. 36. An attorney may set off the amount of his costs, although he has not delivered a bill of such costs one month before the action. Brown *v.* Tibbits, 31 L. J. C. P. 206. If the defendant has given a bill or note for the charges, the above plea would afford no defence to an action on the bill. Jeffreys *v.* Evans, 14 M. & W. 210; S. C. 3 D. & L. 52.

(*n*) Tate *v.* Hitchins, 7 C. B. 875.

(*o*) This must be specially pleaded. Hill *v.* Sydney, 7 Ad. & E. 956. By 6 & 7 Vict. c. 73, s. 35, "In case any person shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto." This section as well as the 26th section (*ante*, 320, note (*a*)), applies only to fees, rewards, and disbursements for any business, matter, or thing done as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had *no* reference to such suits or proceedings. Richards *v.* Suffield, 2 Ex. 616; Greene *v.* Reeve, 8 C. B. 88.

(*p*) Humphrys *v.* Harvey, 2 Dowl. 827; 1 Bing. N. C. 62. See Chit. Arch. This plea

(*q*) The replication may be that the said fees, &c. were not, nor were any of them, for or on account of the prosecuting, &c. any action, &c. in any court of law *or* (see Moore *v.* Boulcott, 3 Dowl. 145) equity. See, also, Beck *v.* Penn, 7 C. & P. 397.

4. *Replication, that the Plaintiff did deliver a Bill.* (*r*)

That he did, one calendar month before this suit, deliver to the defendant [*or* "send by the post to the defendant," *or* "leave for the defendant at his dwelling-house," *as the case may be, following the words of the plea*], a bill in writing of the said charges, fees, and disbursements, subscribed with the proper hand of the plaintiff with his own name [*or* "with the name and style of a partnership of which the plaintiff was a member," *or* "inclosed in a certain letter, (*s*) &c." *as the case may be*], as required by the said statute.

5. *Plea of Maintenance to an Attorney's Bill.* (*t*)

Findon *v.* Parker, 11 M. & W. 675.

6. *Plea to an Action against an Attorney for Negligence, &c. — Denial of the Negligence.* (*u*)

That he did use due and proper care, skill, and diligence in ["bringing, prosecuting, and conducting the said action," *according to the terms of the promise laid in the declaration*].

7. *Plea by an Attorney, Privilege of being sued in another Court.*

Ante, 273.

is to be pleaded where the party *never* was admitted or enrolled as an attorney; it will be observed that it adheres closely to the words of the statute; a plea adding to this that the plaintiff was not authorized or qualified to practice as a solicitor, was held bad for duplicity, as letting in matter beyond the clauses in the statute. Williams *v.* Jones, 2 Q. B. 276. Indorsee against acceptor of a bill. Plea, that the bill was given to drawer, an attorney, for work, &c. that he was not admitted, and that it was indorsed to plaintiff after due. Middleton *v.* Chambers, 1 M. & G. 97; S. C. 8 Dowl. 545.

(*r*) See forms, Engleheart *v.* Moore, 4 D. & L. 60; 15 M. & W. 548; Mant *v.* Smith, 4 H. & N. 324. A joinder of issue on the plea would put *every* material allegation in issue.

(*s*) See Taylor *v.* Hodgson, 3 D. & L. 115.

(*t*) An agreement by an attorney that he shall have half the proceeds of a suit, and hold his client harmless as to costs, is illegal and void as amounting to maintenance. Re Masters, 4 Dowl. 18. And a contract whereby an attorney stipulates with a client that the attorney shall advance money to carry on a suit, and that, if successful, the attorney shall receive from the client a sum in a proportion to the benefit to him from success over and above the legal charges, is also void, as amounting to maintenance. Earle *v.* Hopwood, 9 C. B. N. S. 566; and see O'Brien *v.* Lewis, 32 L. J. Ch. 569. So the purchase of the verdict by an attorney made *pendente lite*, and not for the purpose of enabling the client to carry on the suit, is void. Simpson *v.* Lamb, 7 El. & Bl. 84. But it appears that an assignment of the subject-matter in dispute to the attorney by the client, if made after the verdict, although before judgment, is not void, since it was not an absolute sale, but only security for past advances. Radcliffe *v.* Anderson, El., Bl. & El. 806; S. C. 28 L. J. Q. B. 32; 29 Ib. 128. If there be an agreement for a gross sum, an attorney cannot recover a larger sum than would be allowed by the master on taxation. Philby *v.* Hazle, 8 C. B. N. S. 647; In re Ingle, 25 L. J. Ch. 169. [See Dickinson *v.* Burrell, L. R. 1 Eq. 337.]

(*u*) Effect of *non assumpsit*, *ante*, 275. See other forms, Wright *v.* Newton, 3 Scott, 595. On this issue the plaintiff must prove the negligence. See *ante*, 60. It is not every mistake or misapprehension of an attorney that will make him liable to an action for negligence. The question, in such an action, is, whether the attorney has used reasonable skill and care. See Shilcock *v.* Passman, 6 C. & P. 289. See cases cited, *ante*, 57, Obs.

AUCTIONEER.

The forms of pleas to actions against agents for not selling for the best price, not accounting, &c. may readily be applied to declarations against auctioneers. See *ante*, 295.

AWARDS.

Obs. — See pleas, 7 Wentw. 611; and for law, Russell on Awards, Watson on Awards, 2 Chit. Arch. Index *in voc.; ante*, 64, Obs. *Non assumpsit* to the special counts on an award, forms, 1, 2, *ante*, 63, 65, would only put in issue the submission or agreement to refer. It would not deny the appointment of the umpire, the due enlargement of the time for making the award, that it was in fact made, or the non-performance of its provisions by the defendant; separate traverses of all or any of these allegations may be easily framed. Never indebted, pleaded to an *indebitatus* count; *ante*, 66, form 6; would include a denial of all these allegations as matters of fact from which the promise was to be implied; *ante*, 281. Where *in fact* an award was made, and the defence to a special count is that the arbitrator would not deliver it to the defendant within the prescribed time, the plea should not be a traverse of the making of the award, but a special form stating that defendant requested the arbitrator to deliver the award to him according to the submission, but that he refused, &c. 1 Saund. 327 *b*, note (3). Where the declaration itself shows that the award is defective, the defendant should demur; or, if the declaration avoid showing the defect, but it appears on the face of the award itself, without showing extrinsic matter, the defendant might set out the award, leaving the plaintiff to demur. See Sim *v.* Edmands, [15 C. B. 240.] The plaintiff's non-performance of a condition precedent should be pleaded specially; see form, &c. Hanson *v.* Boothman, 13 East, 23; 2 Saund. 183–188; so must defendant's *performance* of the award. 1 Saund. 324; *post*, "Payments," &c.; [2 Chitty Contr. (11th Am. ed.) 1182, 1183.] Corruption or partiality or misconduct on the arbitrator's part cannot be *pleaded*. See Braddick *v.* Thompson, 8 East, 344; In re Cargey, 2 B. & C. 170; Swinford *v.* Burn, Gow's R. 5; 1 Saund. 327 *b;* Whitmore *v.* Smith, [5 H. & N. 824; 7 Ib. 509.] *Revocation* of the arbitrator's power (when it affords a defence) should be pleaded specially. See form and law, Mills *v.* Bayley, [2 H. & C. 36; Marsh *v.* Bulteel, 5 B. & Ald. 507; Northampton Gas Co. *v.* Parnell, 15 C. B. 638.] But by 3 & 4 W. 4, c. 42, s. 39, the power of any arbitrator appointed by rule of court, judge's order, or order of nisi prius, or by submission containing an agreement that it shall be made a rule of court, shall *not be revocable* without the leave of the court or of a judge.

1. *Plea, Denial of the Award.* (*x*) [*Declaration, ante*, 63.]

That the said —— did not make the said supposed award [*or* "umpirage"] of and concerning the said matters in difference, as alleged. (*y*)

(*x*) Under this plea the defendant might show that the award made by the arbitrator was not made pursuant to the submission to refer. Dresser *v.* Stansfield, 15 L. J. Ex. 274; 14 M. & W. 822. Several pleas may be found in the reports, showing specially that the award is bad by reason of facts not disclosed in the declaration; as that the arbitrator neglected to award on some of the matters brought before him. Charleton *v.* Spencer, 2 Q. B. 695; King *v.* Bowen, 8 M. & W. 625; Dresser *v.* Stansfield, *ubi sup.;* or that the award is not final. Duckworth *v.* Harrison, 4 M. & W. 434; Perry *v.* Mitchell, 12 M. & W. 799; S. C. 2 D. & L. 458; Armitage *v.* Coates, 4 Ex. 641; and see Gisborne *v.* Hart, 5 M. & W. 58, per Lord Abinger. Such pleas, however, are only argumentative denials of making the award. Adcock *v.* Wood, 6 Ex. 814; and see Roberts *v.* Eberhardt, 3 C. B. N. S. 482.

(*y*) The production of the award and rule of court will prove this issue on the part of the plaintiff in *the first instance*, subject to the proof being rebutted by the defendant. Gisborne *v.* Hart. See last note.

2. *Plea of Arbitrament and Award (without Performance), to a Declaration upon a Contract to recover General Damages.* (z)

That after the accruing of the causes of action in the declaration mentioned, certain differences arose and were depending respecting the same between the plaintiff and the defendant, and thereupon they mutually (a) referred the said matters in difference to the award, order, and arbitrament of W. H. and T. F., and in case they should not agree, then to the umpirage of T. P., and agreed that the decision of the said arbitrators or umpire should be final, so as the said award or umpirage should be made in writing ready to be delivered to the said parties, or such of them as should desire the same, on or before the —— day of —— then next; and the said W. H. and T. F. having respectively taken upon themselves the burden of the said arbitration, and not having agreed upon the matters so referred to them, the said T. P. thereupon in due time took upon himself the burden of the said arbitration and umpirage, and duly made and published his award and umpirage in writing, of and concerning the premises, ready to be delivered to the said parties, and did thereby award and declare of and concerning the said matters, that the defendant

(z) See, in general, Rol. Ab. Arbitrament, V.; Com. Dig. Accord, A. 1; Bac. Abr. Arbitrament; [2 Chitty Contr. (11th Am. ed.) 1179 *et seq.*;] Russel on Arbitration; Allen *v.* Milner, 2 Cr. & J. 47, and form there. Gascoyne *v.* Edwards, 1 Y. & J. 19; Whitehead *v.* Tattersall, 1 Ad. & E. 491. These cases establish that it is no plea to an action to recover a *debt*, that the parties referred the claim to arbitration, and that the arbitrator awarded a certain sum to be paid *in money*, unless payment or a tender of that sum be alleged; but that in an action to recover *general unliquidated damages* on a special contract, arbitrament and award, without performance, may be pleaded to a count on the original contract. And see Edwards *v.* Baugh, 11 M. & W. 641, as to this plea, *puis darrein continuance*. Stow *v.* Bloxam, 2 Esp. 804. A plea of a *pending* arbitration cannot be pleaded in bar to the original cause of action. Harris *v.* Reynolds, 7 Q. B. 71; [2 Chitty Contr. (11th Am. ed.) 1186; Smith *v.* Boston, Concord & Montreal R. R. 36 N. H. 458.] But an action will lie for the breach of an agreement to refer. Livingstone *v.* Ralli, 5 El. & Bl. 132. And by the C. L. P. Act, 1854, s. 11, if there is an agreement to refer, and an action is brought, the court, or a judge, may order a stay of proceedings. See, as to this section, Pennell *v.* Walker, 18 C. B. 651; Daunt *v.* Lazard, 27 L. J. Ex. 399; Hirsch *v.* Imthurn, Ib. C. P. 254; Wickham *v.* Harding, 28 L. J. Ex. 215; Roper *v.* Lendon, Ib. Q. B. 260; Blythe *v.* Lafone, Ib. Q. B. 164. It is now decided that where a condition precedent to the bringing of an action is created, the remedy which is afforded by the courts cannot be resorted to until the condition precedent has been performed; and therefore if parties agree to refer the amount of damages, or any matter of that kind, they do not oust the courts of their jurisdiction, and an action will therefore lie for breach of such agreement. Avery *v.* Scott, 5 H. L. Cas. 811; Horton *v.* Sayer, [4 H. & N. 643;] Braunstein *v.* The Accidental Death Insurance Co. [1 B. & S. 782;] Tredwen *v.* Holman, [1 H. & C. 72;] Westwood *v.* The Secretary for India, 1 N. R. 262; [Elliott *v.* Royal Exchange Assurance Co. L. R. 2 Ex. 237; Hemans *v.* Picciotto, 1 C. B. N. S. 646; Lowndes *v.* Stamford, 12 Q. B. 425; Lauman *v.* Young, 31 Penn. St. 306; Snodgrass *v.* Gavit, 28 Penn. St. 224; Smith *v.* Boston, Concord & Montreal R. R. 36 N. H. 458, 487; 1 Dan. Ch. Pr. (4th Am. ed.) 670, 671, and cases in notes; Tobey *v.* Bristol, 3 Story, 800. In Cobb *v.* New England Mut. Marine Ins. Co. 6 Gray, 192, 204, Thomas J. said: "The invalidity of the condition requiring the insured to submit the question of loss to arbitration seemed to have been settled, and upon grounds of public policy, which the contract of the parties could not control. Kill *v.* Hollister, 1 Wils. 129; Thomas *v.* Charnock, 8 T. R. 139; Goldstone *v.* Osborn, 2 C. & P. 550; Robinson *v.* George's Ins. Co. 17 Maine, 131; Gray *v.* Wilson, 4 Watts, 39; Arnould on Ins. 1249; 2 Story Eq. § 1457. The recent cases, however, of Scott *v.* Avery, 8 Ex. 487, and 5 H. L. Cas. 811; Livingston *v.* Ralli, 5 El. & Bl. 132; and Russell *v.* Pellegrini, 6 El. & Bl. 1020, may possibly lead to some revision and qualification of the doctrine as heretofore understood." See Brown *v.* Overbury, 11 Ex. 715; Scott *v.* Liverpool, 3 De G. & J. 334. Form of plea, see Scott *v.* Avery, 8 Ex. 487.]

(a) As to the averments showing the submission and award, see *ante*, 63–65, forms 1 and 2. [McCreary *v.* Taggart, 2 S. C. 418.]

should pay the plaintiff the sum of £—— on the —— day of —— then next [and the defendant, on the said day last aforesaid, paid the said sum of £—— in performance of this award].

3. *Replication thereto.*

[*The replication may be, if the reference to arbitration be denied,* "that the plaintiff and defendant did not submit themselves to, or agree to refer, or refer the said matters in difference to the award, order, or arbitrament of the said W. H. and T. F., or in case they should not agree, then to the umpirage of the said T. P. in manner and form as alleged;" *or, if the award be denied,* "that the said —— did not make the said supposed award," *&c.; or the plaintiff may reply a revocation of the submission* (*see ante,* Obs. 308), *or new assign that the matters in dispute mentioned in the declaration are other than and different to the matters referred.*] (*b*)

BAIL BONDS. (*c*) See "Bail Bond," Obs. *ante,* 67.

1. *Non est Factum.*

Ante, 286. (*d*)

2. *That there was no Writ in the Original Action.* (*e*)

That no writ of *capias* whereon E. F. could or might be arrested or holden to bail, was issued out of the said court in the said action in the said condition mentioned, before the making of the said bond.

3. *Plea that the Bond was not assigned by the Sheriff.* (*f*)

Says that the said bond was not duly assigned by the sheriff to the plaintiff according to the form of the statute in such case made and provided.

4. *Plea that Bail was put in and perfected.* (*g*)

That the said E. F. did cause special bail to be put in for him to the said

(*b*) A joinder of issue would deny *every* material allegation.

(*c*) The bail may, of course, plead *non est factum* if they deny their execution of the bond. Illegality of the bond at common law or by statute should be pleaded specially. See requisites of the bond under 23 H. 6, c. 9, s. 7, &c. Tidd, 9th ed. 233; Chit. Pr. Index, "Bail." How far bail liable. Ib. Plea that a bond was given for ease and favor. 3 Chit. Pl. 7th ed. 193. Bail cannot *plead* matters merely affording ground for equitable relief in reference to the practice of the court, but should apply to the court by motion. Ball *v.* Swan, 1 B. & Ald. 393; Hinton *v.* Acraman, 15 L. J. C. P. 52.

(*d*) *Non est factum* denies only the making of the bond. *Ante,* Obs. 285.

(*e*) See forms, Morgan's Prec. 514; 3 Chit. Pl. 191. Where there was *no* writ, or there is a material *variance* in setting it out in the declaration, the proper form would seem to be a mere denial that the said writ in the declaration mentioned was issued. Where the defence is, that the writ is void, it would perhaps be judicious to point out in the plea the particular objection to or defect in the writ, admitting that it issued. It has been usual to plead that no writ whereon the party could be arrested or holden to bail was ever issued in the action, &c. See Gurney *v.* Hopkinson, 1 Cr., M. & R. 587; Finch *v.* Cocken, 2 Cr., M. & R. 196. Bail cannot plead the principal was not arrested. Taylor *v.* Clow, 1 B. & Ad. 223; Bates *v.* Fisling, 2 Cr. & M. 375, per Bayley J.

(*f*) See form in Phillips *v.* Barlow, 6 C. & P. 781; general form, Dawes *v.* Papworth, Willes R. 408; 2 Saund. 61, note. In Phillips *v.* Barlow, it was decided by Vaughan J. that it suffices that the sheriff assign in the presence of two witnesses, and that they need not attest as subscribing witnesses.

(*g*) It has not been unusual to plead as a plea for delay, where bail has been put

action in the said court, and according to the exigency of the said writ and the course and practice of the said court, K. L. and M. N. came into the said court in their proper persons, and then became pledges and bail [*&c.; set out the recognizance of bail*], as by the record of the said recognizance remaining in the said court fully appears.

5. *Replication thereto, Nul Tiel Record.* (*h*)

That there is not any record of the said supposed recognizance remaining in the said court. [*Here conclude as in forms, post*, "Judgments."]

6. *Pleas to a Bond given under* 1 & 2 *Vict. c.* 110, *s.* 8:—

1. *No Writ of Ca. Sa. in the Original Action.*
2. *That the Time for rendering was extended by Rule of Court to a Certain Day, before which the Render was made.*

Hinton *v.* Acraman, 2 C. B. 367.

BAILEES.

Obs. — In actions against bailees for not keeping goods safe, or not returning them on request, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, operates as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. Pl. R. 6 T. T. 1853.

As to the effect of *non assumpsit*, *ante*, p. 275. We have seen (*ante*, 67) that it is optional on the part of the plaintiff to declare *ex contractu* or *in tort*, but if the action is framed in contract, the breaches must be specially traversed. Any inconvenience that might arise from a doubt whether the count is in contract or *tort* is obviated by the C. L. P. Act, 1852, s. 74, which enacts that where causes of action partake of the character both of breaches of contract and of wrongs, "any plea which shall be good in substance, shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." See *post*, "Carriers."

1. *Non Assumpsit.* (*i*)

Ante, 284.

2. *Plea that Defendant did take due Care, &c.*

That he did use due care, skill, and diligence in and about the ["bleaching the said table-cloths," *or* "did take due and proper care of the said goods and chattels whilst they were in his possession and charge as aforesaid," *or* "that he did redeliver the said goods to the plaintiff when he was so requested as aforesaid"]. (*k*)

but not justified in due time, &c. (so that the bond is forfeited), "that the defendant passed special bail to be put in for him to the said action in the said condition mentioned, according, &c. and this, &c." It seems that where bail have been put in, and the entry remains in the judge's chambers or in the bail book, the plaintiff should, if such a plea be pleaded, take out a summons that the entry be struck out. See Austen *v.* Fenton, 1 Taunt. 23; Leigh *v.* Bertles, 6 Taunt. 167; Tidd, 9th ed. 317; Ladd *v.* Arnaboldi, 1 Cr. & J. 97.

(*h*) See Practice Rules, H. T. 1853, r. 38.

(*i*) To an *indebitatus* count by a bailee, never indebted would put in issue the keeping of the goods at the defendant's request, and the reasonableness of the charges for so doing.

(*k*) See forms, &c. Moss *v.* Smith, 1 M. & G. 229; S. C. 8 Dowl. 19, and 1 Scott N. R. 25.

3. *Plea to an Action against a Livery Stable Keeper for not taking care of a Horse, that the Carelessness consisted in tying up the Horse with one Halter, which was done at the Plaintiff's Request.*

That he did take due and proper care of the said horse, except in tying the said horse up with only one halter, and that he tied the said horse up with one halter only by the direction and order of the plaintiff.

4. *Plea that Money in Defendant's Hands as Bailee was feloniously stolen from him.*

Ante, "Agent," 296.

5. *Plea that Bailor mortgaged the Chattel bailed, and that the Mortgagee has demanded and received the same from the Defendant.* (*l*)

European & Australian Mail Co. *v.* Royal Mail Steam Packet Co. 30 L. J. C. P. 247.

BANKRUPTCY — ASSIGNEES.

I. ASSIGNEES OF A BANKRUPT.

OBS. — See Forms of Declarations, *ante*, 52. Pleas of set-off, and mutual credit, in actions by or against assignees, *post*, "Set-off." Payment to assignees, *post*, "Payment." [Order and disposition. Reynolds *v.* Bowly, L. R. 2 Q. B. 41, 474; Priestly *v.* Pratt, L. R. 3 Ex. 101; Green *v.* Ingham, L. R. 2 C. P. 525.] By R. 5, T. T. 1853, "in all actions by and against assignees of a bankrupt or insolvent, &c. the *character* in which the plaintiff or defendant is *stated on the record* to sue or be sued, shall not in any case be considered as in issue, *unless specially denied*."

The bankrupt law consolidation act, 12 & 13 Vict. c. 106, enacts,

Section 153. "The assignees, with the leave of the court first obtained, upon application to such court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended, and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt." But if the assignees bring an action without such leave, the court in which the action has been brought cannot on that ground stay the proceedings; nor does the want of such leave furnish a good plea to the action. Lee *v.* Sangster, 2 C. B. N. S. 1; Piercy *v.* Roberts, 1 Myl. & K. 4; Casborne *v.* Banham, 6 Sim. 317.

Section 233, as varied by 17 & 18 Vict. c. 119, s. 124. "If the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within two calendar months after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against

(*l*) When a bailor mortgages a chattel bailed, and the mortgagee has a right to demand possession from the bailee, and does demand it, the bailee may refuse to give the chattel to the bailor. European & Australian Mail Co. *v.* The Royal Mail Steam Packet Co. 30 L. J. C. P. 247. As to the right of the bailee to set up the *jus tertii* and form, see Thorne *v.* Tilbury, 3 H. & N. 534; Sheridan *v.* The New Quay Co. 4 C. B. N. S. 618; Anderson *v.* The Midland Ry. Co. 30 L. J. Q. B. 94. [Right of pawnee to repledge. Plea by second pawnee. Donald *v.* Sackling, L. R. 1 Q. B. 585.]

Obs. such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date." A copy of the Gazette is sufficient evidence of any matter contained therein. S. 240.

Section 234. "In any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court, for anything done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, — if defendant, at or before pleading, and if plaintiff, before issue joined, — give notice in writing to such assignees or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person."

1. *Denial that Plaintiffs are Assignees.* (*m*)

C. D. ats.
L. B. and another, suing as assignees, &c. } That the plaintiffs were not nor are assignees as alleged.

2. *Notice to be given with the above Plea.* (*n*)

n the ——.

A. B. and G. H. *suing* as assignees of E. F. an alleged bankrupt, plaintiffs, and

C. D., defendant.

(*m*) Porter *v.* Walker, 1 M. & G. 686. e form, &c. Scott *v.* Thomas, 6 C. & P. 611. hat is evidence of title of assignees, Kelly Morray, L. R. 1 C. P. 667.] In Inglis *v.* ence, 1 Cr., M. & R. 432, it was decided, at in an action by the assignees of a bankpt, admissions of their title as assignees by defendant, in letters addressed to the solor to the commission and to one of the ignees, are *primâ facie* evidence of title, as to dispense with strict proof, though re is a plea denying the title of the plainffs as assignees, and notice to dispute has n given. See *ante*, Obs. Under this plea d the notice (which must in all cases be livered with the plea), the plea alone being fficient, Moon *v.* Raphael, 7 C. & P. 1, the trading, the petitioning creditor's it, the act of bankruptcy, and the validity the fiat, may (all or any of them) be put issue, Butler *v.* Hobson, 4 Bing. N. C. 7; and the same holds in *trover;* Buck- *v.* Frost, 8 Ad. & E. 845; and ejectnt, brought by assignees. Doe *d.* Johnson *v.* Liversedge, 11 M. & W. 517. Under this plea defendant may, in actions of contract, show the non-joinder of another assignee. Jones *v.* Smith, 1 Ex. 831.

(*n*) See *ante*, Obs. and last note. This notice must be specific; notice of intention to dispute "the bankruptcy" is insufficient. Trimley *v.* Unwin, 6 B. & C. 537. If the notice be to dispute "the act of bankruptcy" only, and the plaintiff succeed at the trial in proving an act of bankruptcy, then a trading, and a petitioning creditor's debt, *co-existent with that act*, but no others, are admitted. Porter *v.* Walker, 1 M. & G. 686. If the notice to dispute be not given in due time, the party should obtain a judge's order for leave to withdraw his plea, &c. pleading *de novo*, with such notice. See De Charme *v.* Lane, 2 Camp. 324; Radmore *v.* Gould, 1 Wightw. 80; Poole *v.* Bell, 1 Stark. R. 328. The notice seems to be requisite, although the assignees sue or are sued with another person. Gilman *v.* Cousins, 2 Stark. R. 282; Smith *v.* Nicholson, 2 Stark. Ev. 3d ed.

Take notice that the above-named defendant intends, on the trial of this cause, to dispute the *trading, petitioning creditor's debt*, and *act of bankruptcy* [*or, if one only of such matters be disputed, name it according to the plea*] of E. F. above named. Dated [*&c.*]

——, defendant's attorney [*or* "agent"].

To A. B. and G. H., the above-named plaintiffs,
and to ——, their attorney [*or* "agent"]. (*o*)

3. *Plea to an Action by Assignees for Money had and received to their Use, that the Defendant paid over the Money to bonâ fide Creditors of the Bankrupt by his Command, without Notice of any previous Act of Bankruptcy.* (*p*)

Commencement, ante, 20, 21.] That the money herein pleaded to was received by the defendant after the said E. F. committed an act of bankruptcy, and before the filing of the petition for adjudication of bankruptcy against the said E. F.; and that while he the defendant held the said money for the use of the said E. F., and before the filing of such petition, he the defendant, on behalf of the said E. F., really and *bonâ fide*, and not by way of fraudulent preference, paid over the sum of money herein pleaded to to ——, then being a creditor of the said E. F., to the amount of the same. And the defendant says that he had not at the time of such payment notice of any prior act of bankruptcy by the said E. F. committed.

note; or are not described as assignees on the record; Simmons *v.* Knight, 3 Camp. 251; but it is not necessary on an issue directed by the court. Lott *v.* Melville, 3 M. & G. 40; and *ante*, 126, note (*t*). If the assignees are strangers to the record and their title comes only incidentally in question, it must be regularly proved, though no notice has been given by the opposite party. Doe *v.* Liston, 4 Taunt. 741. Unless notice be given to dispute the petitioning creditor's debt, the debt upon the proceedings must be taken to be admitted for all purposes. Hernaman *v.* Barber, 14 C. B. 583.

(*o*) A like notice, to be given on the part of a plaintiff, to be given before issue joined can be readily framed from the above.

(*p*) The 12 & 13 Vict. c. 106, s. 133, enacts, "that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf before date of the fiat or the filing a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bonâ fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to, or being paid by such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed." Proviso that nothing therein contained shall give validity to payments, &c. by way of fraudulent preference. In Kynaston *v.* Crouch, 14 M. & W. 266, the defendant, as foreman of a bankrupt, carried on his business after a secret act of bankruptcy, and in so doing received money due to the bankrupt and made bonâ *fide* payments for him; in an action for the former money by the assignees, it was held that he could not protect himself under the ordinary pleas of non assumpsit and set-off; and see Pennell *v.* Aston, 14 M. & W. 415. See next form. As to answering an account stated, see *ante*, 294. As to what is sufficient notice of an act of bankruptcy, and generally as to notice, see Christie *v.* Winnington, 8 Ex. 287; Brewin *v.* Short, 24 L. J. Q. B. 297; Pike *v.* Stevens, 12 Q. B. 465; Hope *v.* Meek, 10 Ex. 829; Brewin *v.* Briscoe, 28 L. J. Q. B. 329; Broadbent *v.* Varley, 12 C. B. N. S. 214; Edwards *v.* Gabriel, 30 L. J. Ex. 245; Edwards *v.* Scarsbrook, 32 L. J. Q. B. 45; Young *v.* Roebuck, 32 L. J. 260. And see Bramwell *v.* Eglinton, 4 N. 56, Q. B.

4. *Plea of Payment to a Bankrupt after, but without Notice of an Act of Bankruptcy, and before Petition filed.* (*q*)

Commencement, ante, 20.] That after the accruing of the plaintiff's claim herein pleaded to, and after the said E. F. committed an act of bankruptcy, and before the filing of the petition for adjudication of bankruptcy under which the plaintiffs now sue as such assignees as aforesaid, he the defendant really and *bonâ fide*, and not by way of fraudulent preference, paid to the said E. F., who then accepted and received from the defendant divers sums of money to the amount of the claim herein pleaded to, in full satisfaction and discharge of the said claim. And the defendant says that he had not at the time of such payment notice of any prior act of bankruptcy by the said E. F. committed. (*r*)

5. *Plea to an Action by Assignees, that the Bankrupt assigned the Debt to a Third Person before Bankruptcy.* (*s*)

That before the said C. (the bankrupt) became bankrupt, by a deed (*t*) made the —— day of ——, between the said C. of the one part, and one D. of the other part, after reciting that the said D. had lent and advanced to the said C. £——, and that [*set out any further recitals that may be necessary to explain the transaction*] the said C., before he became bankrupt, on [*&c.*], in pursuance of the said agreement, and for the considerations aforesaid, and of 10*s.* to the said C. paid by the said D., did bargain, sell, assign, transfer, and set over unto the said D. and Co., their executors [*&c.*], all and every [*&c.; set out the operative part of the deed*], and all right, title, and interest, property, benefit, claim, and demand whatsoever at law or in equity of him the said C., of, in, and to the same premises, and every part thereof, to have, hold, recover, receive, take, and enjoy [*&c.*], and all and singular other the remedies thereby assigned or intended so to be unto the said D., his executors [*&c.*], in trust that he the said D. did and should in the first place thereout deduct, retain to, and reimburse himself the said sum of £——, with interest for the same at £5 per cent., and in the next place to pay over the surplus, if any, unto the said C., his executors, administrators, or assigns, or to such person or persons as he or they might appoint to receive the same, whereof he the defendant, before the said C. became bankrupt as aforesaid, and before the commencement of this suit, had notice; and the defendant further says, that from the time of the making of the said deed until and at the time when the said sum of £——, parcel, &c. became due and payable, the said sum of £—— so lent by the said D. to the said C. as aforesaid, together with interest thereon, amounting together to £——, was due and owing from the said C. to the said D., and exceeded the said sum of £——, parcel, &c. herein pleaded to, and which said last-mentioned sum at the commencement of this suit was and still is due and

(*q*) See last note, and observe the notes to pleas, *post*, title "Payment."

(*r*) See Cochrane *v.* Green, *post*, note.

(*s*) Form, &c.; Leslie *v.* Guthrie, 1 Bing. N. C. 697; and law; Tibbets *v.* George, 5 A. & E. 107; and see Gale *v.* Lewis, 9 Q. B. 730; Pott *v.* Lomas, 6 H. & N. 529. Pleas of set-off and mutual credit to actions by assignees, *post*, "Set-off."

(*t*) The assignment need not be in writing. Tibbets *v.* George, 5 Ad. & E. 107. An order of a creditor to his debtor to pay the debt to a third person, assented to by the debtor, binds the debtor. Hamilton *v.* Spottiswoode, 4 Ex. 200. As to assent, see McGowan *v.* Smith, 26 L. J. Ch. 8. All three must be parties to the agreement. Cochrane *v.* Green, 9 C. B. N. S. 464.

payable and unpaid to the said D., who at the time of the said bankruptcy of the said C., and at the time when the plaintiffs became and were such assignees as aforesaid, and from thence until and at the time when the said sum of £——, parcel, &c. became due, claimed to be and was and still claims to be and is entitled to receive from the defendant the said sum of £——, parcel, &c. under and by virtue of the said deed.

II. ASSIGNEES OF AN INSOLVENT. (*u*)

See *post*, "Insolvent."

BANKRUPTCY — BANKRUPT.

Obs. — By the 161st section of the bankruptcy act, 1861, which is substituted for the 205th section of the bankrupt act, 1849, it is enacted, "The order of discharge [certificate under the bankrupt act, 1849] shall upon taking effect discharge the bankrupt from all debts, claims, or demands provable under his bankruptcy save as herein otherwise provided (see s. 159), and if thereafter he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence, and the order of discharge shall be sufficient evidence of the bankruptcy and the proceedings precedent to the order of discharge." [For the corresponding provision in the United States bankrupt act, see Rev. St. U. S. tit. LXI. ch. 5, § 5119, p. 993.]

By section 164, "After the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim, or demand provable under the bankruptcy, or any part thereof on any contract, promise, or agreement, verbal or written, made after adjudication; and if he be sued on any such contract, promise, or agreement, he may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence." [If a judgment is recovered against a party, upon a debt provable in bankruptcy, after he has been adjudged a bankrupt under the United States bankrupt law, his certificate of discharge in bankruptcy is no defence. Bradford *v.* Rice, 102 Mass. 472. Such a judgment cannot be proved against the bankrupt's estate. In re Williams, 2 Bankr. Reg. 79; Gray J. in Bradford *v.* Rice, 102 Mass. 473.]

By section 166, "Any contract, covenant, or security made or given by a bankrupt or other person with, to, or in trust for any creditor for securing the payment of any money as a consideration, or with intent to persuade the creditor to forbear opposing the order for discharge, or to forbear to petition for a rehearing of, or to appeal against the same, shall be void, and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence. Provided always, that no such security, if a negotiable security, shall be void as against a *bonâ fide* holder thereof for value without notice of the consideration for which it was given." Under the 12 & 13 Vict. c. 106, s. 202, such a negotiable security was *absolutely* void; Goldsmith *v.* Hampton, 8 C. B. N. S. 94; Reed *v.* Wiggins, [13 C. B. N. S. 220;] 32 L. J. C. P. 131; and the general issue might be pleaded, and the act and the special matter given in evidence. [For corresponding provision in the United States bankrupt act, see Rev. St. U. S. tit. LXI. ch. 5, § 5131, p. 997.]

The above general pleas of bankruptcy are applicable only where actions are

(*u*) The court of bankruptcy has now the jurisdiction, powers, and authorities formerly possessed by the court for the relief of insolvent debtors. Bankruptcy Act, 1861, s. 1.

Obs. commenced against the bankrupt after the order of discharge has taken effect. If the order of discharge take effect after action, but before plea, it should be so pleaded; if after plea, it should be pleaded *puis darrein continuance*, in either case stating the proceedings. See form, *post*, Todd *v.* Maxfield, 6 B. & C. 105; [Corpening *v.* Grinnell, 10 Ired. (Law) 15; Keene *v.* Mould, 16 Ohio, 12. As to stating the proceedings, see Preston *v.* Simons, 1 Rich. (S. Car.) 262; Downer *v.* Chamberlin, 21 Vt. 414.] As to what is provable under the bankruptcy and barred by the certificate or order of discharge, see Bankrupt Law Consolidation Act, 1849, s. 165 and ss. 172–182; Temple *v.* Pullen, 8 Ex. 389; Young *v.* Winter, 16 C. B. 401; [Metcalfe *v.* Hanson, L. R. 1 H. L. 242; Muge *v.* Rowan, L. R. 3 Ex. 85; Betteley *v.* Stainsby, L. R. 2 C. P. 568;] Warburg *v.* Tucker, 5 El. & Bl. 384; El., Bl. & El. 914; Ex parte Barwis, 25 L. J. Bank. 10; Ex parte Bateman, 15 L. J. Bank. 19; Maples *v.* Pepper, 18 C. B. 177; Boyd *v.* Robins, 4 C. B. N. S. 749; Parker *v.* Ince, 4 H. & N. 53; White *v.* Corbett, 1 El. & El. 692; Thomas *v.* Hopkins, 7 C. B. N. S. 711; Adkins *v.* Farrington, 5 H. & N. 586; Ex parte Boddam, 29 L. J. Bank. 20; Elder *v.* Beaumont, 8 El. & Bl. 353; Betteley *v.* Stainsby, 31 L. J. C. P. 337; Re Moor, 3 N. R. 546, L. C.; Bankruptcy Act, 1861, ss. 149–154; Deacon's Bankruptcy by Langley, and Shelford on Bankruptcy; [Rev. St. U. S. tit. LXI. c. 4, § 5067 *et seq.* c. 5, § 5119, p. 993. Under the United States bankrupt law, no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt. Rev. St. U. S. tit. LXI. c. 5, § 5117, p. 993; Morse *v.* Hutchins, 102 Mass. 439; Cronan *v.* Cutting, 104 Mass. 245; In re Kimball, 6 Blatchf. 292; In re Seymour, 1 Ben. 348; In re Kimball, 2 Ben. 554.] A public officer of a company cannot plead his own bankruptcy in bar of an action in which he is sued as representative of the company. Steward *v.* Dunn, 11 M. & W. 63. The defendant cannot give his bankruptcy in evidence under the general issue. Gowland *v.* Warren, 1 Camp. 363; Stedman *v.* Martinnant, 12 East, 664; R. G. T. T. 1853, *ante*, 276; [1 Chitty Pl. 506.] The plaintiff need not reply *specially* to a plea of the defendant's bankruptcy pleaded generally under the statute; under a joinder of issue he may show any special matter proving the invalidity of the certificate or order of discharge, or defeating or avoiding its operation. Wilson *v.* Kemp, 2 M. & S. 549; Hughes *v.* Morley, 1 B. & Ald. 22; Horn *v.* Ion, 4 B. & Ad. 78. See Bankruptcy Act, 1849, s. 201, repealed by Bankruptcy Act, 1861, s. 159 of the latter act being substituted. [The provisions for testing the validity of a discharge in bankruptcy under the United States bankrupt law, are exclusive; the validity of such discharge cannot be impeached in a suit in a federal or a state court, on a debt provable in proceedings against the defendant under that law, and of a nature to be barred by a valid discharge in those proceedings. Way *v.* Howe, 108 Mass. 502; Burpee *v.* Sparhawk, 108 Mass. 112, 113; Corey *v.* Ripley, 57 Maine, 69; Ocean National Bank *v.* Olcott, 46 N. Y. 12; Rev. Sts. U. S. tit. LXI. c. 5, § 5119, p. 993; Simons *v.* Slocum, 3 Cranch, 300, 308; Crocker *v.* Marine National Bank, 101 Mass. 240; Payne *v.* Able, 7 Bush, 344; but see Beardsley *v.* Hall, 36 Conn. 270; Batchelder *v.* Low, 43 Vt. 662.] To support the plea of bankruptcy, the defendant has only to produce his certificate or order of discharge duly allowed. Taylor *v.* Welsford, Moody & M. 503. See Bankruptcy Act, 1849, s. 205, and Bankruptcy Act, 1861, s. 161, *supra*. [Under the United States bankrupt law, the certificate is made conclusive evidence, in favor of such bankrupt, of the fact and the regularity of his discharge. Rev. Sts. U. S. tit. LXI. c. 5, § 5119, p. 993.] The plea puts merely the certificate or order of discharge in issue. The order of discharge does not release or discharge any person who was a partner with the bankrupt at the time of the bankruptcy, or was then jointly bound or had made any joint contract with him. Bankruptcy Act, 1861, s. 163. [Corresponding to this, the United States bankrupt act provides that the discharge shall not release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. Rev. Sts. U. S. tit. LXI. c. 5, § 5118, p. 993.] In the case of

Obs. the bankruptcy and certificate or order of discharge of one of several debtors, he need not be made a defendant. Form 5, *ante*, 271, note (*n*). If joined, and he plead his certificate or order of discharge, the plaintiff may reply; see Ib.; or may enter a *nolle prosequi* as to him, and proceed against the other debtors. Noke *v.* Ingham, 1 Wils. 89; Moravia *v.* Hunter, 2 M. & Sel. 444; 2 Rose, 264, S. C.; Grant *v.* Jackson, Peake R. 203. A proof or claim by a creditor under the bankruptcy, operates of itself as a relinquishment or discontinuance of any action previously brought against the bankrupt. Bankrupt Act, 1849, s. 182. [See Rev. Sts. U. S. tit. LXI. c. 5, § 5105, p. 990; Bennett *v.* Goldthwait, 109 Mass. 494.] And when a creditor has been allowed to prove, it seems that the bankrupt is not entitled to have an entry or suggestion of the election put on the record in which the action is brought. Kemp *v.* Potter, 6 Taunt. 549; Sainter *v.* Fergusson, 8 C. B. 619. The proof of the debt cannot be pleaded in bar of the action; but the bankrupt may apply to the court in which the action is, to stay proceedings. Harley *v.* Greenwood, 5 B. & Ald. 95; Woodward *v.* Meredith, 2 D. & L. 135. Proof for part of a judgment debt is the same as proof for the whole. Geikie *v.* Hewson, 4 M. & G. 618; Sainter *v.* Fergusson and Woodward *v.* Meredith, *ubi sup.* When the bankrupt is sued jointly with any other person, the relinquishing of the action against the bankrupt does not affect it against such other person. Bankrupt Act, 1849, s. 182.

1. *Plea of Defendant's Bankruptcy and Order of Discharge before Action.*

That he became bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action (*x*) in the declaration mentioned accrued before the defendant so became bankrupt. (*y*) [See *supra*, Obs.]

2. *Plea of Defendant's Bankruptcy and Discharge after Action brought.* (*z*)

That after the accruing of the alleged causes of action, the defendant being liable to become and be adjudged bankrupt within the meaning of the statutes in force concerning bankrupts, such proceedings were had and prosecuted in the court of bankruptcy for the —— district [*or* in the county court of ——, holden at ——], being the court having jurisdiction in that behalf, according to the said statutes, (*a*) that the defendant became and was by the said court duly adjudged bankrupt under and according to the provisions of the said statutes, and the said court afterwards and after the commencement of this suit (*b*) made and granted to the defendant an order of discharge pursuant to the said statutes, which said order has taken and remains in effect.

(*x*) This form must be adhered to. Charlton *v.* King, 4 T. R. 155; Sheen *v.* Garrett, 6 Bing. 688, 689; Wheatley *v.* Williams, 1 M. & W. 537, per Parke B.

(*y*) Non assumpsit might also be pleaded; but this is not advisable where the certificate affords a clear defence, and there is no ground for disputing the debt, as defendant, if he failed, would be liable to costs of proving it. If the plaintiff is proceeding for a cause of action accruing after the bankruptcy, he must new assign. See form, Elder *v.* Beaumont, 27 L. J. Q. B. 25.

(*z*) The preceding statutable form of plea is only applicable when the action is commenced after the bankrupt has obtained his order of discharge; see s. 161, and Obs. *ante*, 316, 317; but the order of discharge after it has taken effect, discharges the bankrupt from all debts provable under the bankruptcy, and should be pleaded as above, or *puis darrein continuance*, according as it takes effect before or after plea pleaded. See Tod *v.* Maxfield, 6 B. & C. 105; [1 Chitty Pl. 689, 690.]

(*a*) See Bankruptcy Act, 1861, s. 88. And as to the jurisdiction of the county courts see ss. 3, 4, 94, 98, 99, 101, and 109; In re Harrison, 312 L. J. Ex. 159; In re Coombs, 31 L. J. Q. B. 65.

(*b*) If pleaded *puis darrein continuance* say, "after the last pleading in this action." See "*Puis darrein continuance*," *post*.

3. *Plea of the Defendant's Bankruptcy and Certificate under the Bankrupt Law Consolidation Act*, 1849.

Betteley *v.* Stainsby, [12 C. B. N. S. 477.]

4. *Pleas under the same Act, setting out the Proceedings.*

Warburg *v.* Tucker, 5 El. & Bl. 384; Young *v.* Winter, 16 C. B. 404; Elder *v.* Beaumont, 27 L. J. Q. B. 25.

5. *Pleas of Defendant's Discharge under Foreign Bankruptcy Proceedings.* (*c*)

Under proceedings in the United States. Potter *v.* Brown, 5 East, 124.

Under a Scotch sequestration. Sidaway *v.* Hay, 3 B. & C. 12.

Under the insolvent law of the Cape of Good Hope. Frith *v.* Wollaston, 7 Ex. 194.

Under the insolvent law of Victoria. Bartley *v.* Hodges, 1 B. & S. 375.

6. *Plea under ss.* 164 *and* 166 *of the Bankruptcy Act*, 1861. (*d*)

That after the 11th day of October, A. D. 1861, he, the defendant, became bankrupt within the meaning of the statutes in force concerning bankrupts and the alleged cause of action accrued pending proceedings in bankruptcy.

7. *Similar Special Pleas under the Bankrupt Law Consolidation Act*, 1849.

Under s. 202 (*repealed*). Goldsmid *v.* Hampton, 5 C. B. N. S. 94.

Under s. 204 (*repealed*). Kidson *v.* Turner, 3 H. & N. 581.

8. *Plea of the Plaintiff's Bankruptcy before Action.* (*e*)

That after the accruing of the alleged causes of action, and before this suit, the plaintiff, being liable to become and be adjudged bankrupt within

(*c*) The general rule applicable to such a case is, that if the debt was contracted in the country where the discharge has been obtained, the discharge will be a discharge in every other country, but a discharge of a contract by the law of a place where the contract was not made or to be performed, will not be a discharge of it in any other country. Accordingly, a discharge by foreign law is no bar to an action in England for an English debt. Smith *v.* Buchanan, 1 East, 6; Phillips *v.* Allan, 1 B. & C. 477; Lewis *v.* Owen, 4 B. & Ald. 654; Bartley *v.* Hodges, *ubi supra*; Story's Conflict of Laws, s. 342; Deacon's Bankruptcy, by Langley, 794 *et seq.* [This subject was very thoroughly discussed, by the counsel and by Shaw C. J. in May *v.* Breed, 7 Cush. 15; Shepherd *v.* Breed, 7 Cush. 44; Marsh *v.* Putnam, 3 Gray, 551. See Blanchard *v.* Russell, 13 Mass. 1; Pitkin *v.* Thompson, 13 Pick. 64; Verry *v.* McHenry, 29 Maine, 206; 2 Chitty Contr. (11th Am. ed.) 1301, 1302; M'Millan *v.* M'Neill, 4 Wheat. 213; Long *v.* Hammond, 40 Maine, 204; Peck *v.* Hibbard, 26 Vt. 698.]

(*d*) Under the corresponding sections (204 and 202) of the bankrupt law consolidation act, 1849, which are repealed, the general issue might be pleaded, and the act and special matters given in evidence. *Ante*, Obs. 316, 317; Weeks *v.* Argent, 16 M. & W. 817; Goldsmid *v.* Hampton, 5 C. B. N. S. 94. The above sections are not retrospective. Reed *v.* Wiggins, 12 C. B. N. S. 220.

(*e*) [See Hodgson *v.* Sidney, L. R. 1 Ex. 313.] The bankruptcy of a sole plaintiff is an issuable plea; Willis *v.* Hallett, 5 Bing. N. C. 465; but not the bankruptcy of one of two plaintiffs. Staples *v.* Holdsworth, 4 Bing. N. C. 144; S. C. 6 Dowl. 196. If the bankruptcy arose after action brought, but before plea pleaded, the plea should be so pleaded; if after plea pleaded, the plea must be *puis darrein continuance*. The right to plead such pleas is, however, subject to the provisions of the 142d section of the C. L. P. Act, 1852, by which it is enacted that

the meaning of the statutes in force concerning bankrupts, became and was duly adjudged bankrupt under and according to the provisions in that behalf of the said statutes, and thereupon and before this suit assignees of the estate and effects of the plaintiff, as such bankrupt, were duly appointed and chosen under and according to the said statutes, whereupon the alleged causes of action became and were, before and at the time of the commencement of this suit, vested in such assignees as aforesaid, as part of the estate and effects of the plaintiff, as such bankrupt as aforesaid.

9. *A like Plea under the Bankrupt Law Consolidation Act*, 1849.

Houghton *v.* Kœnig, 18 C. B. 235.

10. *Plea to an Action by Husband and Wife, of the Husband's Bankruptcy after the Marriage.*

Richbell *v.* Alexander, 10 C. B. N. S. 324.

11. *Plea of a Deed under the* 192*d Section of the Bankruptcy Act*, 1861.

Obs. — The bankruptcy act, 1861, enacts, —

S. 192. "Every deed or instrument made or entered into between a debtor and his creditor, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor, as if they were parties to and had duly executed the same, provided the following conditions be observed, that is to say, —

1. A majority in number representing three fourths in value of the creditors of such debtor, whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor in writing, assent to or approve of such deed or instrument:

2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same:

3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor:

4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered:

5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor, or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three fourths in value of the creditors of the debtor, whose debts amount to ten pounds or upwards, have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed:

6. Such deed or instrument shall, before registration, bear such ordinary and ad valorem stamp duties as are hereinafter provided:

7. Immediately on the execution thereof by the debtor, possession of all

"The bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order, to be obtained for that purpose within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made, and in case the assignees neglect or refuse to continue the action and give such security within the time limited by the order, the defendant may within eight days after such neglect or refusal plead the bankruptcy." This section does not apply to actions commenced *after* the bankruptcy or insolvency of the plaintiff. Stanton *v.* Collier, 3 El. & Bl. 274.

the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

S. 193. "The date, names, and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the chief registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within forty-eight hours after the deed shall have been left with the registrar as aforesaid, and a copy of such entry shall be published in the London Gazette within four days after the making of such entry." The deed takes effect from its date as if the debtor had been adjudicated bankrupt on that day. Re Moor, 3 N. R. 547, L. C.

S. 194. "Every deed, instrument, or agreement whatsoever, by which a debtor not being a bankrupt conveys, or covenants, or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the court in London shall allow (Wishart *v.* Fowler, 33 L. J. Q. B. 125), be registered in the court of bankruptcy, and in default thereof shall not be received in evidence." This section applies to all deeds whatsoever, which are, or profess to be, or are obviously on the face of them intended to be deeds of arrangement between a debtor and the whole body of his creditors. Hodgson *v.* Wightman, 1 H. & C. 810; [Prichard *v.* Timothy, 35 L. J. Ex. 165.]

S. 195. "No deed or instrument whatever required to be registered as aforesaid shall be registered unless, in addition to the ordinary stamp duty, it also be impressed with or have affixed to it a stamp denoting a duty computed at the rate of five shillings upon every hundred pounds or fraction of a hundred pounds of the sworn or certified value of the estate or effects comprised in or to be collected or distributed under such deed or instrument, provided that the maximum of ad valorem duty payable in respect of any such deed or instrument, shall be two hundred pounds."

S. 196. "Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the hour of the day at which the same was brought into the office of the chief registrar for registration."

S. 197. "From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of, and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed, or may be used or exercised, by assignees or creditors, with respect to the bankrupt or his acts, estate, and effects in bankruptcy; and except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do, if the debtor in such deed had been adjudged bankrupt and his estates were administered in bankruptcy." The title of the trustees relates back to an act of bankruptcy prior to the date of the deed. Topping *v.* Keysell, 12 W. R. 756; 4 N. R. 197, C. P.; [33 L. J. C. P. 225. As to the effect of the section, Porter *v.* Kirkus, L. R. 2 C. P. 590; Williams *v.* Cadbury, L. R. 2 C. P. 453. And see end of note (*f*), *post*, 324.]

S. 198. "After notice of the filing and registration of such deed has been

Obs. given as aforesaid, no execution, sequestration, or other process against the debtor's property, in respect of any debt, and no process against his person in respect of any debt, other than such process, by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant without leave of the court; and a certificate of the filing and registration of such deed, under the hand of the chief registrar and the seal of the court, shall be available to the debtor for all purposes as a protection in bankruptcy."

The certificate of registration is no protection unless the deed itself is valid. Dewhurst *v.* Kershaw, 1 H. & C. 726; Ilderton *v.* Castrique, 32 L. J. C. P. 206; Ilderton *v.* Jewell, 32 L. J. C. P. 256; Leigh *v.* Pendlebury, 33 L. J. C. P. 172; [but see Lloyd *v.* Harrison, 34 L. J. Q. B. 97; 35 Ib. 153; and Ames *v.* Colnaghi, 37 L. J. C. P. 159.]

S. 200. "If a debtor cannot obtain the assent of a majority in number representing three fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities accepted, drawn, made, or indorsed by him are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, it shall be sufficient if he obtain the consent of a majority in number representing three fourths in value of all his other creditors to such deed or instrument as aforesaid, provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place at which he shall have carried on business, immediately prior to the date of such deed or instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument, by notice in writing addressed to the trustee or trustees thereof, within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall state the circumstances of the case, and the same shall be allowed by the court, and provided the deed or instrument be in such form as is expressed in schedule D to this act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with."

These sections are in substitution for ss. 224–229 of the act of 1849, which are now repealed, but many of the cases upon deeds under the latter sections will be found of service with respect to deeds under the act of 1861, and will be found all collected, *post*, 324, 325.

The law with respect to the requisites of a valid deed under the 192d section, is still in an unsettled state, the decisions of the courts being somewhat conflicting. They all, however, agree in holding that a deed, to be within the act, must profess to be, and be for the benefit of *all* the creditors impartially, as much for one as for another, and a deed which excludes any creditor or gives one an advantage over another, is not binding on non-assenting creditors. Wells *v.* Hacon, 4 N. R. 99; 12 W. R. 790. Accordingly, non-assenting creditors are not bound by a deed for the benefit of those creditors who shall execute it within a certain time; Ex parte Morgan, in re Woodhouse, 2 L. J. Bank. 15; Berridge *v.* Abbott, 1 N. R. 437, C. P.; Dewhurst *v.* Kershaw, 1 H. & C. 726; Copeman *v.* Hart, 2 N. R. 126, C. P.; or providing for payment to those creditors only who shall execute it; Ilderton *v.* Castrique, 32 L. J. C. P. 206; Ilderton *v.* Jewell, 32 L. J. C. P. 256; 33 L. J. C. P. 148; Ex parte Godden, in re Shettle, 32 L. J. Bank. 37; Dingwall *v.* Edwards, 33 L. J. Q. B. 161; or providing for trade creditors only; Walter *v.* Adcock, 7 H. & N. 54; or where non-executing creditors are placed in a situation inferior to that of the majority of the creditors. Ex parte Cockburn, *re* Smith & Laxton, 3 N. R. 227; 4 N. R. 1, L. C.; Clapham *v.* Atkinson, 33 L. J. Q. B. 81. [See, also, Thompson *v.* Knight, L. R. 2 Ex. 42; Tetley *v.* Wanless, L. R. 2 Ex. 21, 275; Peel *v.* Webster, 36 L. J. Ex. 188; McLaren *v.* Baxter, L. R. 2 C. P. 559; Isaacs *v.* Green, L. R. 2 Ex. 352.

[When the deed is within the meaning of the 192d section, and there is no inequality as between the creditors, and no fraud, the court will not decide upon the reasonableness of the provisions of the deed, that being only matter for the consideration of the creditors. Jacobson *v.* Lamont, 36 L. J. Ex. 222; L. R. 2 Ex. 394; Bailey *v.* Bowen, L. R. 3 Q. B. 133; In re Richmond

Hotel Co. (Limited), ex parte King, L. R. 3 Eq. 10; Fitzpatrick *v.* Bourne, L. R. 3 Q. B. 233. A deed whereby the creditors bind themselves personally to indemnify the trustees, is not within the section. Wigfield *v.* Nicholson, Weekly Notes, 1868, p. 115. A deed providing for separate creditors only; Ex parte Glen, L. R. 2 Ch. Ap. 670; 36 L. J. Q. B. 51; or joint creditors only; Tomlin *v.* Dutton, Weekly Notes, 1868, p. 115, Q. B.; is not within the section, nor is a mere letter of license. Latham *v.* Lafone, L. R. 2 Ex. 115.] A covenant to indemnify the debtor against negotiable instruments indorsed or put into circulation by the creditors, is unreasonable. Woods *v.* Foote, Ex. Ch. 32 L. J. Ex. 199; 1 H. & C. 841; [Oldis *v.* Armston, L. R. 2 Ex. 406;] Ingelbach *v.* Nicholls, 2 N. R. 75, C. P.; Nicholson *v.* Potts, 4 N. R. 70, Ex. Ch.; Balden *v.* Pell, 4 N. R. 186, Q. B. So provisions subjecting the creditor to the loss of his debt on breach of a covenant not to sue; Dell *v.* King, 2 H. & C. 84; Leigh *v.* Pendlebury, 33 L. J. C. P. 172; that he shall verify his debt by solemn declaration or otherwise to the satisfaction of the trustee, or lose all benefit under the deed. Leigh *v.* Pendlebury, *ubi sup.* And see Kidson *v.* Barclay, Strick *v.* De Mattos, and Dewhurst *v.* Jones, Ex. June 1, 1864.

A power in the deed enabling the trustees to make such arrangements as they may deem expedient with the creditors whose debts are under £10, is inconsistent with the act. Ex parte Spyer, re Josephs, 32 L. J. Bank. 62. In that case the lord chancellor rejected the power as repugnant to the general tenor of the deed, and held its existence no objection to the validity of the deed; but see *contra*, Woods *v.* Foote and Dell *v.* King, *ubi sup.*

That a "*cessio bonorum*" is not necessary to the validity of a deed under the 192d section, can scarcely at present be considered as finally decided. Under the corresponding sections of the bankrupt act 1849 (ss. 224–229), the language of which differs but very slightly from that of the sections cited above, it was held in Tetley *v.* Taylor, 1 El. & Bl. 529 (reversing the judgment of the queen's bench), followed by a number of other cases, that a "*cessio bonorum*" was necessary, and that a reservation of any part of the debtor's property excepting his *necessary* wearing apparel, Spitzer *v.* Chaffers, 33 L. J. C. P. 7, prevented the deed from being binding upon non-assenting creditors. Following the decisions under the act of 1849, Pollock C. B. and Martin B. in Walter *v.* Adcock, 7 H. & N. 541, held that a "*cessio bonorum*" was required by the 192d section of the act of 1861, but the lord chancellor, in Ex parte Morgan, in re Woodhouse, *ubi supra*, disapproved of Tetley *v.* Taylor, and held that that section did not require that a deed should comprise the whole of a debtor's property; and in Ex parte Cockburn, [33 L. J. Bank. 17;] 3 N. R. 227, he stated that it was in his opinion well settled and clear, according to the intent of the bankruptcy act, 1861, that an assignment or surrender of the debtor's estate was not necessary for the validity of a deed of composition or release under the 192d section, and this has since been followed by all the courts.

As the only provision in the statute as to the operation of the deed itself, is that it shall be as valid and effectual and binding on all the creditors as if they had executed it, it is necessary, in order that the deed may afford a good answer to an action by way of plea, that it should contain a release, a covenant not to sue, or some provision, rendering the deed pleadable in bar to an action. Tabor *v.* Edwards, 4 C. B. N. S. 1; Legg *v.* Cheesbrough, 5 C. B. N. S. 741; Ipstones Park Company *v.* Pattinson, 2 H. & C. 829; Whitehead *v.* Porter, 4 N. R. 99, Q. B.; Wells *v.* Hacon, 16 C. B. N. S. 638; Keyes *v.* Elkins, 34 L. J. Q. B. 25; Eyre *v.* Archer, 16 C. B. N. S. 638; Jones *v.* Morris, 34 L. J. Q. B. 90; Clarke *v.* Williams, 34 L. J. Ex. 60; Ex. Ch. 189; Ray *v.* Jones, 19 C. B. N. S. 416. But a composition deed, providing that the composition shall be taken in discharge is, if the composition be tendered and the tender pleaded, a good answer. Garrod *v.* Simpson, 34 L. J. Ex. 70. A deed under the 200th section of the act in the form expressed in the schedule D to the act is not pleadable in bar to an action. Eyre *v.* Archer, Jones *v.* Morris, and Clarke *v.* Williams, *ubi sup.* The debtor would appear to be in no better position than a bankrupt before he has obtained an order of discharge, and the only way to take advantage of such a deed, or a deed not containing a release or provision plead-

Obs able in bar, is under the 198th section, rendering a certificate of the fili and registration of the deed available to the debtor for all purposes as a p tection in bankruptcy. But if the deed is pleadable, and there was an o portunity for the defendant to plead it, he must plead it in order to have t benefit of it. Whitmore *v.* Wakerley, 34 L. J. Ex. 83; Couston *v.* Robi 12 W. R. 1012; but see Hartley *v.* Mare, 34 L. J. C. P. 187; [The Staffo shire Bank *v.* Emmott, L. R. 2 Ex. 208.] Protection for person and pro erty in bankruptcy is not sufficient ground for staying an action. Naylo Mortimore, 10 C. B. N. S. 566.

The assent of each creditor must be absolute; it will not be sufficient if co tional. Secured creditors must be reckoned in calculating the requisite nu *ber;* Ex parte Godden, 32 L. J. Bank. 37; Turquand *v.* Moss, 17 C. B. S. 15; Ex parte Smith, 10 L. T. N. S. 803; and the value of their securit is not to be deducted in estimating their *value.* Ex parte Godden, and T quand *v.* Moss, *ubi supra;* Whittaker *v.* Lowe, L. R. 1 Ex. 74; Re Sta 35 L. J. B. 15. They cannot *prove* without allowing for the value of th security. Ex parte Morgan, 32 L. J. Bank. 15; and see King *v.* Randall, C. B. N. S. 721. A trust deed may operate as a good conveyance as agai an execution creditor, though not assented to by the requisite number creditors under s. 192; Symonds *v.* George, 33 L. J. Ex. 231; 34 Ib. 1 and a deed under the 192d section assigning the debtor's property is fraudulent within the statute of Elizabeth. Evans *v.* Jones, 34 L. J. 25. (*f*)

That after the passing and coming into operation of the bankruptcy 1861, the defendant was indebted to the plaintiff, and the plaintiff was a c itor of the defendant, in respect of the alleged claim, and the defendant also indebted to divers other persons, his creditors, and thereupon a d dated the —— day of ——, was made and entered into between the defe ant and his creditors [*or* "between the defendant of the first part, and A and C. D., trustees on behalf of the creditors of the defendant, of the sec part, and his creditors of the third part," *as the case may be*], relating to debts and liabilities of the defendant, and his release therefrom [*or* "the

(*f*) The numerous cases decided or reported since the preceding pages were in the press will be found in this note. Deeds have been held valid and pleadable in Strick *v.* De Mattos, 3 H. & C. 22; Woods *v.* De Mattos, L. R. 1 Ex. 91; Dewhirst *v.* Jones, 3 H. & C. 60; Stone *v.* Jellicoe, 3 H. & C. 263; Keyes *v.* Elkins, 5 B. & S. 240; Walker *v.* Nevill, 3 H. & C. 403; Hidson *v.* Barclay, 3 H. & C. 361, (reversing the decision of the exchequer, 3 H. & C. 9;) Hernulewizc *v.* Jay, 6 B. & S. 697; Bailey *v.* Bowen, L. R. 3 Q. B. 133; Coles *v.* Turner, L. R. 1 C. P. 373; Bond *v.* Weston, L. R. 1 Q. B. 169; Johnson *v.* Barratt, L. R. 1 Ex. 65; Gresty *v.* Gibson, L. R. 1 Ex. 112; Corner *v.* Sweet, L. R. 1 C. P. 456; Blumberg *v.* Rose, L. R. 1 Ex. 232; Greenberg *v.* Ward, L. R. 1 C. P. 585. Invalid or not pleadable in Davis *v.* Raphael, 13 W. R. 185; Armitage *v.* Baker, 10 L. T. N. S. 526; Benham *v.* Broadhurst, 34 L. J. Ex. 61; Martin *v.* Gribble, 3 H. & C. 631; Lyne *v.* Wyatt, 18 C. B. N. S. 593; The Chesterfield Co. *v.* Hawkins, 3 H. & C. 677; Gurrin *v.* Kopera, 3 H. & C. 694; Buvelot *v.* Mills, L. R. 1 Q. B. 104; Boulnois *v.* Mann, L. R. 1 Ex. 28; Giddings *v.* Penning, L. R. 1 Ex. 325. See, as to tender of composition, Fessard *v.* Mugnier, 18 C. B. N. S. 286; Garrod *v.* Simpson, 3 H. & C. 395. As to and separate creditors, Walker *v.* Nevill *sup.;* Ex parte Cockburn, 33 L. J. Bank. Ex parte Oldfield, 11 L. T. N. S. 756; European Central Ry. Co. *v.* Westall, J. Q. B. 9. As to what claims are pro or barred, Mare *v.* Underhall, 4 B. 566; Ex parte Mendel, 33 L. J. Bank. Ex parte Kempson, 34 L. J. B. 21; General Discount Co. *v.* Stokes, 30 L. P. 25; Saunders *v.* Best, 17 C. B. N. S. Woods *v.* De Mattos, L. R. 1 Ex. 91. to setting aside execution, Stone *v.* Jeff *ubi sup.;* Baerselman *v.* Langlands, 34 Ex. 3. As to effect of certificate, L *v.* Harrison, 6 B. & S. 36; L. R. 1 502. As to extending time for registra Re Skinner, 34 L. J. Bank. 9. As t scinding registration and leave to issue cution, Re Ellis, 35 L. J. Bank. 12. A registration, Prichard *v.* Timothy, 35 Ex. 165; Pearson *v.* Pearson, Ib. 172 Savin, Ib. Bank. 37. As to joint d Andrew *v.* Macklin, 6 B. & S. 201. jurisdiction under the 197th section Brooks, 33 L. J. Bank. 41; Re Beale, J. Bank. 61; Re Thinn, Ib. 55; Re Re 35 Ib. 20; Re Marks, Ib. 22. As to credit, Stanger *v.* Miller, L. R. 1 Ex.

tribution, inspection, management, and winding-up of his estate," *as the case may be*], which said deed is in the words and figures following [*set out the deed, which in general will be more convenient than stating the effect of the material parts of it*]. (*g*) And the defendant says that the several conditions required by the 192d section of the said act to be observed, in order to render the said deed as valid and effectual, and binding on all the creditors of the defendant, as if they were parties to and had duly executed the same, were before action duly observed, and the said deed became, and was, and is, as valid and effectual and binding on the plaintiff, as if he had been a party thereto, and had duly executed the same. (*h*)

12. *Plea under ss.* 211–223 *of the Bankrupt Act*, 1849, *and Law.*

Alcard *v.* Messon, 7 Ex. 753; 8 Ex. 260; Tindall *v.* Hibbert, 2 C. B. N. S. 199.

13. *Pleas under ss.* 224–229 *of the Bankrupt Act*, 1849.

Phillips *v.* Surridge, 1 L., M. & P. 458; 19 L. J. C. P. 337; Stewart *v.* Collins, 10 C. B. 634; Drew *v.* Collins, 6 Ex. 670; Tetley *v.* Taylor, 1 El. & Bl. 521; Cooper *v.* Thornton, 1 El. & Bl. 544; Fisher *v.* Bell, 12 C. B. 363; March *v.* Warwick, 1 H. & N. 158; Macnaught *v.* Russell, 1 H. & N. 611; Bloomer *v.* Darke, 2 C. B. N. S. 165; Tabor *v.* Edwards, 4 C. B. N. S. 1; Irving *v.* Gray, 3 H. & N. 34; Leonard *v.* Sheard, 1 El. & El. 667; Legg *v.* Cheesbrough, 5 C. B. N. S. 741; Snodin *v.* Boyce, 4 H. & N. 391; Gardner *v.* Chapman, 7 C. B. N. S. 317; Dunlop *v.* Cruger, 7 H. & N. 525; Spitzer *v.* Chaffers, 33 L. J. C. P. 7.

14. *Plea of an Arrangement after Adjudication under the* 185*th and subsequent Sections of the Bankruptcy Act*, 1861. (*i*)

Obs. — As to change from bankruptcy to arrangement, the Bankruptcy Act, 1861, enacts, —

S. 185. "At the first meeting of creditors held after adjudication, in manner herein provided, or at any meeting to be called for the purpose, and of which ten days' notice shall have been given in the London Gazette, three fourths in number and in value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, composition, or otherwise, and that an application shall be made to the court to stay proceedings in the bankruptcy for such period as the court shall think fit."

S. 186. "The registrar shall report such resolution to the court within four days from the date of such resolution, and the bankrupt, or any creditor, nominated in that behalf by the meeting, may then apply to the court, that the proceedings in bankruptcy may be stayed in the terms of such resolution, and the court, after hearing the bankrupt and such creditors as may desire to be heard for or against the resolution, and if it shall find that the resolution was duly carried, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, shall confirm the

(*g*) See Walter *v.* Adcock, 7 H. & N. 541, and Woods *v.* Foote, 1 H. & C. 841, for forms setting out the deed, and Oppenheimer *v.* Grieves, 7 H. & N. 533; Dell *v.* King, 2 H. & C. 84, for forms reciting the deed.

(*h*) Forms alleging compliance with the conditions *seriatim*, will be found in many of the cases cited.

(*i*) Besides the mode of arrangement pointed out by the above sections, the creditors may, after adjudication under the 110th section of the act, take the management of the bankrupt's affairs into their own hands, and the bankrupt, after having made a full discovery of his estate, will be entitled to apply for an order of discharge. This order of discharge will be pleadable in the forms given, *ante*, 318.

Obs. — same and make order accordingly, and in such order shall give such directions as to the interim management of the estate, as it shall deem expedient."

S. 187. "If the proceedings in bankruptcy be stayed as herein provided, the bankrupt or any creditor nominated in that behalf by the meeting aforesaid, may at any time within the period during which the proceedings are so stayed, produce to the court a deed of arrangement, signed by or on behalf of three fourths in number and value of all the creditors of the bankrupt, and the court may consider the same, and may examine, on oath, the bankrupt and any of the creditors who may desire to be heard in support of or in opposition to the deed, and may make such other inquiry as it may think necessary; and if the court shall be satisfied that the deed has been duly entered into and executed, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall, by order, make a declaration of the complete execution of the deed, and shall direct the same to be registered with the chief registrar, and shall also, if it thinks fit, annul the bankruptcy; and such deed shall thereafter be as binding in all respects on any creditor, who has not executed the deed, as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order."

S. 188 gives the court power to entertain applications with respect to the deed and the bankrupt's estate generally, and provides that all questions arising under the deed shall be decided according to the law and practice of bankruptcy.

S. 189 gives the court power to summon and examine the bankrupt, creditors, and other persons, and to compel the production of documents, &c.

S. 190 provides that the bankruptcy shall proceed in case the resolution is not duly reported, &c.

S. 191 provides that if the bankruptcy be annulled, the order shall be filed and notice given in the London Gazette.

The defendant says that after the accruing of the plaintiff's claim, and whilst the plaintiff was a creditor of the defendant in respect thereof, and after the passing and coming into operation of the bankruptcy act, 1861, the defendant being liable to become and be adjudged bankrupt within the meaning of the statutes in force concerning bankrupts, a petition for adjudication of bankruptcy was duly filed against the defendant in the court of bankruptcy for the —— district, being the court having jurisdiction in that behalf according to the said statutes, and such proceedings were thereupon held that the defendant was by the said court duly adjudged bankrupt, and at the first meeting of creditors held after adjudication in the manner in the bankruptcy act, 1861, provided [*or* at a meeting called for the purpose, and of which ten days' notice had been given in the London Gazette] three fourths in number and value of the defendant's creditors present or represented at such meeting did resolve that the defendant's estate should be wound up under a deed of arrangement [*or* composition, *or* otherwise], and that an application should be made to the said court to stay proceedings in the bankruptcy for such period as the court should think fit; and the registrar of the said court did report such resolution to the said court within four days from the date of such resolution, and the bankrupt [*or* a creditor nominated in that behalf by the said meeting] did then apply to the court, that the proceedings in bankruptcy might be stayed in the terms of such resolution; and the said court, after hearing the bankrupt and such creditors as desired to be heard for or against the resolution, finding that the resolution was duly carried, and that its terms were reasonable and calculated to benefit the general body of the creditors under the estate,

confirm the same and made order accordingly, and in such order gave such directions as to the interim management of the estate as it deemed expedient. And the defendant further says, that while the proceedings in bankruptcy were stayed as aforesaid, the defendant [*or* a creditor nominated on that behalf by the meeting aforesaid] did, within the period during which the proceedings were so stayed as aforesaid, produce to the said court a deed of arrangement signed by or on behalf of three fourths in number and value of all the creditors of the bankrupt, and the said court considered the same and examined on oath the bankrupt, and such of his creditors who desired to be heard for or in opposition to the deed, and made such other inquiry as the said court thought necessary. And the said court, being satisfied that the said deed had been duly entered into and executed, and that its terms were reasonable, and calculated to benefit the general body of the creditors under the estate, did, by order, make a declaration of the complete execution of the said deed, and did direct the same to be registered with the chief registrar [and did also annul the bankruptcy, and the order annulling the same was filed with the proceedings and notice thereof given in the London Gazette]; and the said deed was duly registered with the chief registrar in manner directed by the said order, and before action all things were done and happened, and exist, and all conditions were observed necessary, according to the said act, to make the said deed as binding in all respects on the plaintiff as if he had executed it. And the defendant further says, that in and by the said deed of arrangement it was amongst other things provided [*or* covenanted, *as the case may be*] that [*set out so much of it as contains a release or matter pleadable in bar of the action*] (*k*) [*or* the said deed of arrangement was and is in the words and figures following, *setting out the deed verbatim*]. (*l*)

15. *Pleas of a Composition after Adjudication and Last Examination under ss.* 230, 231 (*now repealed*) *of the Bankrupt Act*, 1849. (*m*)

Taylor *v.* Pearse, 2 H. & N. 36.

16. *Plea of a Petition for Arrangement under the Control of the Court, under s.* 211 (*now repealed*) *of the Bankrupt Act*, 1849, *and Adjudication of Bankruptcy, under s.* 223, (*n*) *and a Composition after the Last Examination, under ss.* 230, 231. (*o*)

Hazard *v.* Mare, 6 H. & N. 434.

(*k*) See Obs. *ante*, 323, as to the necessity of the deed containing a release, &c. in order to be pleadable in bar to an action. And with reference to arrangements under the above sections of the acts, there seems to be no provision similar to the 198th section, as to deeds under the 192d section, so that it would appear that under the above sections a debtor has no protection, unless given to him by the terms of the deed itself, or the court of bankruptcy is entitled to interfere under the power given to it by the 188th section.

(*l*) See note (*k*), *supra*, and *ante*, 323.

(*m*) An offer of composition, to be effectual under the above sections, must be made to *all* the creditors, and not to those only who execute the deed. Taylor *v.* Pearse, *ubi supra*.

(*n*) When a trader is adjudicated bankrupt under this section, without the filing of a petition by a creditor, the bankruptcy has no relation back to any act done by the bankrupt prior to adjudication. Monk *v.* Sharp, 2 H. & N. 540.

(*o*) Payment or tender, or an attempt to pay or tender, is necessary to make a plea good, and a payment into court of the amount of the composition is not sufficient. Hazard *v.* Mare, *ubi supra;* Evans *v.* Powis, 1 Ex. 601.

17. *Plea of an Arrangement under the* 7 & 8 *Vict. c.* 70, *and Certificate under s.* 13 *of that Act.* (*p*)

This plea can be readily framed from the forms in Tindall v. Hibberd, 2 C. B. N. S. 199, and Alcard *v.* Messon, 7 Ex. 753; *ante*, 324, 325.

18. *Replication to a Plea of Plaintiff's Bankruptcy, that he assigned the Debt before Bankruptcy.*

That before he became bankrupt, by indenture between the plaintiff of the one part and A. B. and C. D. of the other part, he the plaintiff, for a good and valuable consideration, assigned the said debt to the said A. B. and C. D., and appointed them his attorneys to sue for and recover the said debt, whereof the defendant, before the plaintiff became bankrupt as aforesaid, had notice, and that this action is commenced and prosecuted in the name of the plaintiff for the sole use and benefit, and at the instance of the said A. B. and C. D., and not for the use or benefit of the plaintiff, or his said assignees, who have no beneficial interest therein. (*q*)

19. *Replication to a Plea of the Bankruptcy of one of the Plaintiffs, that he assigned his Share and Interest to the other Plaintiffs before the Bankruptcy.* (*r*)

That before the commencement of this suit, and before the plaintiff J. W. became bankrupt as in the said plea mentioned, the plaintiffs were copartners in the business of [distillers], and carried on the said business as such copartners, and that before such bankruptcy, and before the commencement of this suit, the said copartnership was dissolved upon the terms contained in the indenture hereinafter mentioned and set forth, and the plaintiffs further say, that the said causes of action accrued to the plaintiffs as such copartners during their

(*p*) This act, commonly called the gentleman's act, as amended by the 23 & 24 Vict. c. 147, is not repealed by the bankruptcy act, 1861, notwithstanding the extension of the bankruptcy laws to non-traders. The 13th section provides, that when the arrangement has been fully carried into effect, the commissioner shall give the petitioning debtor a certificate which shall operate as fully as a certificate of conformity in bankruptcy, except as to debts enumerated in the 2d section of the act. No deed being required under this act, the difficulties which have been found to arise as to registration and other matters connected with deeds of arrangement under the bankruptcy act, 1861, are avoided. See Deacon's Bankruptcy, by Langley, 989 *et seq.*

(*q*) See forms and law, Monk *v.* Sharp, 2 H. & N. 540; Dean *v.* James, 1 Ad. & E. 809, note (*a*); Smith *v.* Smith, 2 Cr. & M. 231; Tibbetts *v.* George, 5 Ad. & E. 115; Buck *v.* Lee, 1 Ad. & E. 804. And see a replication, that the plaintiff is suing as trustee only of his wife's marriage settlement, Parnham *v.* Hurst, 8 M. & W. 743; that he is suing in trust for a creditor to whom he had assigned the bond on which action brought, Dangerfield *v.* Thomas, 9 Ad. & E. 292; that he is suing for the benefit of a trustee to whom he had assigned the debt for the benefit of creditors, Smith v. Keating, 6 C. B. 136; and, in an action on a policy on goods, that he assigned the goods and policy, and is suing only as trustee, Castell *v.* Boddington, 1 El. & Bl. 66, 879; that he is suing as trustee for the rent of a house in which he has no beneficial interest, Hooton *v.* Kœnig, 18 C. B. 235; and see D'Arnay *v.* Chesneau, 13 M. & W. 796. The replication may be as to the whole or part of the demand. See Dean *v.* James, *ubi supra*. Plea to an action by *assignees*, that the bankrupt assigned the debt to a third person before action, *ante*, 315, form 5. ["To a plea that the plaintiff is a bankrupt, and that all of his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third person for whose benefit the suit is prosecuted." Per J. in Rhoades *v.* Blackiston, 106 Mass. 336. See Hynson *v.* Barton, 5 Ark. 492.]

(*r*) See last note.

said copartnership and before the making of such indenture; and that at and upon the dissolution of the said copartnership, and before the plaintiff J. W. became bankrupt as aforesaid, and before the commencement of this suit, by a certain indenture then made between the plaintiff J. W. of the one part and the plaintiffs W. S. and M. S. of the other part, after reciting that [*set out sufficient of the indenture in the past tense to show the assignment of the bankrupt's interest to the other partners*], of all which the defendant afterwards, and before the plaintiff J. W. became bankrupt, and before the commencement of this suit, had notice; (*s*) and the plaintiffs further say, that this action was commenced under and by virtue of the said indenture, in respect of the said causes of action, for the sole use and benefit of the plaintiffs W. S. and M. S., who alone became, and were, and are, beneficially interested therein and entitled thereunto, by virtue of the said indenture, and not in any manner for the use or benefit of the plaintiff J. W. or his said assignees, or creditors, under the said bankruptcy.

PLEAS UNDER THE OLD BANKRUPTCY ACTS.

1. *To an Action for Money paid; the Bankruptcy of Defendant, and that the Money was paid by Plaintiff as a Surety for a Debt of Defendant before his Bankruptcy.*

Jackson *v.* Magee, 3 Q. B. 48.

2. *To a Note, that a Prior Indorser became Bankrupt before the Indorsement to Plaintiff. Replication, that it was received by Plaintiff before Fiat, without Notice of Prior Act of Bankruptcy.*

Green *v.* Steer, 1 Q. B. 707; and see Braithwaite *v.* Gardner, 8 Q. B. 472.

3. *That the Plaintiff has been twice a Bankrupt, and that he did not pay* 15*s. in the Pound on the Second Fiat.*

Young *v.* Rishworth, 8 Ad. & E. 470; Mackay *v.* Wood, 7 M. & W. 420.

4. *The Bankruptcy of the Plaintiff before the Causes of Action accrued, and that Defendant afterwards paid the Assignees.*

Sievers *v.* Boswell, 3 M. & G. 524.

5. *To a Bill, that it was accepted by the Defendant, in order to induce the Plaintiff, the Petitioning Creditor, to abandon the Prosecution of the Fiat.*

Davis *v.* Holding, 1 M. & W. 159.

PLEAS IN INSOLVENCY.

See "Insolvent," *post.*

(*s*) This allegation is essential. Dean *v.* James, 1 Ad. & E. 809, note (*a*); Buck *v.* Lee, 1 Ad. & E. 804; Belcher *v.* Campbell, 15 L. J. Q. B. 11; [8 Q. B. 1;] knowledge, however, is equivalent to actual notice. Tibbetts *v.* George, 5 Ad. & E. 115. And see *ante*, 315, note (*t*).

BILLS OF EXCHANGE.

I. PLEAS IN DENIAL.

Obs. — "In all actions upon bills of exchange and promissory notes, the plea of '*non assumpsit*' and 'never indebted' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note." R. G. T. T. 1853, r. 7. [Uncertainty of payee. Holmes *v.* Jacques, L. R. 1 Q. B. 376. That amount of bill had been paid to plaintiffs by a third person, but they had neglected to hand over the bill, is bad. Agra & Masterman's Bank *v.* Leighton, L. R. 2 Ex. 56.]

In pleading, therefore, to a declaration which contains a count on a bill and *indebitatus* counts, care should be taken to confine the plea which is meant to apply to the cause of action on the bill, to the count setting it out; see Donaldson *v.* Thompson, 6 M. & W. 316; Hughes *v.* Pool, 6 M. & G. 271: and then the general issue, or other plea to the *indebitatus* counts, should be pleaded to the residue of the declaration; for if the general issue be pleaded to the bill count, the plaintiff may (if the defendant be under terms to plead issuably) sign judgment; Sewell *v.* Dale, 8 Dowl. 309; Kelly *v.* Villebois, 3 Jur. 1172; 8 Dowl. 136; Chit. Pr.; and see Parrett *v.* Goddard, 9 M. & W. 458; in the latter case he should enter a *nolle prosequi* to the *indebitatus* counts. Fraser *v.* Newton, 8 Dowl. 773. If the defendant be not under terms of pleading issuably, and "*non assumpsit*" or "never indebted" be pleaded, the proper course would be to apply to a judge to set the plea aside or make the defendant plead another plea, with costs. Robertson *v.* Ellis, 5 D. & L. 403. If issue be joined on a plea of *non assumpsit* to a bill, the facts from which the promise to pay it are implied, such as the acceptance, &c. are put in issue and may be given in evidence. Finleyson *v.* Mackenzie, 3 Bing. N. C. 824; S. C. 6 Dowl. 71. In Neale *v.* Proctor, 2 C. & K. 456, it was held that the plea of *non assumpsit* admitted the handwriting. If the general issue be pleaded to a count on a bill, and in the same plea another defence, without leave to plead several matters, the plaintiff is justified in signing judgment. Hockley *v.* Sutton, 2 Dowl. 700; and see C. L. P. Act, 1852, s. 86. Where, however, the statement of the bill is only inducement, as in an action by or against an executor on a bill of the testator, with a promise to or by the late executor, *non assumpsit* may be pleaded; the effect of which would be to admit the making of the bill, but to deny the promise by or to the executor. Timmis *v.* Platt, 2 M. & W. 720; Rolleston *v.* Dixon, 2 D. & L. 892.

Under a plea in denial, *i. e.* denying the drawing or making, or indorsing or accepting a bill or note, as the case may be, the objection that it is not properly stamped may be taken. Dawson *v.* Macdonald, 2 M. & W. 26; M'Dowal *v.* Lyster, Ib. 52; Field *v.* Woods, 7 Ad. & E. 114. It seems, however, that a special plea to that effect would not be demurrable. See Hayward *v.* Smith, 4 Bing. N. C. 684. By 31 Geo. 3, c. 25, s. 19, a bill or note not duly stamped cannot "be pleaded or given in evidence or admitted in any court to be good or available for any purpose;" it cannot be looked at by the jury. Jardine *v.* Payne, 1 B. & Ad. 663. The original debt may be recovered on a count thereon, although there were *laches* in presenting the bill, &c. if it be void for want of a proper stamp. Wilson *v.* Vysar, 4 Taunt. 288; Alves *v.* Hodges, 7 T. R. 241. Payment of money into court upon a count on a bill, waives the objection as to the stamp. Israel *v.* Benjamin, 3 Camp. 40. But the want of a fresh stamp must be pleaded. Lazarus *v.* Cowie, 3 Q. B. 459.

As to stamps on foreign bills and their cancellation, see 17 & 18 Vict. c. 83, s. 5; 23 Vict. c. 15, ss. 12 & 13; 23 & 24 Vict. c. 111, s. 5, and Siordet *v.* Kuczynski, 17 C. B. 251, and Pooley *v.* Brown, [11 C. B. N. S. 566;] 31 L. J. C. P. 134.

See, generally, as to alteration of a written contract, *ante*, 298. An alteration of a bill of exchange or promissory note in a material part, although made by a stranger, avoids the instrument. Davidson *v.* Cooper, 11 M. & W. 778; 13 M. & W. 343; [Hirschfield *v.* Smith, L. R. 1 C. P. 340; Shaw C. J. in

Obs. Wheelock *v.* Freeman, 13 Pick. 168; Smith *v.* Mace, 44 N. H. 553; White *v.* Haas, 32 Ala. 430; Wilson *v.* Jamieson, 7 Penn. St. 126; Miller *v.* Reed, 27 Penn. St. 244; U. S. Bank *v.* Russell, 3 Yeates, 391; Stephens *v.* Graham, 1 Serg. & R. 508; Gardiner *v.* Harback, 21 Ill. 129; Ivory *v.* Michael, 33 Missou. 398; Warren *v.* Layton, 3 Harr. (Del.) 404; Mitchell *v.* Ringgold, 3 Harr. & J. 159; Buck *v.* Appleton, 14 Maine, 284; Trigg *v.* Taylor, 27 Missou. 245; Bruce *v.* Westcott, 3 Barb. 374; Wade *v.* Withington, 21 Ill. 561. See *ante*, 298; Boyd *v.* McConnell, 10 Humph. 68.] As to what is an alteration in a material part, see Master *v.* Miller, 1 Sm. L. Cas. 776; Burchfield *v.* Moore, 3 El. & Bl. 683; 23 L. J. Q. B. 261; where all the authorities were reviewed. Gardner *v.* Walsh, 5 El. & Bl. 83; Warrington *v.* Early, 23 L. J. Q. B. 47; [2 El. & Bl. 763]; [Blair *v.* Bank of Tennessee, 11 Humph. 84; Owings *v.* Arnot, 33 Missou. 406; Lisle *v.* Rogers, 18 B. Mon. 528; Hocker *v.* Jamieson, 2 Watts & S. 438; Lowe *v.* Angrove, 30 Geo. 129; Benjamin *v.* McConnell, 9 Ill. 536; Gardiner *v.* Harback, 21 Ill. 129; Scott *v.* Walker, 2 Dudley, 43; Bruce *v.* Westcott, 3 Barb. 374; Thornton *v.* Appleton, 29 Maine, 298; Homer *v.* Wallis, 11 Mass. 309; Fay *v.* Smith, 1 Allen, 577.]

But if the alteration is made, although in a material part, before it is issued, or the bill is altered to correct a mistake only, it does not become void; Chit. on Bills, 127–133, 10th ed.; Byles on Bills, 300, 8th ed. where all the cases are collected; [Hervey *v.* Harvey, 15 Maine, 357; Ames *v.* Colburn, 11 Vt. 390; Wilson *v.* Henderson, 9 Sm. & M. 375; Hill *v.* Barnes, 11 N. H. 395; Grimstead *v.* Briggs, 4 Iowa, 559; Hunt *v.* Adams, 6 Mass. 519; Aldous *v.* Cornwell, L. R. 3 Q. B. 573; *ante*, 298; Ratcliffe *v.* Planters' Bank, 2 Sneed, 425; Boyd *v.* Brotherson, 10 Wend. 93; Cole *v.* Hills, 44 N. H. 227; Wheat *v.* Arnold, 36 Geo. 479.]

If a bill has been altered, so as to render it void either at common law (as to which see Crotty *v.* Hodges, 4 M. & G. 561), or under the stamp laws (as to which see Chit. on Bills, 65–79, 10th ed.; Byles on Bills, 300, 8th ed.), and it be declared upon in its altered form, that defence may be taken under pleas denying the drawing, &c.; Cock *v.* Coxwell, 2 Cr., M. & R. 291; Calvert *v.* Baker, 4 M. & W. 417; and if any material alteration be apparent on the face of the bill when produced in evidence, it will then lie on the plaintiff to prove that it was made under such circumstances as not to render it void. Knight *v.* Clements, 8 Ad. & E. 215; Clifford *v.* Parker, 2 M. & G. 909. The plaintiff must show that the alteration was made previously to the bill being issued. Johnson *v.* Duke of Marlborough, 2 Stark. 313; Glenman *v.* Dickenson, 5 Bing. 184; [2 Chitty Contr. (11th Am. ed.) 1163, and note (*c*), where many of the authorities upon this point are cited; Wheat *v.* Arnold, 36 Geo. 479; Simpson *v.* Stackhause, 9 Penn. St. 186; Paine *v.* Edsell, 9 Penn. St. 178; Clark *v.* Eckstein, 22 Penn. St. 507; Hoffner *v.* Wenrich, 32 Penn. St. 423; Hills *v.* Barnes, 11 N. H. 395. The doctrine that an alteration in an instrument is presumed to have been made after its execution, or under circumstances to vitiate it, does not meet with universal assent. See 2 Chitty Contr. (11th Am. ed.) 1163, note (*c*); Cumberland Bank *v.* Hale, 7 N. J. (Law) 215; Ault *v.* Fleming, 7 Iowa, 143; Crabtree *v.* Clark, 20 Maine, 337; Davis *v.* Jenny, 1 Met. 221; Harlan *v.* Berry, 4 Greene (Iowa), 212; Jones *v.* Ireland, 4 Iowa, 63; Norfleet *v.* Edwards, 7 Jones (N. Car.), 455; Agawam Bank *v.* Sears, 4 Gray, 95; Hayden *v.* Goodnow, 39 Conn. 164; Welch *v.* Coulborn, 3 Houst. (Del.) 647. That the question whether the alteration was made before or after execution, and whether made with or without the assent of the adverse party, is properly to be decided by the jury, see 2 Chitty Contr. (11th Am. ed.) 1163, note (*c*) and cases cited: Crabtree *v.* Clark, 20 Maine, 337; Beaman *v.* Russell, 20 Vt. 205; Pullen *v.* Hutchinson, 25 Maine, 249; Hunt *v.* Gray, 35 N. J. (Law) 227.] But this is not so if the making of the bill, as described, is admitted on the record. Sibley *v.* Fisher, 7 Ad. & E. 444. But if the bill be declared on in its *original* state, the subsequent alteration must be specially pleaded. Davidson *v.* Cooper, 13 M. & W. 343; S. C. 1 D. & L. 377; Mason *v.* Bradley, 11 M. & W. 590; Ib. 388. See form, &c. *post*, 338. Where the subsequent alteration is such that it affords a defence under the stamp laws, then a plea in denial will suffice to let in that objection. Mason *v.* Bradley, *supra*.

OBS. The defendant can neither compel a plaintiff to produce a bill at the trial, nor go into secondary evidence of its contents, if he pleads only pleas in confession and avoidance, and gives no notice to produce it; Godered *v.* Armour, 3 Q. B. 956; Lawrence *v.* Clarke, 15 L. J. Ex. 40; S. C. 3 D. & L. 87; unless on a plea impeaching the bill on the ground of *alteration*. Barker *v.* Malcolm, 7 M. & W. 101.

By 17 & 18 Vict. c. 125, s. 87, "In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge or a master, against the claims of any other person upon such negotiable instrument." Otherwise the loss of a negotiable instrument is a defence to an action on it — *aliter*, if it is not negotiable. Clay *v.* Crowe, 5 Ex. 295; 16 L. J. Ex. 280; 9 Ex. 604; per Lewis C. J.; Charnley *v.* Grundy, 23 L. J. C. P. 122; [14 C. B. 608. As to giving bond of indemnity in action on lost note, see, further, Fales *v.* Russell, 16 Pick. 315; Higgins *v.* Watson, 1 Mich. 428; Desmond *v.* Rice, 1 Hill, 530; Meeker *v.* Jackson, 3 Yeates, 442; Snyder *v.* Wolfley, 8 Serg. & R. 331; Smith *v.* Rockwell, 2 Hill, 482; Bisbing *v.* Graham, 14 Penn. St. 14; Almy *v.* Reed, 10 Cush. 421; Jones *v.* Fales, 5 Mass. 101; Freeman *v.* Boynton, 7 Mass. 486; Tuttle *v.* Standish, 4 Allen, 481.] The court of chancery will not entertain a bill for the payment of money due upon a bill of exchange which is proved to have been destroyed, the plaintiff having a sufficient remedy at law. Wright *v.* Lord Maidstone, 24 L. J. Ch. 623. [But in Massachusetts, where there is no statute providing protection for parties sued at law upon lost or destroyed bills and notes, it has been decided that the owner of bank bills, which cannot be identified or distinguished from other similar bills, cannot maintain an action against the bank which issued them, upon circumstantial evidence that they have been destroyed, and a tender of a bond of indemnity. Tower *v.* Appleton Bank, 3 Allen, 387. So it was held that the owner of a lost note cannot maintain an action at law against the indorser, in a case where a bond to indemnify the defendant against being called upon a second time to pay the note would not afford to him an adequate protection. Tuttle *v.* Standish, 4 Allen, 481. In Savannah National Bank *v.* Haskins, 101 Mass. 370, 376, Colt J. said: "Since the late case of Tuttle *v.* Standish, *supra*, it can no longer be contended that a recovery at law can be had against an acceptor or indorser, upon a simple bond protecting the defendant from being called on to pay a second time to a *bonâ fide* holder. The acceptor of a bill of exchange not only has a right to such protection, but he has a right to have the bill surrendered to him on its payment, to be used as a voucher in his settlement with the drawer. The remedy afforded by a court of equity in such cases is appropriate and complete. A demurrer to a bill in equity seeking such remedy in this case, was overruled. As to the jurisdiction in equity in such cases, see, also, 1 Dan. Ch. Pr. (4th Am. ed.) 392, and note (2); Burrows *v.* Goodhue, 1 Greene (Iowa), 48; Thayer *v.* King, 15 Ohio, 242.]

1. *Drawer or Indorsee against Acceptor; Denial of Acceptance.* (*t*)

That he did not accept the said bill as alleged. [*If the declaration contain*

(*t*) This plea merely denies the acceptance of the bill as set out in the declaration. As to alteration, *ante*, 330, 331; improper stamp, *ante*, 327. By proof of the acceptance, the *drawing* will be admitted, but not the indorsements. Per Parke B. Brind *v.* Hampshire, 1 M. & W. 371. If, therefore, the acceptor deny the *drawing*, plaintiff may reply the acceptance by way of estoppel. Sanderson *v.* Collman, 4 M. & G. 209; or *semble*, demur, Ib. 225, note (*a*), and see Ashpitel *v.* Bryan, [3 B. & S. 474; Phillips *v.* im Thurn, L. R. 1 C. P. 463.] The acceptance does not admit the indorsement, though it was there at the time of acceptance. Beeman *v.* Duck, 11 M. & W. 251; Armani *v.* Castrique, 13 M. & W. 443; Roberts *v.* Tucker, 16 Q. B. 560. It is not necessary in the first instance to prove the identity of the defendant with the party who accepted the bill. Roden *v.* Rydo, 4 Q. B. 626; Sewell *v.* Evans, Ib. The defendant will succeed on the above plea if it turn out that he was only an indorser. Gwinnell *v.* Herbert, 5 Ad. & E. 436. A plea by an indorser, that he "did not make or draw, &c." was held not a nullity. Allen *v.* Walker, 2 M. & W. 317. The words "now overdue" in sch. B to C. L. P. Act, 1852, in forms of declarations on bills of exchange, are part of the description

any indebitatus count in addition to the count on the bill, then add the following or other appropriate plea:—

And as to the residue of the declaration, the defendant says that he never was indebted as alleged.

2. *Indorsee against Acceptor; Denial of Indorsement.* (*u*)

That the said G. H. did not indorse the said bill.

3. *Indorsee against Drawer; Denial of the Drawing.* (*x*)

That he did not draw the said bill, as alleged.

4. *To the like; Denial that Bill was presented for Acceptance.* (*y*)

That the said bill was not duly presented for acceptance, as alleged.

of the bill, and are put in issue by the plea of *non acceptavit*. Hinton *v.* Duff, 31 L. J. C. P. 199; [11 C. B. N. S. 724.] The defendant may also show under the above plea that his name has been wilfully forged. See Griffiths *v.* Payne, 11 Ad. & E. 131. But if the drawer has once admitted the acceptance, and thereby given currency to the bill, he cannot afterwards show that it is forged. Leach *v.* Buchanan, 4 Esp. 226. He may show that the circumstances are such as to negative an authority from the defendant to the party accepting the bill in his name, which authority might otherwise be implied, as that it was fraudulently accepted by the defendant's partner in the name of the partnership firm, for his own private purposes, of which the plaintiff had notice. Jones *v.* Corbett, 2 Q. B. 828; Wilson *v.* Lewis, 2 M. & G. 197; Musgrave *v.* Drake, 5 Q. B. 185; Grout *v.* Enthoven, 1 Ex. 382; Stagg *v.* Elliott, 31 L. J. C. P. 260; [Hogg *v.* Skeen, 18 C. B. N. S. 426.]

(*u*) A plea denying the indorsement to the plaintiff, denies not only the signature, but also a *delivery* with intent to transfer the bill; Marston *v.* Allen, 8 M. & W. 494; and therefore, if a declaration by a holder of a bill derive title to the plaintiff by alleging an indorsement from A. to B., evidence that A. gave the bill to M. for a special purpose only (*viz.* to keep for him), and that M. in fraud of that special purpose, gave it to B., who as well as the plaintiff took it with knowledge of that fraud, is admissible under a plea denying the indorsement from A. to B. Ib.; Bull *v.* Ingestrie, 12 Q. B. 317; Lloyd *v.* Howard, 15 Q. B. 995. See Harmer *v.* Steele, 4 Ex. 1; 19 L. J. Ex. 34; Law *v.* Parnel, 7 C. B. N. S. 282; Harrop *v.* Fisher, 10 C. B. N. S. 196. But the court of queen's bench has held that this is only applicable where the facts negative an indorsement between parties to the bill other than the plaintiff, and not where the indorsement is from the last indorser to the plaintiff. Hayes *v.* Caulfield, 5 Q. B. 81. So, also, under a plea denying the indorsement, it may be given in evidence that the bill was indorsed and delivered to the plaintiff only as agent of a third party who has dissented from the conduct of the plaintiff in suing on the bill; Adams *v.* Jones, 12 Ad. & E. 455; and if a declaration allege that a note was made to a plaintiff in a certain capacity (*e. g.* as manager of a certain bank, the plaintiff not suing *in that character*), a plea is an argumentative denial of the making of the note, which denies that he was such manager. Per Maule J. Robertson *v.* Steward, 1 M. & G. 512. If the bill be indorsed by an agent in the name of a firm, the authority of the agent to make the indorsement may be questioned under a plea denying the indorsement. Fearn *v.* Filica, 8 Scott N. R. 241. It is no objection that the bill is indorsed merely for the purpose of suing. Ancona *v.* Marks, 31 L. J. Ex. 163. [See 1 Chitty Pl. 18, note (*a*).] The indorsement may be on the *face* of bills. Young *v.* Glover, 3 Jur. N. S. 637; Rex *v.* Bigge, 1 Stra. 18; 3 P. W. R. 419; Ex parte Yates, 27 L. J. Bank. 9.

(*x*) The plaintiff has only to prove on the trial, in answer to this plea, the defendant's handwriting. The remainder of the plaintiff's case is admitted. An acceptor or indorser is estopped from denying the drawing or a prior indorsement. Macgregor *v.* Rhodes, 6 El. & Bl. 266; Sanderson *v.* Collman, 4 M. & G. 209; Armani *v.* Castrique, 13 M. & W. 443; Ashpitel *v.* Bryan, [3 B. & S. 474. See Gloucester Bank *v.* Salem Bank, 17 Mass. 33, 43; United States Bank *v.* Bank of Georgia, 10 Wheat. 333, 353; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Woodward *v.* Harbin, 1 Ala. 104; 3 Kent, 86, note (*b*).]

(*y*) The defendant has to prove the acceptance alleged by him. The plaintiff's case is in other respects admitted. The acceptance of an inland bill must be in writing upon the bill. 1 & 2 Geo. 4, c. 78, s. 2. And by the 19 & 20 Vict. c. 97, s. 6, the acceptance of a bill, inland or foreign, made after 1856, must be in writing on the bill and signed by the acceptor or some person duly authorized by him. Inland bill defined, s. 7. See generally of presentment for acceptance, Chit. on Bills, 186, 10th ed.; and *ante*, 76.

5. *Indorsee against Drawer; Denial of Presentment for Payment.* (z)

That the said bill was not duly presented to the said G. H. for payment, as alleged.

6. *To the like; Denial of Notice of Non-payment.* (a)

That he had not due notice of the non-payment of the said bill, as alleged.

7. *Payee or Indorsee against Acceptor of a Bill with a Qualified Acceptance* (*Form* 11, *ante*, 77); *Denial of Presentment according to Acceptance.* (b)

That the bill of exchange was not presented at Messrs. G. and H., bankers, London [*this should be in the words of the acceptance*], as alleged.

8. *Drawer against Acceptor of a Bill, accepted payable on a Contingency* (*Form* 14, *ante*, 78); *Denial that the Event has occurred.* (c)

That he did not receive the debt due to him from G. H. [*according to the fact*], as alleged.

(z) This puts the plaintiff on evidence of a due presentment to the drawee, of which a promise to pay the bill after due, is evidence on this issue. Croxon *v.* Worther, 5 M. & W. 5; *ante*, 79, note (*y*); and if a bill be accepted payable at a banker's, who has become the holder when it arrives at maturity, no proof of presentment is necessary. Bailey *v.* Porter, 14 M. & W. 44. Presentment for payment. Chit. on Bills, 244, 10th ed.; *ante*, 77.

(a) That due notice was given, or that defendant subsequently promised payment or acknowledged liability, must be proved by plaintiff to defeat this plea. The jury may infer from a subsequent promise to pay, that defendant had due notice, or waived the notice, and the practical consequence is that in almost every case proof of a promise to pay cures the want of notice. Rabey *v.* Gilbert, 6 H. & N. 536; Bartholomew *v.* Hill, 10 W. R. 273, Ex.; Woods *v.* Dean, 3 B. & S. 101; Cordery *v.* Colville, [14 C. B. N. S. 374; *ante*, 79, note (*y*), and cases cited.] The notice must state that the bill has been dishonored, and that the holder looks to the defendant to pay it. Solarte *v.* Palmer, 7 Bing. 629; and see Bailey *v.* Porter, 14 M. & W. 44; Paul *v.* Joel, 4 H. & N. 355; [Burkam *v.* Trowbridge, 9 Mich. 209; Burgess *v.* Vreeland, 4 Zabr. 71.] If the notice be ambiguous, it lies on defendant under this plea, to show that there was another bill to which the notice was applicable. Shelton *v.* Braithwaite, 7 M. & W. 436. See Cook *v.* Litchfield, 5 Selden, 279.] Dispensation with notice, on the ground of want of effects, is not admissible for plaintiff under this issue. Burgh *v.* Legge, 5 M. & W. 421; *ante*, 76, note (*e*), and 79, note (*y*). [As to the sufficiency of the notice, see Cook *v.* Litchfield, 5 Selden, 279; Home Ins. Co. *v.* Green, 19 N. Y. 518; Bromage *v.* Vaughan, 9 Q. B. 608; Mellersh *v.* Rippen, 7 Ex. 578; Denistoun *v.* Stewart, 17 How. 606; Tobey *v.* Lennig, 14 Penn. St. 483; Artisans' Bank *v.* Backus, 36 N. Y. 100; Gill *v.* Palmer, 29 Conn. 54; Etting *v.* Schuylkill Bank, 2 Barr, 355; Townsend *v.* Lorain Bank, 2 Ohio St. 345.] As to notice of dishonor generally, see Byles on Bills, 251, 3d ed.; Chit. on Bills, 298, 10th ed. [Where the defendant had paid the price of cotton by a bill to which his name was not attached, this does not dispense with his right to notice of dishonor of the bill. Smith *v.* Mercer, L. R. 3 Ex. 51.]

(b) This plea only requires proof from the plaintiff that he presented the bill at the particular place. See 1 & 2 Geo. 4, c. 78; Gibb *v.* Mather, 8 Bing. 214; Shelton *v.* Braithwaite, 8 M. & W. 252; Halstead *v.* Shelton, 5 Q. B. 86. If a note is made payable at a particular place, *in the body of it*, presentment there must then be averred and proved. Spindler *v.* Grellett, 1 Ex. 384; Van der Donc *v.* Thelluson, 8 C. B. 812. But where by a memorandum at the foot of a promissory note, it was made payable at a particular place, it is not necessary to aver and prove a presentment there, because the memorandum does not constitute a part of the contract. Williams *v.* Waring, 10 B. & C. 2; Chit. on Bills, 250, 10th ed.

(c) This plea puts the plaintiff on proof that the contingency has happened, but admits the rest of his case.

Drawer, not being Payee, and having taken up the Bill, against Acceptor (Form 2, ante, 74); Denial that Bill was returned. (d)

That the said bill of exchange was not returned to the plaintiff, (e) as alleged.

10. *Indorsee against Drawer, default Acceptance (see Form 6, ante, 76); that Drawer did accept. (f)*

That the said E. F. did accept the said bill of exchange when presented to him for acceptance.

11. *Indorsee against Drawer of Bill payable after Sight, default Acceptance (or Payment); Denial that Bill was presented for Acceptance in due Time. (g)*

That the said bill was not duly presented to the said E. F. for acceptance.

12. *Indorsee against Drawer, default Acceptance; that the Defendant had not due Notice of Non-acceptance. (h)*

That he had not due notice of the non-acceptance of the said bill of exchange, as alleged.

13. *Against Drawer, default Payment, alleging that Drawer could not be found (see Form 16, ante, 80); that due Search and Inquiry were not made for him. (i)*

That diligent search and inquiry were not made for the said E. F., as alleged.

14. *Indorsee against Drawer, alleged to have dispensed with Presentment (see Form 18, ante, 81); that he did not dispense therewith. (k)*

That he did not dispense with the presentment of the said bill of exchange o the said E. F. for payment, nor discharge the plaintiff therefrom, as alleged.

15. *Indorsee against Drawer, alleging the latter had no Effects in Drawee's Hands, and that no Notice was given (see Form 15, ante, 79); Plea that there were Effects. (l)*

That when the said bill was drawn [*or* "after the drawing of the said bill,

(d) The plaintiff has only to prove upon is plea that he took up the bill after its shonor.

(e) If the allegation be that "the bill was ken up and paid by the plaintiff," then the nverse should be framed accordingly.

(f) The plaintiff will defeat this plea mply by proving a presentment for accept- ce before action, and that the bill is not cepted.

(g) This applies only where the bill is yable after sight. See Mellish *v.* Rawdon, Bing. 416. As to time of presentment, and what is a reasonable delay in doing so, see Chit. on Bills, 188–191, 10th ed.

(h) Plaintiff has only to prove due notice of dishonor, or a subsequent promise or admission of liability by defendant, as to this, *ante*, form 6, note.

(i) Plaintiff has only to prove a due search or inquiry, to establish his case on the bill. See Chit. on Bills, 332.

(k) The plaintiff must prove the dispensation; he need prove no more on this plea.

(l) The defendant has to prove effects as alleged. Fitzgerald *v.* Williams, 6 Bing. N.

and before the same became due, and before this suit," *or* "when the said bill became due," *according to the fact*], the said E. F. had in his hands effects of the defendant to the amount of the said bill. (*m*)

16. *In the like case; that there was a Consideration for the Bill.*

That there was value and consideration (*n*) for the making the said bill [*or, if the consideration arose after drawing and before acceptance, state* "for the acceptance of the said bill by the said E. F.," *or, if the consideration accrued after acceptance and before payment, state* "for the payment of the said bill by the said E. F." (*o*)] to the amount of the said bill.

17. *Indorsee or Drawer of Foreign Bill, default Acceptance (or Payment) (Forms* 32, 33, *ante*, 86); *that the Bill was not protested, or due Notice given.* (*p*)

That the said bill of exchange was not duly protested for non-acceptance [*or* "non-payment," *or* "that the defendant had not due notice of dishonor and protest," *according to the fact*], as alleged.

II. PLEAS IN CONFESSION AND AVOIDANCE.

OBS. — All matters in confession and avoidance, as discharge, void or voidable contract, fraud, payment, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, &c. must be pleaded. Pl. R. T. T. 2, 8.

18. *Indorsee against Drawer or Acceptor; Plea of Payment by the Defendant to the Plaintiff.* (*q*)

That after the said bill became due, (*r*) and whilst the plaintiff was the

C. 68. The plaintiff need adduce no other evidence than such as may tend to disprove the plea. See cases cited, *ante*, 79, note (*y*).

(*m*) See Rabey *v.* Gilbert, 6 H. & N. 536; and cases there cited.

(*n*) It seems that the nature and extent of the consideration need not be stated.

(*o*) Where it is doubtful when the consideration arose, it may be advisable to plead generally "that there was a consideration for drawing the said bill, and for the acceptance and payment thereof by the said E. F." For assuming that such an allegation requires proof of a consideration existing at the times when the bill was drawn and accepted and became due (*sed qu.*), yet it is probable that the judge at the trial would allow an amendment to be made, so that evidence of a consideration existing at either of those periods would be sufficient.

(*p*) The plaintiff has only to prove due protest or notice (*as the case may be*) in answer to this plea. [What is due notice of dishonor, Rothschild *v.* Currie, 1 Q. B. 43; Hirschfield *v.* Smith, L. R. 1 C. P. 340.]

(*q*) By R. 24, Hil. T. 1853, "in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay the proceedings upon payment of the debt and costs in that action only." This plea will be supported by proof of a payment in money or in goods received as money by the plaintiff himself. Cannon *v.* Woods, 2 M. & W. 467; but in the latter case, if the payment was not in money, but was an accord and satis-

(*r*) A payment before due, will not discharge the liability of any of the parties to a subsequent *bonâ fide* holder. Morley *v.* Culverwell, 7 M. & W. 174; Cripps *v.* Davis, 12 M. & W. 159; Lazarus *v.* Cowie, 3 Q. B. 464; [Mobley *v.* Ryan, 14 Ill. 51; Grant *v.* Kidwell, 30 Misson. 455; County Commissioners *v.* Fox, 1 Morr. (Iowa) 48.] For nothing will discharge either drawer or acceptor, but payment when due, or payment for the purpose of discharging and satisfying the bill. Attenborough *v.* Mackenzie, 25 L. J. Ex. 244; [Mabry *v.* Matheny, 10 Sm. & M. 323;] and if the acceptor discounts a bill, he may reissue it. Ib. But the liability between immediate parties to a bill or note may be discharged by parol, and may be so pleaded. Foster *v.* Dawber, 6 Ex. 839; 20 L. J. Ex. 385.

holder thereof, (*s*) and before action, the defendant satisfied and discharged the plaintiff's claim by payment. (*t*)

19. *Indorsee against Acceptor; Plea of Payment to Drawer, showing Facts to make it a Good Payment against the Plaintiff.* (*u*)

That after the said bill became due, (*x*) and whilst E. F. [*the drawer*] was the holder thereof, the defendant satisfied and discharged the said bill and the claim of the said E. F. upon the same, and all causes of action in respect thereof, by payment to the said E. F.; (*y*) and the said E. F. first indorsed the said bill to the plaintiff, and the plaintiff first took and received the same after the said payment thereof.

20. *Indorsee against Drawer; Payment by Acceptor to Plaintiff after due.* (*z*)

That after the bill became due, and whilst the plaintiff was the holder thereof, and before this suit, the said A. B. [*the acceptor*] satisfied and discharged the said bill and the plaintiff's claim thereon by payment.

faction in goods, it should be so pleaded. Mitchell *v.* Cragg, 10 M. & W. 367. See forms, *ante*, 289, and Hall *v.* Poyser, 13 M. & W. 600. So the plea will be supported by proof of payment by a transfer in account. Stewart *v.* Aberdeen, 4 M. & W. 218, or on an agreed set-off. Foster *v.* Dawber, 6 Ex. 839. If a payment be made by one of two makers of a note, Beaumont *v.* Greathead, 2 C. B. 494, the authority of the other will be implied; Thorne *v.* Smith, 20 L. J. C. P. 71; and it should be pleaded as a payment by both. If the whole sum alleged to be paid cannot be proved, the defendant will be allowed in reduction of damages for as much as he does prove, though the plea itself is not proved. Lord *v.* Ferrand, 1 D. & L. 630. A bill is not finally discharged until paid by or on behalf of the acceptor. An indorser who has taken it up can sue upon it. Payment should always be made to the *proprietor* of the bill, and the party paying it has a right to require that it should be given up to him; Hansard *v.* Robinson, 7 B. & C. 90; Alexander *v.* Strong, 9 M. & W. 733. See Chit. on Bills, 268, 10th ed.; Byles on Bills, 204, 8th ed.; [Savannah National Bank *v.* Haskins, 101 Mass. 370, 376; Tuttle *v.* Standish, 4 Allen, 481, 482; Tower *v.* Appleton Bank, 3 Allen, 387.]

(*s*) This is a necessary averment. Steele *v.* Harmer, 14 M. & W. 831.

(*t*) After payment at maturity on behalf of the acceptor, a bill can no longer be transferred; Lazarus *v.* Cowie, 3 Q. B. 459; Thomas *v.* Fenton, 16 L. J. Q. B. 362; but it will not be inferred, from the simple fact of payment, that that was done by the acceptor. *Aliter*, if *he* produce the bill; Phillips *v.* Warren, 14 M. & W. 379; Jones *v.* Broadhurst, 9 C. B. 173; but a payment by the acceptor to the drawer, *before due*, will not discharge the liability of the former to an indorsee, though there was no value for the indorsement by the drawer to such indorsee. Milkes *v.* Dawson, 5 Ex. 948. A drawer may pay a bill before, Burbridge *v.* Manners, 3 Camp. 194, or after due and reissue it; Callow *v.* Lawrence, 3 M. & S. 94; [see Gardner *v.* Maynard, 7 Allen, 456;] or he may pay an indorsee and leave the bill in his hands to sue the acceptor; Williams *v.* James, 15 Q. B. 498; but payment by a drawer to an indorsee is no defence for the acceptor, even though the indorsee sues him against the drawer's consent. Jones *v.* Broadhurst, 9 C. B. 173; Randal *v.* Moon, 12 C. B. 261.

(*u*) See the notes to the last form. Evidence that the bill was paid by *some one*, when due, will not support this plea, unless the defendant produce it at the trial. Phillips *v.* Warren, 14 M. & W. 379; Jones *v.* Broadhurst, 9 C. B. 173. A payment after action will not deprive the plaintiff of his right to go on for costs. Toms *v.* Powell, 7 Ex. 536. Payment by an accommodation drawer is a discharge of the bill. Lazarus *v.* Cowie, 3 Q. B. 459.

(*x*) See note (*r*), 336.

(*y*) See note (*q*), 336.

(*z*) See the notes to forms 18 and 19. This form may easily be adapted to the case of payment by the *drawer*.

21. *Indorsee against Acceptor; Plea that the Bill was altered as to its Date by the Drawer.* (*a*)

That after the said bill was drawn, and accepted, and issued, (*b*) it was, without the consent of the defendant, altered in a material part, (*c*) by the date of the said bill being erased, and instead thereof another date being inserted in writing.

22. *Payee against Maker of a Note; Plea that it was given by the Defendant for a Bill (on which he was once liable) in Ignorance that the Bill had been subsequently avoided by Alteration.*

Bell *v.* Gardiner, 4 M. & G. 11; S. C. 1 Dowl. N. S. 683; and see, as to this defence, Kelly *v.* Solari, 9 M. & W. 54.

23. *Indorsee against Acceptor; Plea that the Bill was given in Ignorance to renew a prior Forged Bill.*

Mather *v.* Lord Maidstone, 1 C. B. N. S. 273.

24. *Drawer against Acceptor; Plea that the Acceptance was for Plaintiff's Accommodation, and without Value.* (*d*)

That he accepted the said bill for the plaintiff's accommodation, (*e*) and that

(*a*) For form of pleas of alteration in date, see Atkinson *v.* Hawdon, 2 Ad. & E. 628; Langton *v.* Lazarus, 5 M. & W. 629; in amount, Hamblin *v.* Bruck, 9 Q. B. 306; in the acceptance, Burchfield *v.* Moore, 3 El. & Bl. 683; by adding another maker to a note, Gardner *v.* Walsh, 5 El. & Bl. 83; by increasing rate of interest, Warrington *v.* Early, 2 El. & Bl. 763; by inserting date, Bradley *v.* Bardsley, 14 M. & W. 873. As to the law upon this subject, see the works of Story, Bayley, Byles, and Chitty on Bills, and *ante*, 331, Obs. Atkinson *v.* Hawdon, 2 Ad. & E. 628; Whitfield *v.* Collingwood, 1 C. & K. 325. It is for the holders to explain and justify apparent alterations; Sibley *v.* Fisher, 7 Ad. & E. 444; [*ante*, 331;] but the defendant would have to begin on this issue, the plaintiff being obliged to produce the bill without notice. Barker *v.* Malcolm, 7 M. & W. 101; *ante*, 331, Obs. The alteration of a bill after it is issued, avoids it under the stamp laws, although the alteration be by consent; unless it be made in order to correct a mistake and to effectuate the original intention of the parties; Chit. Stamp Laws, Index, *in voc.*; Chitty on Bills, 129, 10th ed.; Gardner *v.* Walsh, 5 El. & Bl. 83. As to when this defence should be specially pleaded, *ante*, "Alterations," 331; and Obs., 298. A *bonâ fide* indorser for value without notice of the alteration cannot recover. Burchfield *v.* Moore, 3 El. & Bl. 683.

(*b*) This is a material averment. Langton *v.* Lazarus, 5 M. & W. 629.

(*c*) An alteration in an immaterial part will not vitiate. Sanderson *v.* Symons, 1 B. & B. 426; Walter *v.* Cubley, 2 Cr. & M. 151; Chitty on Bills, 10th ed. 128, [*ante*, 298.]

(*d*) By R. 8, T. T. 1853, "Drawing, indorsing, accepting, &c. bills or notes by way of accommodation, must be specially pleaded." "An accommodation bill is a bill to which the accommodating party, be he acceptor, drawer, or indorser, has put his name, without consideration, for the purpose of benefiting or accommodating some other party, who desires to raise money on it, and is to provide for the bill when due." Byles on Bills, 119, 8th ed.; [3 Kent, 86, and note (*b*).] A bill without consideration or value is inoperative as between the immediate parties to it. There is an implied promise on the part of the person accommodated, to indemnify the person accommodating. Reynolds *v.* Doyle, 1 M. & G. 753.

(*e*) *Accommodation* being a technical word, shows sufficiently the *affirmative* circumstance which may be stated in a plea from which the want of consideration may be implied. See the judgment of Lord Abinger in Easton *v.* Pratchett, 1 Cr., M. & R. 806. In other cases the facts from which the absence of consideration may be implied must be pleaded; Atkinson *v.* Davis, 11 M. & W. 236; and a bill given to take up an accommodation bill may itself be said to be given for accommodation. Thomas *v.* Fenton, 1 D. & L. 28; 16 L. J. Q. B. 362; Hay *v.* Ayling, 16 Q. B. 423.

there never was any value (*f*) or consideration (*g*) for the acceptance of the said bill or payment thereof by the defendant.

25. *Indorsee against Acceptor; Plea that the Acceptance was for the Accommodation of the Drawer, who indorsed without Value.* (*h*)

That he accepted the said bill for the accommodation of the said E. F. [*the drawer*], and there never was any value or consideration for the acceptance of the said bill or payment thereof by the defendant; and the said bill was indorsed to the plaintiff, and he always held the same without any value or consideration [*or, if there be several indorsements,* "the said alleged indorsements of the said bill were respectively made, and the said alleged indorsees and the plaintiff always held the said bill without any value or consideration"].

26. *Similar Plea in the above Case, that the Acceptance was for the Accommodation of the Plaintiff.*

Thompson *v.* Clubley, 1 M. & W. 212.

(*f*) This is disproved if any value passed during the currency of the bill. Burton *v.* Penton, 9 Q. B. 843. "Value" should be negatived as well as "consideration." Graham *v.* Pitman, 3 Ad. & E. 521; and see Trinder *v.* Smedley, 3 Ad. & E. 522; Boden *v.* Wright, 12 C. B. 445.

(*g*) See *post*, 341, note (*o*), and as to the effect of absence of consideration, see *ante*, 338, note (*d*). It affords no defence except as between the immediate parties, unless it be shown also that every one of the indorsements was without consideration, or that they took place under circumstances having the same legal effect, *post*, 341, note (*o*). To an action by an indorsee against acceptor, a plea merely denying consideration for the *defendant's acceptance* was held bad. Reynolds *v.* Iverney, 3 Dowl. 453; French *v.* Arthur, 3 Dowl. 130; Low *v.* Chifney, 1 B. & C. 267; and in Hunter *v.* Wilson, 4 Ex. 489, 19 L. J. Ex. 8, it was said that there ought to be a statement equivalent to an allegation that none of the previous parties to the bill had given value for the indorsement. See Whitaker *v.* Edmunds, 1 Ad. & E. 638; Kearns *v.* Durell, 6 C. B. 596. A party may show by parol that there was no consideration for a bill, or that the original consideration on which the bill was given has since wholly failed, as to which see *post*, 343; [Morgan *v.* Fallenstein, 27 Ill. 31; Herbert *v.* Ford, 29 Maine, 546; Sumwalt *v.* Ridgely, 20 Md. 107; Aldrich *v.* Stockwell, 9 Allen, 45; Mattock *v.* Livingston, 9 Sm. & M. 489; Moore *v.* Maddock, 33 Missou. 575; Haynes *v.* Thom, 28 N. H. 386; Clement *v.* Reppard, 15 Penn. St. 111; Ruggles *v.* Swanwick, 6 Minn. 526; McCready *v.* Cann, 5 Harr. (Del.) 175; Slade *v.* Halsted, 7 Cowen, 322;] but he cannot show by parol any *contract* inconsistent with that appearing on the face of the note itself; Beasant *v.* Cross, 29 L. J. C. P. 173; Abbott *v.* Hendricks, 1 M. & G. 791; Brown *v.* Langley, 4 M. & G. 466; Moseley *v.* Hanford, 10 B. & C. 729, such as a collateral agreement not to sue on it. Webb *v.* Spicer, 7 D. & L. 324; 18 L. J. Ex. 142; Thompson *v.* Clubley, 1 M. & W. 212, where see forms of pleas. Upon the above principles, such an agreement, not in writing, would be unavailing. Holt *v.* Miers, 9 C. & P. 191; Adams *v.* Wordley, 1 M. & W. 374; Cassner *v.* Mincher, 13 M. & W. 704. A plea showing that a bill was given for an existing judgment was held bad as not negativing consideration. Baker *v.* Walker, 14 M. & W. 465.

(*h*) See form, &c. Mills *v.* Barber, 1 M. & W. 426; Parr *v.* Jewell, 16 C. B. 684, and Arbouin *v.* Anderson, 1 Q. B. 498. See notes to the last form. The defendant must begin on this plea. Ib.; and Whittaker *v.* Edmonds, 1 Ad. & E. 366; Mercer *v.* Whall, 5 Q. B. 447. The rule is now settled, that unless the title of the plaintiff to the bill be impeached on the ground of *fraud, forgery, illegality*, or *duress*, or it be shown that the bill has been *lost* or *stolen*, the plaintiff cannot be called upon to prove consideration in the first instance. Mills *v.* Barber, *supra;* Lewis *v.* Parker, 4 Ad. & E. 838; Fitch *v.* Jones, 5 El. & Bl. 238, and *post*, 341, note (*p*). It seems that the plaintiff may reply, setting out what the precise consideration was, as goods sold, &c. in which case he would have to begin; Low *v.* Burrows, 2 Ad. & E. 483; Edwards *v.* Jones, 7 C. & P. 633; Batley *v.* Catterall, 1 M. & Rob. 379; the defendant might then rejoin, that the goods were paid for. Per Alderson B. Rowlandson *v.* Roantree, 6 C. & P. 551.

27. *Indorsee against Acceptor; Plea that the Bill was accepted for the Accommodation of the Drawer, and was taken by Plaintiff after due, &c.* (*i*)

That the said bill was accepted by the defendant before the same became due, for the accommodation of E. F. [*the drawer*], to enable him to raise money thereon or indorse the same for his own use and benefit before the same should become due and payable, and not otherwise, and that there never was any value or consideration for the said acceptance, or for the payment by the defendant of the amount of the said bill or any part thereof; (*k*) and the said bill remained and was outstanding in the hands of E. F. [*the drawer*], and not given up to the defendant, as it ought to have been, until and after the time when the same became due and payable, without any fault or negligence on the part of the defendant, *and without any authority or permission from the defendant to negotiate the said bill after the same became due or payable;* and after the said bill became due and payable, (*l*) and before the defendant could procure the return thereof to him, E. F. [*the drawer*] indorsed and delivered the said bill to the plaintiff, who received the same with notice of the premises.

28. *Indorsee against Acceptor; that Defendant deposited Goods with the Drawer as Collateral Security for Payment of the Bill; that Drawer sold Goods and applied Proceeds to the Bill, and after it was overdue indorsed it to Plaintiff.*

Holmes *v.* Kidd, [3 H. & N. 891.]

29. *Indorsee against Acceptor; Plea that the Drawer violated his Agreement with the Defendant to get the Bill discounted for him, and that Plaintiff has no better Title than the Drawer.* (*m*)

That the defendant gave the said bill to the said E. F. [*the drawer*], who received the same from the defendant and always held it for a special purpose only, (*n*) that is to say, that he might get it discounted for the defendant, and

(*i*) Transfer of a bill after it is due, except where for less than £5 (17 Geo. 3, c. 30, s. 1), is valid. Chit. on Bills, 152, 10th ed. But the transferee takes it with all its equities, because it is his duty to make inquiries concerning it. Sturtevant *v.* Ford, 4 M. & G. 101. But although the indorsee of an overdue bill takes it with all the equities arising out of the transaction itself, he does not take it subject to any collateral claim, such as set-off existing between the earlier parties. Whitehead *v.* Walker, 10 M. & W. 696; Burrough *v.* Moss, 10 B. & C. 558. When the action is by an indorsee, the plea should show that by agreement between the defendant and the drawer, the bill was only to be negotiated during its currency, and that without the defendant's consent; see Stein *v.* Yglesias, 1 Cr., M. & R. 565; the drawer negotiated it after it was due, and *that the plaintiff took it from him with notice;* Parr *v.* Jewell, 16 C. B. 684, where see form; the latter allegation being essential. Carruthers *v.* West, 11 Q. B. 143. See forms of plea. Robinson *v.* Little, 9 Q. B. 602; Stein *v.* Yglesias, *ubi sup.*

(*k*) The defendant's father owed the payee of a note a sum of money, and the defendant gave his note for the amount; it was held that as the debt was actually due when the note was given, and there was a consideration of family affection, the above facts would not support this plea. Cooke *v.* Long, 1 Car. & M. 510.

(*l*) This is an essential allegation. Cripps *v.* Davis, 12 M. & W. 159. Evidence of it. Bounsall *v.* Harrison, 1 M. & W. 611. The proof lies on defendant. Parkin *v.* Moon, 7 C. & P. 408.

(*m*) See forms, Uther *v.* Rich, 10 Ad. & E. 784; Dobie *v.* Larkin, 10 Ex. 776; Hall *v.* Featherstone, 3 H. & N. 284.

(*n*) That the drawer *took* as well as that the defendant *gave* him the bill for the spe-

pay him over the proceeds; but the said E. F. did not get it discounted for the defendant, nor pay over any of the proceeds thereof, (*o*) and in fraud of the defendant, and without his consent, and in violation of the said purpose, indorsed the said bill to the plaintiff; and the defendant further says, that, except as aforesaid, there never was any value or consideration for the defendant's accepting or paying the said bill [*impeachment of plaintiff's title*]; and that there never was any value (*p*) or consideration for the indorsement of the said bill to the plaintiff, or for his being the holder thereof [*or* "when the said bill was first indorsed to the plaintiff, he had notice of the premises," *or* "the said bill was overdue when it was first indorsed to the plaintiff"]. [*If more than one indorsement, each must be impeached in one or other of these ways.*] (*q*)

cial purpose, must be proved. Eden *v.* Jurtle, 10 M. & W. 835.

(*o*) Or the special purpose may be "that the said E. F. should take care of the bill for the defendant, and should not negotiate or part with it to any other person." See Bramah *v.* Roberts, 1 Bing. N. C. 469. In an action on a bill or note, where the defence is want of consideration, the defendant, whether he be the acceptor, maker, or indorser, must show affirmatively under what circumstances, or upon what terms, or for what purpose the instrument was given, that is, he must show *the facts* from which the *absence* of consideration would appear. Per Parke B. Mills *v.* Oddy, 2 Cr., M. & R. 103; [Greer *v.* George, 8 Ark. 131; Phelps *v.* Younger, 4 Ind. 450; Prior *v.* Coulter, 1 Bailey, 517; Coburn *v.* Odell, 30 N. H. 540; Doe *v.* Burnham, 31 N. H. 430; Horn *v.* Fuller, 6 N. H. 511; Adams *v.* Hackett, 27 N. H. 293; Sawyer *v.* Vaughn, 25 Maine, 337, 339; Emery *v.* Estes, 31 Maine, 155; Parish *v.* Stone, 14 Pick. 198, 201; Jennison *v.* Stafford, 1 Cush. 168, 169; Mitchell *v.* Rome R. R. Co. 17 Geo. 574; Feagan *v.* Cureton, 19 Geo. 404; Camp *v.* Tompkins, 9 Conn. 545; Mandeville *v.* Welch, 5 Wheat. 277; Kennedy *v.* Murdick, 5 Harr. (Del.) 263; Middlebury *v.* Case, 6 Vt. 165; 1 Chitty Contr. (11th Am. ed.) 25, 26; but see Delano *v.* Bartlett, 6 Cush. 364; Morris *v.* Bowman, 12 Gray, 467.] A plea simply alleging the want of consideration, is bad on demurrer, though good after verdict. Easton *v.* Pratchett, 1 Cr., M. & R. 798; Stoughton *v.* Lord Kilmorey, 2 Cr., M. & R. 72; S. C. 3 Dowl. 705; Stephens *v.* Underwood, 4 Bing. N. C. 656; Trinder *v.* Smedley, 3 Ad. & E. 522. At chambers such a plea has been held to be non-issuable. See Chit. Prac. 11th ed. 248. A plea negativing consideration *for the plaintiff* only, was held bad on general demurrer. Graham *v.* Pitman, 3 Ad. & E. 521. If the facts are such that the indorsee got hold of the bill without the drawer having ever had any *intention* to deliver it to him so as to enable him to use it for *any* purpose, then deny the indorsement. See Marston *v.* Allen, 8 M. & W. 494. If A. deliver or transfer a bill to B. for a *particular purpose*, to be effected through the medium of the bill for A.'s benefit (as to discount the bill, &c.), B. cannot, by indorsing the bill to C., even for a valuable consideration, as a debt, &c. give C. any right of action thereon against A., if C. at the time he received the instrument had notice of the circumstances, and the transfer to him be in violation of good faith, and will, if upheld, defeat the purposes for which B. held the bill. Delaunay *v.* Mitchell, 1 Stark. 439; Evans *v.* Kymer, 1 B. & Ad. 529; Chit. on Bills, 9th ed. 72, 80, 238.

(*p*) *Value*, as well as *consideration*, must be negatived. The plaintiff would recover, if it appeared that he gave *any* value for the bill, as his knowledge of or privity with previous misconduct of the drawer, would not be in issue. Uther *v.* Rich, 10 Ad. & E. 784. Though the defendant prove the whole plea except this averment, that will not be sufficient to call upon the plaintiff to prove consideration; Brown *v.* Philpot, 2 M. & R. 286; *ante*, 339, note (*g*), unless there is proof of circumstances of suspicion which might be left to the jury as evidence of fraud. Hall *v.* Featherstone, 3 H. & N. 284; Smith *v.* Brave, 16 Q. B. 244; Berry *v.* Alderman, 14 C. B. 95; Harvey *v.* Towers, 6 Ex. 656. Evidence of fraud or illegality, or that the bill was lost or stolen, puts the plaintiff on proof that he is a holder for value. See cases last cited, and Raphael *v.* Bank of England, 17 C. B. 161; Mather *v.* Lord Maidstone, 1 C. B. N. S. 273; and *post*, 345, note (*a*); [Smith *v.* Livingston, 111 Mass. 343, 344; Clark *v.* Thayer, 105 Mass. 216; Tucker *v.* Morrill, 1 Allen, 528; Smith *v.* Edgeworth, 3 Allen, 233; Sistermans *v.* Field, 9 Gray, 331; Monroe *v.* Cooper, 5 Pick. 412; Worcester County Bank *v.* Dorchester & Milton Bank, 10 Cush. 488; Wyer *v.* Dorchester & Milton Bank, 11 Cush. 51; Bailey *v.* Bidwell, 13 M. & W. 73.]

(*q*) Any one of these three allegations is sufficient to impeach the plaintiff's title, and it is now not unusual to make them all in one plea (instead of in separate pleas), although such a plea would formerly have been bad on special demurrer for duplicity. Leaf *v.* Robson, 13 M. & W. 651. Where there are several indorsements, a great multiplicity of pleas may be thus avoided.

30. *Indorsee against Acceptor; Plea that the Acceptance was for the Drawer's Accommodation, who indorsed it to A. to discount it for him, but that A., in Violation of that Purpose, indorsed to the Plaintiff with Notice.*

Lees *v.* Hoffstadt, 9 C. & P. 559.

31. *Indorsee against Drawer; Plea that the Bill was drawn for the Acceptor's Accommodation, and indorsed by the Defendant to A. to discount for the Acceptor, and that A., in Violation of that Purpose, indorsed to the Plaintiff with Notice.*

Lewis *v.* Parker, 4 Ad. & E. 838.

32. *Indorsee against Acceptor; Plea that the Defendant accepted without Value, and that the Bill was settled in an Account with a prior Indorsee, and that Plaintiff took the Bill after it was due.* (*r*)

That he accepted the said bill for the accommodation of the said E. F. [*the drawer*], and that there never was any value or consideration for such acceptance, and that there never was any value or consideration for the indorsement of the said bill by the said E. F. to the said G. H. [*the first indorsee*]; and the defendant further says that the said J. K. [*the plaintiff's indorser*] was the holder of the bill when the same became due and payable, and that after the said indorsement to the said J. K. and whilst he was the holder of the said bill and before it was indorsed to the plaintiff [*here state the settlement between the first and second indorsers, which may be as follows:* (*s*) "the said G. H. and the said J. K. had accounts depending between them, and were respectively indebted to each other, and an account was stated and settled between them respecting such accounts and debts, including the said bill, and the said J. K. then had credit in such account for the full amount of the moneys then due and claimable upon and in respect of the said bill, and the amount or balance then found to be due upon such account from the said J. K. to the said G. H., after giving such credit, was paid and satisfied, and all claims thereon of the said J. K. were then extinguished"]; and the defendant further says, that, after such satisfaction of the said bill as aforesaid, the same remained in the hands of the said J. K. without consideration or value and without the consent of the defendant, and the said J. K., in violation of good faith and without the consent of the defendant, indorsed the said bill to the plaintiff, and the plaintiff first took the same long after the same became due, and after the same had been satisfied and paid as aforesaid.

(*r*) It would seem that this defence might be taken under the stamp laws, on a plea of *non accepit*, as the payment by an accommodation drawer is equivalent to payment by the acceptor, and renders the bill incapable of being reissued without a fresh stamp. See Lazarus *v.* Cowie, 3 Q. B. 459; Parr *v.* Jewell, 16 C. B. 684, where the facts were specially pleaded. Similar defence to a note. Bartrum *v.* Cuddy, 9 Ad. & E. 274.

(*s*) See another form, Cripps *v.* Davis, 12 M. & W. 159, or it would suffice, instead of the part within the brackets, to state a payment of the bill by the first indorsee to the second, as *ante*, form 18, or to state an accord and satisfaction according to any of the precedents, *ante*, 289, *mutatis mutandis*.

33. *Indorsee against Acceptor; Plea that the Bill was indorsed to the Plaintiff after it was due, and that the Defendant paid Part to a Prior Holder, and gave him another Bill in Renewal.*

That at the time the said bill became due and payable, it was in the hands of the said G. H. in the declaration mentioned, as the lawful holder thereof for value, and before the bill became due, and whilst the said G. H. continued to hold the same, it was agreed between the defendant and G. H. that the defendant should pay to the said G. H. part of the amount of the said bill, and that the defendant should accept a bill of exchange for the residue of the amount of the said bill, to be drawn by the said G. H. upon him the defendant; and afterwards, and before the said bill became due, and whilst the same was in the hands of the said G. H. as the holder thereof, and before the same was indorsed to the plaintiff, the defendant, in pursuance of the said agreement, paid to the said G. H. part of the amount of the said bill, and accepted and delivered to the said G. H. such bill of exchange as aforesaid, for and on account of the residue of the said bill; and the said G. H. accepted and received on the terms aforesaid the said sum, and the bill so accepted by the defendant as last aforesaid, and the defendant then became liable to pay the said last mentioned bill; (*t*) and the defendant further says [*as ante*, 340, Form 29].

34. *Plea that the Plaintiff accepted a Composition for the Bill from a Prior Holder, without Defendant's Consent.*

Houlditch *v.* Cauty, 4 Bing. N. C. 418.

35. *Indorsee against Indorser; Plea that the Plaintiff indorsed the Bill away before due, to a Person unknown, who presented it to the Acceptor, by whom it was refused, of which Defendant had no Notice.*

Bartlett *v.* Benson, 14 M. & W. 733; 15 L. J. Ex. 23.

36. *Drawer against Acceptor; Plea that the Bill was accepted on a Consideration to be received in future, which failed before it took effect* (e. g. *that the Plaintiff should sell Goods to the Defendant, which he failed to do.* (*u*)

That the bill was drawn and accepted by the defendant for and on account

(*t*) If the defendant has paid the bill given a renewal, state the fact thus: "and paid the same when the same became due;" or, if not due when the action was commenced, allege that "the time for payment of the same had not elapsed at the commencement of this suit."

(*u*) See other forms, Wells *v.* Hopkins, M. & W. 7; Camac *v.* Warriner, 1 C. B. 356; Astley *v.* Johnson, [5 H. & N. 137;] Gillett *v.* Whitmarsh, 8 Q. B. 966. It is material to attend to the distinction between *original* absence of a consideration, and a failure of the consideration upon which the instrument was given. In the former case the plea should aver, that there was *never* any consideration. In the latter, the plea should show as above the original consideration and its *failure*. The total failure of consideration on a bill may arise where the consideration for the bill was to be carried into effect at a future time, and failed in being so; as, where a man gives another a promissory note for the trouble he will have in being his executor, and the maker dies first. Solly *v.* Hinde, 2 Cr. & M. 516. Thus it would be a good plea to a bill, that it was given for the purchase-money of an estate which had not been conveyed to the defendant, that there was no writing within the statute of frauds,

of the price of certain goods (*x*) sold by the plaintiff to the defendant, and which goods were to be delivered to the defendant before the bill should become payable, and that there never was any value or consideration for the defendant's acceptance of the bill, or for his paying the amount thereof, except as aforesaid; and although he was always, before the bill became due and payable, ready and willing to accept and receive the said goods upon the terms aforesaid, yet the plaintiff did not deliver such goods or any part thereof to the defendant, but wholly neglected and refused so to do. (*y*)

37. *Drawer against Acceptor; Plea that the Bill was accepted subject to an Investigation of Accounts between the Parties, and that it was afterwards found that there was no Balance against the Defendant.*

That before the said bill of exchange was drawn and accepted, there were accounts between the plaintiff and the defendant, which were then open and unsettled, and it had not then been ascertained whether or not the balance was in favor of the plaintiff; and when the bill was drawn and accepted, it was agreed between the plaintiff and defendant that the said accounts should be investigated by the plaintiff and defendant, and an account stated between them respecting the same, before the bill should become due, and that in the event of its being found, upon the settlement of such account, that the defendant was not indebted to the plaintiff on such accounts, the defendant should not be called upon by the plaintiff or be liable to pay to him the said bill; and the plaintiff then drew and the defendant then accepted the said bill, and the plaintiff received the same upon the terms of the said agreement; and afterwards, and before the bill became due, and before this suit, the said

and that the plaintiff had refused to give possession of or convey the estate; Jones *v.* Jones, 6 M. & W. 84; or that it was on condition plaintiff would pay debts for defendant, which he had not done. Cole *v.* Cresswell, 11 Ad. & E. 661; Chit. on Bills, 10th ed. 49. The *partial* failure of consideration involving a question of unliquidated damages, affords no defence, as in the case of a bill for the price of an unsound horse warranted sound, but which has not been taken back; 7 East, 483; 14 East, 486; Mann *v.* Lent, 10 B. & C. 877; Spiller *v.* Westlake, 2 B. & Ald. 155; or for work which has been badly done; Trickey *v.* Larne, 6 M. & W. 278; S. C. 8 Dowl. 174; or for goods sold with a warranty which has been broken; Warwick *v.* Nairn, 10 Ex. 762; Horsfall *v.* Thomas, [1 H. & C. 90;] Camac *v.* Warriner, *ubi supra*; nor can the failure of *part of the consideration* be pleaded as a defence to the whole bill. Clarke *v.* Lazarus, 2 M. & G. 167; Chit. on Bills, 10th ed. 49; Camac *v.* Warriner, 1 C. B. 356. The above plea might readily be adapted to a case where the plaintiff was an indorsee, by adding one of the averments at the end of form 29, p. 340, observing the notes there. [But generally, in the American states, a partial, as well as a total failure of the consideration may be given in evidence by the maker of a note, to defeat or mitigate, as the case may be, a recovery. So, the true value of articles may be shown in reduction of the price, even on a note given, as between the original parties, in cases of sales with warranty, or false representation, though the article has not been returned: and this is allowed to prevent circuity of action. 1 Chitty Contr. (11th Am. ed.) 652, 653, and notes; Harrington *v.* Stratton, 22 Pick. 510; McKnight *v.* Devlin, 52 N. Y. 402; Rasberry *v.* Moye, 23 Miss. 320; Benj. Sales (1st Am. ed.), § 902, note (*a*); Hill *v.* Southwick, 9 R. I. 299; Goodwin *v.* Morse, 9 Met. 278; Wright *v.* Roach, 57 Maine, 700; Mixer *v.* Coburn, 11 Met. 561; Westcott *v.* Nims, 4 Cush. 215; Perley *v.* Balch, 23 Pick. 283; Stacy *v.* Kemp, 97 Mass. 166, 168; Cook *v.* Castner, 9 Cush. 277; Burnett *v.* Smith, 4 Gray, 50; Coburn *v.* Ware, 30 Maine, 202; Hammatt *v.* Emerson, 27 Maine, 308; Albertson *v.* Halloway, 16 Geo. 207; Lane *v.* Oldham, 22 Ind. 51; Butler *v.* Northampton, 50 N. H. 33; Hitchcock *v.* Hunt, 28 Conn. 343; 2 Kent, 474.]

(*x*) Or "in consideration that the plaintiff would lend and advance money," &c. or "perform certain services." In the latter case it should be averred that the time for performing the services had elapsed. Abbott *v.* Hendricks, 1 M. & G. 791. This may readily be adapted accordingly.

(*y*) If goods of a different quality were delivered by the plaintiff and accepted by the defendant, that should be replied. Weis *v.* Hopkins, 4 M. & W. 7.

accounts were investigated by the plaintiff and defendant, and an account was stated and settled between them, and it then appeared and was found by them that the defendant was not indebted to the plaintiff in respect thereof, nor is the defendant indebted to the plaintiff in respect of the said accounts or otherwise, nor has he the defendant received any value for the said bill; and by reason of the premises, the plaintiff, at the commencement of this suit, held and now holds the said bill without any value or consideration, and seeks to enforce payment thereof in violation of the said agreement.

38. *Drawer against Acceptor, or Indorsee against his Indorser; Plea that the Acceptance or Indorsement was obtained by Fraud.* (*z*)

That the defendant's acceptance [*or* "indorsement"] of the said bill was obtained and procured *by the plaintiff* by fraud.

39. *Indorsee against Acceptor; Plea that the Drawer obtained the Acceptance by Fraud, and that Plaintiff took the Bill with Notice thereof, or without Value, or after due.* (*a*)

That the acceptance of the said bill was obtained from him by the said C. S. [*the drawer*], by fraud. [*Impeach the plaintiff's title as in* Form 29, *ante*, 341.]

(*z*) See *post*, title "Fraud." If it be shown that the bill was obtained of the plaintiff by fraud or illegality, or duress, or that it has been lost or stolen, that compels the plaintiff to prove consideration, but not otherwise; Mills *v.* Barber, 1 M. & W. 426; Harvey *v.* Towers, 6 Ex. 656; [*ante*, 341, note (*p*);] so if it be shown that the person who indorsed to plaintiff parted with it in violation of good faith. Smith *v.* Braine, 16 Q. B. 244. So, a man who signs a note on the representation that he is not to be liable unless another person signs it, who refuses to do so, is not liable on it. Awde *v.* Dixon, 6 Ex. 869; and see Southall *v.* Rigg, [11 C. B. 481.] Where the action is by an indorsee and the fraud was committed by the drawer or a prior indorser, the plea should state such fact, and then show that the plaintiff took the bill with notice of the fraud or without consideration. Bramah *v.* Roberts, 1 Bing. N. C. 469; per Tindal C. J. Foster *v.* Pearson, 1 Cr., M. & R. 849; Lewis *v.* Reilly, 1 Q. B. 349. See next form and notes, and Chit. on Bills, 10th ed. 50.

(*a*) *Supra*, note (*z*). In this case the proof, by the defendant, of the fraud, puts the plaintiff on proof of the consideration given by him, &c. Duncan *v.* Scott, 1 Camp. 100; Bayley *v.* Bidwell, 13 M. & W. 73. See Hall *v.* Featherstone, 3 H. & N. 284; [*ante*, 341, note (*p*)]. If a person takes a negotiable instrument *bonâ fide*, and for full value, he can recover on it, although it had been stolen and he took it negligently. Raphael *v.* Bank of England, 17 C. B. 161; [Smith *v.* Livingston, 111 Mass. 342; Goodman *v.* Simonds, 20 How. (U. S.) 343.] But the presumption that the holder of a bill gave value for it is rebutted, if it appear that the acceptance is a forgery — the holder must then prove that he gave consideration for it. Mather *v.* Lord Maidstone, 1 C. B. N. S. 273; 26 L. J. C. P. 58. See Fitch *v.* Jones, 5 El. & Bl. 338; *ante*, 339, note (*h*), 341, note (*p*). It is not sufficient to allege that the plaintiff was guilty of *gross negligence* in taking the bill; Uther *v.* Rich, 10 Ad. & E. 788; [Smith *v.* Livingston, 111 Mass. 342; Goodman *v.* Simonds, 20 How. (U. S.) 343;] as the holder of negotiable securities, transferable by delivery, or indorsement in blank, may give a title which he does not himself possess, to a person who takes them *bonâ fide* for value before they are due. Haynes *v.* Foster, 2 Cr. & M. 237; Foster *v.* Pearson, 1 Cr., M. & R. 849. Gross negligence may, however, be *evidence* under the above plea, as one of the ingredients from which a jury may infer *mala fides*. Goodman *v.* Harvey, 4 Ad. & E. 870. But unless the jury come to the conclusion that the plaintiff was in privity with, or had knowledge of, the conduct of a previous indorser, it will be no defence to an action on the bill, even that such previous indorser stole it; Ib.; and Arbouin *v.* Anderson, 1 Q. B. 504; Robinson *v.* Reynolds, 1 G. & D. 526; S. C. 2 Q. B. 196, confirmed by Thiedman *v.* Goldschmidt, 1 De G., F. & J. 4.

40. *Plea to a Note, that it was signed by Defendant as a Surety for A. B., to whom Plaintiff was to advance a Sum of Money, and that Plaintiff, without Defendant's Consent, advanced a Less Sum.*

Stone *v.* Compton, 5 Bing. N. C. 144; and see Green *v.* Gosden, 3 M. & G. 446; Brown *v.* Wilkinson, 13 M. & W. 14.

41. *Indorsee against Acceptor (or Drawer); that Plaintiff has indorsed away the Bill. (b)*

That after the bill was indorsed to the plaintiff, and before this suit, he indorsed it (the same being payable to order and transferable by indorsement) (c) to a person to the defendant unknown [*or* "to one G. H."], who thenceforth has been and is the holder thereof.

42. *Indorsee against Maker; that Payee became Bankrupt before he indorsed it to Plaintiff.*

Green *v.* Steer, 1 Q. B. 707.

43. *Drawer or Indorsee against Acceptor; that the Bill has been lost by the Plaintiff. (d)*

That the plaintiff, after he became the holder of the said bill, lost the same, and the same still is out of his control and possession, the same being payable to order and transferable by indorsement. (e)

44. *Plea to a Declaration averring no Effects with Drawee instead of Notice of Dishonor (ante, 79, Form 15), that one P. was liable to Defendant for the Amount of the Bill, and that there were Mutual Accounts between P. and the Acceptor, and that Defendant drew and the Acceptor accepted for and on Account of the Premises, and in the Belief that the Acceptor would pay when due, and Replication in Denial.*

Terry *v.* Parker, 6 Ad. & E. 503. (f)

(b) See forms, &c. Arthur *v.* Beales, 1 Ex. 608; Jones *v.* Studd, 4 Bing. 663; and see Wright *v.* Watts, 3 Q. B. 89. This plea cannot fairly and effectually be pleaded in cases where the plaintiff has had the bill returned to him, and is the holder. It compels him, however, in his replication, to reply that he afterwards took it up, or he may reply that the plaintiff was the holder at the time of the commencement of this suit. See form, &c. Frazer *v.* Welsh, 8 M. & W. 629. Instances of bad replications to this plea. Schild *v.* Kilpin, 8 M. & W. 676; Basan *v.* Arnold, 8 Dowl. 357; S. C. 6 M. & W. 559. If an overdue bill be indorsed after action brought, the indorsee, with notice of the action, has no right of action on the bill. Jones *v.* Lane, 3 You. & Col. 281.

(c) This allegation is necessary if it does not appear on the declaration.

(d) See the law upon this subject, Chit. on Bills, 10th ed. 178. The holder of a bill must produce it, in order to enforce it; Hansard *v.* Robinson, 7 B. & C. 90; Ramuz *v.* Crowe, 1 Ex. 167; and the loss even after dishonor is a good defence (Ib.), and in an answer to a count on the consideration. Crowe *v.* Clay, 8 Ex. 295; 9 Ex. 604; [2 Chitty Contr. (11th Am. ed.) 1139.] But the bill need not be produced after judgment by default. Lane *v.* Mullins, 1 Dowl. N. S. 562; S. C. 2 Q. B. 254. But the loss cannot be pleaded to a non-negotiable note. Wain *v.* Bailey, 10 Ad. & E. 616. By the C. L. P. Act, 1854, s. 87, "In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master against the claims of any other person upon such negotiable instrument."

(e) See note (c), *supra*.

(f) It would also be an answer to a declaration containing such an averment, to show

45. *Indorsee against Drawer; Plea of Discharge by Time given to the Acceptor.* (*g*)

That after the said bill became due, and whilst the plaintiff held the same, t was, without the defendant's consent, for a good and sufficient consideration, greed by and between the plaintiff and the said E. F. (*h*) [*the acceptor*], that he plaintiff should give the said E. F. time for payment of the amount due pon the said bill; and in pursuance of such agreement the plaintiff gave time o the said E. F. for payment of the said bill, without the defendant's consent. (*i*)

46. *Plea of Discharge by taking a Cognovit.* (*k*)

Hall *v.* Cole, 4 Ad. & E. 577.

47. *Indorsee against Indorser; Discharge by giving Time to a Party Intermediate between the Plaintiff and the Defendant.*

Lyon *v.* Holt, 5 M. & W. 250. N. B. It was held in that case that the dorsement of the party to whom the time was given was material to be roved.

48. *Indorsee against Acceptor; Plea that an Intermediate Indorser was a Married Woman; and Replication that she indorsed with the Authority of her Husband.*

Prince *v.* Brunatti, 1 Bing. N. C. 435.

49. *Plea that the Plaintiff is a Convicted Felon.*

Bullock *v.* Dodds, 2 B. & Ald. 258; and see, as to the law on this subject, mbert *v.* Taylor, 4 B. & C. 138; Doe *v.* Pritchard, 5 B. & Ad. 765; Re nders, Saunders *v.* Warton, 32 L. J. Ch. 224. See "Felony," *post.*

t the defendant had a remedy over against e third person, in which case he is enti- l to notice. Norton *v.* Pickering, 8 B. & 610; Cory *v.* Scott, 3 B. & Ald. 619; k. on Bills, 10th ed. 187.

(*g*) See forms. Isaac *v.* Daniel, 8 Q. B. ; Smith *v.* Winter, 4 M. & W. 461. As his defence, see Price *v.* Edmunds, 10 B. 583; Whitfield *v.* Hodges, 1 M. & W. ; Chit. on Bills, 10th ed. 286. Mere for- rance or inactivity on the part of the litor, is no discharge. Strong *v.* Foster, C. B. 201; [1 Chitty Contr. (11th Am. 779, and note (*m*[1]), in which the Ameri- cases, to the same effect, are cited.] It ecessary to show that the holder legally d himself to give time, and, therefore, if time was given by consenting to a judge's r, it must appear by the order, if set out he plea, that proceedings were in the a time stayed; Michael *v.* Myers, 6 M. 702; and that a longer time was thus n than that in which, by the practice of urt, judgment might have been obtained nst the acceptor. Kennard *v.* Knott, 4 G. 474. But if the plea merely aver, as in the text, an *agreement* to forbear, then, it seems, that the fact that the agreement was by a judge's order, and that no longer time was given than the acceptor would have had by the practice of the court, should be specially replied. Isaac *v.* Daniel, 8 Q. B. 500. But Wightman J. seemed to think in that case that those facts might be proved under a replication denying the forbearance. See, also, James *v.* Williams, 13 M. & W. 828.

(*h*) An agreement with a *stranger* to give time to the principal, does not discharge surety. Fraser *v.* Jordan, 8 El. & Bl. 303.

(*i*) In general, a mere binding agreement to give time between prior parties to the bill, founded *upon a fresh and sufficient consideration*, would seem *ipso facto* to discharge the subsequent parties. Clark *v.* Wilson, 3 M. & W. 208; Lyon *v.* Holt, 5 M. & W. 250; [1 Chitty Contr. (11th Am. ed.) 781, note (*x*), in which the American cases, to the same effect, are cited.]

(*k*) See other forms, Moss *v.* Hall, 5 Ex. 46; Kennard *v.* Knott, 4 M. & G. 474; Michael *v.* Myers, 5 M. & G. 702.

50. *Indorsee against Acceptor; Plea no Consideration for Acceptance, and that by Agreement between the Drawer and Plaintiff, the latter was only to enforce the Note on certain Conditions, which the Drawer had not complied with.*

Edwards *v.* Jones, 2 M. & W. 414; S. C. 5 Dowl. 385.

51. *Indorsee against Indorser; Plea that the Drawer (who indorsed to Defendant) and the Plaintiff were the same Persons; (l) Replication that the Defendant indorsed for the Acceptor's Accommodation, to whom Plaintiff gave Consideration.*

Wilders *v.* Stevens, [15 M. & W. 208;] and see Boulcott *v.* Woolcott, 16 M. & W. 584; Williams *v.* Clark, 16 M. & W. 834.

BILL TAKEN FOR THE DEBT.

Obs. — In the case of a *simple contract* debt or *money demand*, if the creditor accepts from the debtor or a stranger a bill or note for and on account of the debt, that operates as a conditional payment. Bottomley *v.* Nuttall, 5 C. B. N. S. 144; James *v.* Williams, 13 M. & W. 828; Kearslake *v.* Morgan, 5 T. R. 513; Belshaw *v.* Bush, 11 C. B. 191; 22 L. J. C. P. 24; Kendrick *v.* Lomax, 2 Cr. & J. 405; Simon *v.* Lloyd, 2 Cr., M. & R. 187; [2 Chitty Contr. (11th Am. ed.) 1133 *et seq*]. But the remedy on the original demand is only suspended, and revives upon the dishonor of the bill. *Per cur.* Crowe *v.* Clay, 9 Ex. 608; 23 L. J. Ex. 151; [Butler *v.* Haight, 8 Wend. 535.] Where it is agreed that the bill shall be taken as payment of the debt, the right of suing for the debt is lost, and the only remedy is upon the bill. Sayer *v.* Wagstaff, 5 Beav. 415; Said *v.* Rhodes, 1 M. & W. 153. [Many cases to the same effect, decided in the American courts, are cited in note (*x*) to 2 Chitty Contr. (11th Am. ed.) 1135; Coburn *v.* Odell, 30 N. H. 540, 557; Bonnell *v.* Chamberlin, 26 Conn. 487; Lyman *v.* United States Bank, 12 How. (U. S.) 225; Vail *v.* Foster, 4 Comst. 312; Steamboat Charlotte *v.* Hammond, 9 Missou. 59; Miries *v.* McDowell, 4 Geo. 182; Geiser *v.* Kersher, 6 Gill & J. 305; Hutchins *v.* Olcott, 4 Vt. 555; Kean *v.* Dufresne, 3 Serg. & R. 233. In Massachusetts, and some other states, the giving a negotiable note for a simple contract debt is held to be *primâ facie* evidence of payment of it, liable to be rebutted by circumstances showing a different intent. See Reed *v.* Upton, 10 Pick. 525; Wallace *v.* Agry, 4 Mason, 342; Marston *v.* Boynton, 6 Met. 127; Shaw C. J. in Melledge *v.* The Boston Iron Co. 5 Cush. 158, 170; Descadillas *v.* Harris, 8 Greenl. 298; Newall *v.* Hussey, 18 Maine, 249; Camp *v.* Gullett, 2 Eng. 524; Costar *v.* Davies, 3 Eng. 213.]

But to debt on a bond conditioned for payment of money, pleas that after the day of payment, and before action, the obligor received certain bills of exchange not yet due, on account of part of the sum due on the bond, and certain moneys in satisfaction of the residue, were held ill. Worthington *v.* Wigley, 3 Bing. N. C. 454. So, a promissory note given and received for rent does not extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note. Nor does the receipt of such note of itself suspend the right of distraining. Davis *v.* Gyde, 2 Ad. & E. 623.

So, a plea of bill taken will not be good in a case of unliquidated damages. Griffiths *v.* Owen, 13 M. & W. 58. See, further, on this subject, [2 Chitty Contr. (11th Am. ed.) 1113 *et seq.*]

(*l*) As to this defence, see Bishop *v.* Hayward, 4 T. R. 470; Steel *v.* Harmer, 14 M. & W. 831.

1. *Plea that the Defendant accepted a Bill of Exchange not yet due on account of the Debt.* (*m*)

That before this suit the plaintiff made his bill of exchange, (*n*) bearing date [*&c.*], and thereby required the defendant [two months] after the date thereof, which period had not elapsed at the commencement of this suit, (*o*) to pay to the plaintiff or order (*p*) £——, and the defendant then accepted the said bill and then delivered the same to the plaintiff, who then received the same from the defendant (*q*) for and on account of the said debt and the causes of action in respect thereof.

2. *Replication (to a Plea that the Defendant accepted a Bill drawn by a Third Person) that the Bill was dishonored when due.* (*r*)

That before this suit the said bill of exchange became due and payable, but the defendant has not paid the same; and the plaintiff, at the time of the commencement of this suit, held and now holds the said bill unpaid and unsatisfied. (*s*)

(*m*) Where the action is on a bill or note, the plea should show that both the one given in substitution and also the one on which the action is brought were outstanding at the commencement of the suit; Goldshede *v.* Cottrell, 2 M. & W. 20; Boydell *v.* Champion, 2 M. & W. 435; or else the second bill would be pleaded as having been *given*, Sharp *v.* Griffiths, 2 Cr., M. & R. 159, and then in accord and satisfaction of the debt and damages. In the latter case, as the remedy would not revive with the dishonor of the second bill, a replication that it was duly dishonored was held bad. Sard *v.* Rhodes, 1 M. & W. 155, and see form of plea there; and see Thompson *v.* Perceval, 5 B. & Ad. 925; Kirwan *v.* Kirwan, 2 Cr., M. & R. 617. For form, &c. of plea of accord and satisfaction by delivering another bill to a prior holder before the indorsement to the plaintiff, Lewis *v.* Lyster, 2 Cr., M. & R. 704. Effect of bill given "*to take up*" and "*in lieu*" another. Goldshede *v.* Cottrell, 2 M. & W. 20. In such case it is a question for the jury whether the bill is given in substitution or only to gain time for payment. Ib. Evidence necessary to show that a bill has been accepted in satisfaction. Baker *v.* Jubber, 1 M. & G. 212; [2 Chitty Contr. (11th Am. ed.) 1135, note (*x*).] The presumption in the first instance will be, that the bill was given "for and on account." Sayer *v.* Wagstaff, 5 Beav. 415. [In Massachusetts and in other states, the giving of the bill or note is *primâ facie* evidence of payment. Id. 348; 2 Chitty Contr. (11th Am. ed.) 1135, note (*x*).] Payment by bill to an agent of the plaintiff, and replication that the agent received it without plaintiff's authority, and that the bill was returned to defendant. Huxley *v.* Hilder, 7 M. & G. 51.

(*n*) If a blank stamp was accepted by the defendant and remitted to the plaintiff to fill up his name, it should be so pleaded. Baker *v.* Jubber, 1 M. & G. 212.

(*o*) It is necessary to show this, where defendant, as acceptor, was the primary debtor. See Simon *v.* Lloyd, 2 Cr., M. & R. 187, cited *post*, form 3, and note (*t*); Price *v.* Price, 16 M. & W. 232; and it must be proved also where the bill is not given in satisfaction of the debt. Goldshede *v.* Cottrell, 2 M. & W. 20. Where a third person is a party to the bill, it is sufficient in the first instance to state the delivery and acceptance, and it is not necessary to show that the bill is running or was paid by the defendant or indorsed away before action by the plaintiff. Mercer *v.* Cheese, 4 M. & G. 804. Such an averment would be proper where the bill was overdue before action. See form, &c. Maillard *v.* Duke of Argyll, 1 D. & L. 536; S. C. 6 M. & G. 40; Emblin *v.* Dartnell, 1 D. & L. 591; Wright *v.* Watts, 3 Q. B. 89; Belshaw *v.* Bush, 11 C. B. 191. For form, &c. that plaintiff has lost the bill, Crowe *v.* Clay, 8 Ex. 295; 9 Ex. 604.

(*p*) It must appear that the instrument was a negotiable security, and that the plaintiff took an interest in it. James *v.* Williams, 13 M. & W. 828; S. C. 2 D. & L. 713.

(*q*) It must be distinctly alleged that the bill was given by defendant and received by plaintiff on account, &c. Simon *v.* Lloyd, 2 Cr., M. & R. 187. A plea stating that the bill was taken "for and on account and in payment, &c." was held good on special demurrer; the court said that the word "payment" did not necessarily import accord and satisfaction. Maillard *v.* Duke of Argyll, 1 D. & L. 536; S. C. 6 M. & G. 40. So the words "in discharge," similarly occurring in a plea of this nature, will be taken to mean "for and on account." Emblin *v.* Dartnell, 1 D. & L. 591.

(*r*) See Atkinson *v.* Hawdon, 2 Ad. & E. 628, and note (*o*), *supra*.

(*s*) *Semble*, this allegation is necessary, because it would be a defence to an action for a debt, that a bill has been given for it by

3. *Plea that the Defendant accepted a Bill not due, in Payment of the Debt, and for Plaintiff's Accommodation, and delivered it to the Plaintiff without a Drawer's Name attached thereto.*

Simon *v.* Lloyd, 2 Cr., M. & R. 187; S. C. 3 Dowl. 813. (*t*)

4. *That the Defendant indorsed a Bill to the Plaintiff on account of the Debt.*

That before this suit the defendant indorsed and delivered to the plaintiff a bill of exchange, bearing date [*&c.*], drawn by the defendant (*u*) on and accepted by one E. F., and whereby the defendant requested the said E. F. to pay to him the defendant or order [two months] after the date thereof [*add, if the fact be so,* "which period had not elapsed when this action was commenced"] the sum of £——, and the plaintiff then received [*&c.; proceed and conclude as in* Form 1, p. 349]. (*x*)

5. *Replication to last Plea, that the Bill is overdue and unpaid.*

That before this suit the said bill became due and payable, and was duly presented for payment, and was dishonored, of which the defendant had due notice, but did not pay the same, and the plaintiff at the time of the commencement of this suit held and now holds the said bill unpaid and unsatisfied. (*y*)

6. *That Defendant indorsed to the Plaintiff on Account a Bill upon a Third Person, and was discharged from it by Laches.* (*z*)

That [*&c.; proceed as in* Form 4 *to the end, showing that plaintiff took the*

defendant, and is outstanding in the hands of another party. Per Parke B. Boydell *v.* Champneys, 2 M. & W. 435; and see Goldshede *v.* Cottrell, Ib. 20. The defendant being the acceptor is not entitled to presentment or demand of payment. If the defendant were the *drawer* or *indorser* of the bill, it should be averred that it was presented for payment when due, and that defendant had due notice of dishonor. See forms, *ante*, 76–78.

(*t*) The plaintiff replied that the bill remained in his hands unnegotiated and unpaid, and without any drawer's name put to it. Held, that the replication was no answer to the plea, and that the plea was good, at least as it was not demurred to. *Semble*, it was not open even to a demurrer. The plea there may easily be adopted to the case where the defendant *indorsed* a bill to the plaintiff on account of the debt.

(*u*) Or, if a third person were the drawer, aver that fact and state his indorsement to the defendant. See form, &c. Peacock *v.* Pursell, 14 C. B. N. S. 728.

(*x*) [A like plea, as to a bill drawn by a third party, Peacock *v.* Pursell, 14 C. B. N. S. 728.]

(*y*) For form, &c. see Belshaw *v.* Bush, 11 C. B. 191, and note (*s*), *supra*. [If the plaintiff takes a bill indorsed by the defendant on account of the debt, or merely as collateral security for the debt and it is dishonored, and he neglects to give notice of the dishonor to the defendant, or otherwise renders the bill worthless, he loses his remedy both on the bill and on the debt. Bridges *v.* Berry, 3 Taunt. 130; Soward *v.* Palmer, 8 Taunt. 277; Camidge *v.* Allenby, 6 B. & C. 373; Peacock *v.* Pursell, 14 C. B. N. S. 728.]

(*z*) This must be specially pleaded, and cannot be relied on under *non assumpsit*. Green *v.* Smithies, 1 Q. B. 798. It is sufficient in this plea to show merely that the plaintiff took the bill on account; see *ante*, 350, note (*u*); because it will be *presumed* that it has operated as satisfaction for the debt until the contrary be shown. Hebden *v.* Hartjak, 4 Esp. 46; Mercer *v.* Cheese, 4 M. & G. 804; S. C. 2 Dowl. N. S. 619; check, Griffiths *v.* Owen, 13 M. & W. 58. The plaintiff by joining issue would deny that he took the bill for and on account of the debt, but must reply specially that the bill was presented for payment when due, but was dishonored, of which the defendant had due notice; see form 5; so that the plaintiff was restored to his former rights. Where, however, the defendant has a clear defence by reason of the bill having been satisfied before action, or the plaintiff having indorsed it away, and not then being the holder, or on account of laches in presenting it or giving notice of dishonor, it may be better at once to plead such matter also, upon the principle of the above form. Some prolixity and delay may thus be avoided.

bill on account, and then proceed:] and the said bill became due before this suit, but was not duly presented for payment [*or* "but the defendant had not due notice of the non-payment thereof," *according to the fact* (*a*)].

BONDS.

OBS. — See *supra*, "Annuity," "Bail Bonds," and *post*, "Illegal Considerations," "Fraud." If the defendant deny his execution of the bond, or rely on a variance, he must plead *non est factum*, *ante*, 285. If he rely on payment, he must plead accordingly. So, in the case of *performance* of the condition in other cases. If there be a *set-off* it must be pleaded specially. So also illegality of consideration at common law or by statute must be specially pleaded. Alteration, *ante*, 298. Harden *v.* Clifton, 1 Q. B. 522; Davidson *v.* Cooper, 13 M. & W. 343. Cancellation. Alsager *v.* Close, 10 M. & W. 576; Gummer *v.* Adams, 13 L. J. Ex. 40.

"A party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material; and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out." C. L. P. Act, 1852, s. 56. See Sim *v.* Edwards, 15 C. B. 240.

1. *General Issue Form.* (*b*)

Ante, 286.

2. *Plea to a Count on a Money Bond of Payment according to the Condition* (*ad Diem*). (*c*)

That the said bond was and is subject to a condition thereunder written, whereby the said bond was to become void upon payment of £——, and interest on the same at £—— per cent. per annum, on the —— day of ——, A. D. ——.* And the defendant on the said day paid to the plaintiff the said sum of £——, with interest as aforesaid, according to the said condition.

3. *To a like Count, Plea of Solvit post Diem.* (*d*)

As in last form to the asterisk.] And the defendant, after the said day, and before this suit, paid to the plaintiff the said sum of £——, with all interest then due thereon.

(*a*) Or, "that the said bill, &c. was duly paid by the said E. F. when due;" or, if paid afterwards, see form 18, *ante*, 336; or if the plaintiff altered the bill, show that fact. See *ante*, 338, forms 21, 22; Alderson *v.* Langdale, 3 B. & Ad. 660; Atkinson *v.* Hawdon, 2 Ad. & E. 628. In the latter case it was held, that though plaintiff alter and thus avoid a bill *accepted* by defendant and drawn by plaintiff for goods sold, plaintiff may yet sue for the price. Plea, that the plaintiff kept a bill delivered to him an unreasonable time before presentment for acceptance. Straker *v.* Graham, 4 M. & W. 722. If a creditor who holds a bill as collateral security for a debt, by his laches renders the bill worthless or deteriorated in value, this has the same effect, as between the debtor and creditor, as payment of the bill. Peacock *v.* Pursell, [14 C. B. N. S. 728.]

(*b*) *Non est factum* denies only the making of the bond. *Ante*, Obs. 285, 286.

(*c*) See statute of Anne, &c. cited, *ante*, 87, 88, Obs. Where the declaration is on a bond and assigns a breach, the plea should merely negative such breach, unless there be matter in confession and avoidance. To an action on a bond conditioned to pay money on demand, the defendant pleaded no demand, and to that plea a replication that there was a demand, was held good. Thorne *v.* Jenkins, 12 M. & W. 614, where see a form.

(*d*) See the preceding form, and note thereto. The defendant may plead as to part payment in satisfaction *post diem*, under 4 & 5 Anne, c. 16, s. 12 (which see *ante*, Obs. 87). Husband *v.* Davis, 10 C. B. 645; but see *contra*, Ashbee *v.* Pidduck, 1 M. & W. 654; Worthington *v.* Wyley, 3 Bing. N. C. 454; Marriage *v.* Marriage, 1 C. B. 761.

4. *Plea of Set-off to an Action on a Bond.* (*e*)

As in Form 2 *to the asterisk.*] And at the commencement of this suit there was truly and justly due from the defendant to the plaintiff upon the said bond according to the said condition thereof £——, (*f*) for principal and interest. And the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim in respect of the said sum of £—— for [*state the subject-matter of the set-off, as post,* "Set-off"], which amount the defendant is willing to set off against the plaintiff's claim.

5. *Plea of Release of a Bond.* (*g*)

Post, "Release."

6. *That Bond was delivered merely as an Escrow.*

Murray *v.* Earl of Stair, 2 B. & C. 82.

7. *Plea that Bond was made in France, and was bad because the Law of France had not been complied with.*

Benham *v.* Earl of Mornington, 3 C. B. 133.

8. *Plea of Payment into Court.* (*h*)

As in Form 2 *to the asterisk.*] And the defendant brings into court £— [*principal and interest*], and says that the said sum is enough to satisfy the plaintiff's claim in respect of the matter herein pleaded to.

9. *To Debt on a Bond within Statute* 8 *&* 9 *W.* 3; *General Plea of Performance.*

Obs. — See the Obs. *ante*, p. 87; and 2 Saund. 409, 410, note (3); 1 Saund. 116, note (1); Roakes *v.* Manser, 1 C. B. 531; Grey *v.* Friar, 15 Q. B. 891–909; and as to indemnity bonds, see *post*, 353, note (*m*).

Where the condition of a bond consists of several particular things to be performed by the obligor, he cannot plead a general performance, but must set forth particularly in his plea how he has performed each particular thing, and lay a time and place of performance. 1 Saund. 116, note (1). But if there be anything specific in the subject, though consisting of a number of acts, they must all be enumerated. Ib.; Kepp *v.* Wiggett, 6 D. & L. 96.

(*e*) See statute 8 Geo. 2, c. 24, s. 5, which gives this plea, *post*, "Set-off," Obs. Tucker *v.* Tucker, 4 B. & Ad. 746. A set-off cannot be pleaded to a bond conditioned to indemnify generally. Attwool *v.* Attwool, 2 El. & Bl. 23.

(*f*) The precise sum due, or plaintiff may reply that more was due. Symmons *v.* Knox, 3 T. R. 65; Grimwood *v.* Barrett, 6 T. R. 460; Ball *v.* Shaw, Holt's N. P. 293.

(*g*) See Cocks *v.* Nash, 9 Bing. 342.

(*h*) By the C. L. P. Act, 1860 (23 & 24 Vict. c. 126), s. 25, "In any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain with a penalty, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond; and such payment shall be made and pleaded in like manner, and according to the provisions of 'The C. L. P. Act 1852,' and the like proceedings may be had and taken thereupon as to costs and otherwise." If payment into court is not pleaded, the defendant may bring the principal, interest, and costs into court under 4 & 5 Anne, c. 16, s. 13. As to payment into court under 8 & 9 W. 3, c. 11, it would seem that the defendant cannot pay money into court unless he pays in the whole amount of penalty, as the plaintiff has a right to a judgment for the whole to protect him against future breaches. The Bishop of London *v.* M'Neil, 9 Ex. 490.

Obs. Where the condition is for the performance of all the covenants in an indenture, the defendant may plead a *general* performance, and it must come from the other side to show the contrary in some particular. Ib.

Unless some of the covenants are in the negative, for to those he must give a special answer in the negative ; or in the disjunctive, for then he must show which of them he has performed. Ib.; and Sanders *v.* Coward, 15 L. J. Ex. 97; [15 M. & W. 48.]

As pleading performance generally was only ground of special demurrer, pleading so can only now be objected to as calculated to embarrass. C. L. P. Act, 1852, ss. 51, 52.

Of course excuses for performance may be pleaded, as the non-performance of a condition precedent. See Webb *v.* James, 8 M. & W. 645 ; S. C. 1 Dowl. N. S. 36.

That the said bond (*i*) was and is subject to a condition thereunder written, whereby, after reciting that [*set out the material recitals*], the condition of the said bond was declared to be such that if [*set out the condition*], then the said bond should be void, and before this suit the defendant performed and fulfilled the said condition on his part. [*If any particular act is to be performed, or the defendant is to have the option of performing one of two acts, aver a specific performance; or, if any acts are not to be done, aver that defendant did not do them. See* Obs. *supra.*]

10. *To Debt on a Bond conditioned to perform the Covenants in another Indenture; General Plea of Performance.* (*k*)

Set out the condition, as in the last form.] And the defendant says that by the said indenture in the said condition mentioned, he did covenant (*l*) [*&c.; set out covenant in question*], and before this suit the defendant performed and fulfilled the said covenant and condition on his part. [*See last form.*]

11. *Non-damnificatus to an Indemnity Bond.* (*m*)

Set out the condition, as in Form 9.] And the defendant says that the plaintiff has not at any time since the making of the said bond and condition hitherto

(*i*) See a form, Roakes *v.* Manser, 1 C. B. 53. This and the next form are applicable when the condition of the bond is not set out, and no breaches are assigned in the declaration. Performance cannot be pleaded without setting out the condition. 2 Saund. 409, note (2). This defence cannot be given in evidence under a plea that the plaintiff was damnified of his own wrong. White *v.* Ansdell, 1 M. & W. 350. For form setting out the condition verbatim and showing discharge by act of parliament, see Brown *v.* Corporation of London, 30 L. J. C. P. 225.

(*k*) See note (*i*). and the Obs. prefixed to form 9, *supra*, and *ante*, p. 87, Obs. Matter in *excuse* of performance must be pleaded; as the non-performance of a condition precedent, &c.

(*l*) The whole indenture should be set out; Sanders *v.* Coward, 15 L. J. Ex. 97; [15 M. & W. 48;] and performance of all the defendant's covenants should be averred where the condition is general for performance of defendant's covenants, &c. Ib. See 1 Saund. 52, 58, 59; 2 Saund. 409; 2 Chit. Plead. 7th ed. 196, note (*x*); Kerry *v.* Baxter, 4 East, 344, 345; Roakes *v.* Manser, 1 C. B. 531; S. C. 3 D. & L. 17.

(*m*) See 1 Saund. 115, 117, and a similar form in assumpsit; Jones *v.* Williams, 7 M. & W. 493, and the Obs. p. 87, *ante*. This plea is proper where the bond is to indemnify and nothing more, and the plaintiff must reply any damage specifically. 1 Saund. 116, note (1). Insufficient plea of the variation of risk to a bond conditioned for faithful services of a clerk. Anderson *v.* Thornton, 3 Q. B. 271. In general, if the default has happened, the plaintiff may recover on an indemnity bond the full amount of his *liability* thus induced, though he has not actually discharged it. Loosemore *v.* Radford, 9 M. & W. 657. An indemnity against the wrongful payment of a legacy covers the obligee's costs in defending an equity suit brought by the legatee. Lloyd *v.* Mostyn, 2 Dowl. N. S. 476; S. C. 10 M. & W. 478. Legality of a bond given to a trustee to indemnify him from violating his trust. Warwick *v.* Richardson, 10 M. & W. 284. Indemnity against legal costs; Vesey *v.* Mantell, 9 M. & W. 323; against the de-

been in any wise damnified by reason of anything in the said condition mentioned.

12. *Plea to an Indemnity Bond, Payment to Plaintiff in Accord and Satisfaction after Forfeiture, and whilst the Damages were unliquidated.*

Field *v.* Robins, 8 Ad. & E. 90.

13. *Replication assigning Breaches.* (*n*)

See last edition of this work, p. 453.

BRIBERY.

Obs. — See *ante*, 92. 17 & 18 Vict. c. 102, amended by 21 & 22 Vict. c. 87; 26 Vict. c. 29, are the acts in force relating to bribery. As to proof of election being held, see Reed *v.* Lamb, 29 L. J. Ex. 452; 17 & 18 Vict. c. 102, s. 14, limits the time of bringing an action to within one year next after the offence, and also enacts that the action shall be proceeded with and carried on without any wilful delay. Where the plaintiff did not declare for eleven months after writ issued, the court held that he had been guilty of wilful delay within the statute. Taylor *v.* Vergette, 30 L. J. Ex. 400; [7 H & N. 143,] where see a proposed plea of wilful delay.

The provisions of the corrupt practices prevention act, 1854 (17 & 18 Vict. c. 102), do not affect a creditor's right to recover from a candidate for work or goods connected with the election done or supplied on the personal order of the candidate. Nurton *v.* Dickson, 5 H. & N. 637; 29 L. J. Ex. 337. See Reg. *v.* Leatham, 30 L. J. Q. B. 205.

Plea of General Issue by Statute. (*o*)

By statute 21 Jac. 1, c. 4, s. 4. } That he is not guilty.

BROKER.

Obs. — See *ante*, 38 *et seq.*, and 93. A dealer (within the city of London) in shares in a public company, is a "broker" within 6 Anne, c. 16. Smith *v.* Lindo, 4 C. B. N. S. 395. As also, is a stock-broker. Clarke *v.* Powell, 4 B. & Ad. 846. But a ship-broker is not within the acts for the admission and regulation of brokers. Gibbons *v.* Bule, 4 Bing. 301. "In the employment of a broker," relates to goods and money, and not to personal contracts for work and labor. Milford *v.* Hughes, 16 M. & W. 174; 16 L. J. Ex. 40, per Rolfe B. If a broker is unlicensed, he cannot recover commission for work done as a broker; Smith *v.* Lindo, 4 C. B. N. S. 395; 5 Ib. 587; Cope *v.* Rowland, 2 M. & W. 149; but he may recover his advances, or money paid at the defendant's request. Ib.; Pidgeon *v.* Burslem, 3 Ex. 465. See, also, Jessopp *v.* Lutwyche, 10 Ex. 614; [Smith *v.* Lindo, *supra*: Chapman *v.* Shepherd, L. R. 2 C. P. 228; Whitehead *v.* Izod, L. R. 2 C. P. 228.] No charge for brokerage or commission in or about the sale or purchase mentioned

fault of a tax collector. Gwynne *v.* Burrell, 6 Bing. N. C. 853; S. C. in Dom. Proc. 7 Cl. & Fin. 572. Matter of law, as that the default was not within the meaning of the indemnity, cannot be pleaded. Summers *v.* Ball, 8 M. & W. 596. See an instance in a plea to a tax collector's bond, Webb *v.* James, 7 M. & W. 279; S. C. 9 Dowl. 314. The above plea would not be good where some special matter of performance must be averred. *Ante*, Obs. 352, 353. See form of plea, that, "if plaintiff was damnified, he was damnified of his own wrong, &c." White *v.* Ansdell, 1 M. & W. 348. Evidence under such a plea. Warre *v.* Calvert, 7 Ad. & E. 154.

(*n*) The breaches are now generally assigned in the declaration, and the replication in general is only a joinder of issue. *Ante*, 87, 88, Obs. as to assigning or suggesting breaches, &c. under the statute.

(*o*) See *ante*, 286–288, and note (*o*).

Obs. referred to in any delivery-order or dock warrant, &c. (23 Vict. c. 15, s. 9; 23 & 24 Vict. c. 111, ss. 13, 14, and schedule), or in any contract note (23 & 24 Vict. c. 111, s. 7, and schedule), is lawful, unless such document is stamped.

1. *Plea that the Plaintiff was not a duly Licensed Broker.*

Cope *v.* Rowland, 2 M. & W. 149; Milford *v.* Hughes, 16 M. & W. 174.

[2. *Pleas in Action by Broker against Client for carrying out a Sale of Shares, that the Company was being wound up.*

Biederman *v.* Stone, L. C. 2 C. P. 504.]

CARRIERS.

Obs. — See, generally, *ante*, 94, and *post*, Torts, tit. "Carriers;" Chit. & Temple on Carriers. As to the effect of *non assumpsit*, *ante*, 275. The declaration against a carrier may be framed either in contract or tort, in the former case charging a breach of contract, in the latter a breach of duty. See Morgan *v.* Ravey, 6 H. & N. 265; Courtney *v.* Earle, 10 C. B. 73; Boorman *v.* Brown, 3 Q. B. 511; 11 Cl. & F. 1; Tattan *v.* Great Western Ry. Co. [2 El. & Bl. 844; Southern Express Co. *v.* McVeigh, 20 Grattan, 264; 1 Chitty Pl. 150, 151.] But the court will look at the real substance of the case, before they decide whether the declaration is in contract or tort; Legge *v.* Tucker, 1 H. & N. 500; and decide accordingly, and will not be bound by mere form.

If the declaration is framed in contract, *non assumpsit* denies the contract, but not the breach of it. R. 6, T. T. 1853.

Thus it would deny that the defendant received the goods in the character of a carman, and for the purpose of being carried, &c.; Webb *v.* Page, 5 M. & G. 199; also the property of the plaintiff in the goods, and whether he, as consignor or consignee, be the person to sue. Gilbert *v.* Dale, 5 Ad. & E. 545. It would also deny any qualification of the common law contract, such as that the plaintiff agreed to watch the goods. Binet *v.* Dale, 2 M. & W. 775. The carriers' act must be specially pleaded. Syms *v.* Chaplin, 5 Ad. & E. 634.

If the declaration be in tort, *not guilty* denies the loss or damage, but not the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received. R. 16, T. T. 1853; and see *post*, Torts, tit. "Carriers." If it is doubtful whether the declaration is in contract or tort, either form of plea may be used. C. L. P. Act, 1852, s. 74. The breach must be denied specifically.

1. *General Issue. Non Assumpsit.*

That he did not promise as alleged. (*p*)

2. *Never Indebted, to the Indebitatus Counts.* (*q*)

Ante, 284.

2a. *Plea to an Action for Freight that Defendant had indorsed the Bill of Lading to a Third Person.*

Lewis *v.* McKee, 36 L. J. Ex. 7 L. R. 2 Ex. 37.]

3. *Traverse of Delivery and Receipt of the Goods.*

That the plaintiff did not deliver to the defendant, nor did the defendant receive from the plaintiff the said goods, as alleged.

(*p*) *Ante*, 276, 284. (*q*) *Ante*, 274–282.

4. *Plea that the Defendant did safely carry and deliver the Goods.* (r)

That he carried the said goods to ——, and safely and securely delivered the same to [*or* for] the plaintiff within a reasonable time. (s)

5. *Plea by a Carrier by Land, that he is protected by the Carriers' Act,* 1 *W.* 4, *c.* 68, *the Goods being above the Value of* £10, *and the Value not declared or insured.* (t)

That the said goods were articles and property of the description mentioned in the 1st section of an act of parliament passed in the first year of the reign of K. W. 4, for the more effectual protection of common carriers for hire, and were contained in one parcel or package which was delivered by the plaintiff to the defendant, and received by him as a common carrier by land for hire, at a certain office or receiving house of the defendant for the receipt of goods to be carried by him as a common carrier for hire; and the value of the said goods so contained in the said parcel or package then exceeded the sum of £10; and at the time of the delivery and receipt of the said goods as aforesaid, there was affixed, according to the form of the said statute, in legible characters in a public and conspicuous part of the said office, a notice, whereby the defendant notified that a certain increased rate of charge therein mentioned was required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of articles and property of the description mentioned in the first section of the said statute. And at the time of the delivery and receipt of the said goods as aforesaid, for the purpose aforesaid, the value and nature thereof were not declared by the person sending or delivering the same, and neither the said in-

(r) As to what is a performance of the carriers' contract or duty, and a sufficient delivery by him, see Chit. & Temple on Carriers, 86. If the defence be that the goods were improperly packed, or that the goods were stopped *in transitu*, or that the goods were not insured under the carriers' acts, these defences must be specially pleaded.

(s) If there are any other breaches in the declaration, they should, if desired, be traversed in the same way as above.

(t) See forms, Behrens *v.* Great Northern Ry. Co. [6 H. & N. 366;] Hinton *v.* Dibbin, 2 Q. B. 646; Syms *v.* Chaplin, 6 Ad. & E. 634. See *ante*, 94, where the clauses of the carriers' act are set out. As to what articles are within the act, see Chit. & Temple on Carriers, 48, and Bernstein *v.* Baxendale, 6 C. B. N. S. 251, where the subject is fully discussed, and Brent *v.* Midland Ry. Co. 33 L. J. Ex. 187. If the goods are declared, it is the carrier's duty to *demand* the extra charge; and if he neglects to do so, he is liable for loss or injury, although the extra charge is not tendered. Behrens *v.* Great Northern Ry. Co. 6 H. & N. 366. The statute relates only to carriers by land; but when a carrier is so partly by land and partly by sea, the statute protects him, if the loss or injury occur during the land carriage. Pianciani *v.* London & South Western Ry. Co. 18 C. B. 226. The liability of owners of ships is regulated and restricted by the merchant shipping act, 17 & 18 Vict. c. 104, ss. 503, 506, and the merchant shipping amendment act, 1862, 25 & 26 Vict. c. 63, s. 54. See, also, Williams *v.* African Steam Ship Co. 1 H. & N. 300. But the act does not protect carriers in all cases where the owner of the article sustains damage from the neglect of the carrier. Thus, it does not protect a carrier for a temporary loss, or delay in delivering. Hearn *v.* London & South Western Ry. Co. 10 Ex. 793; Pianciani *v.* London & South Western Ry. Co. 18 C. B. 226; and see Chit. & Temple, 86. A carrier is protected by the act even when the loss arises by reason of the gross negligence of himself or his servants. Hinton *v.* Dibbin, 2 Q. B. 646. See Chit. & Temple, 51, 82. By section 8, the carrier (*ante*, 94) is liable for loss arising from the felonious acts of servants in his employ. Great Western Ry. Co. *v.* Rimell, 18 C. B. 575; Metcalfe *v.* London, Brighton & South Coast Ry. Co. 4 C. B. N. S. 307; where a form of replication, that the loss arose from the felonious acts of the defendant's servants.

creased charge nor any engagement to pay the same was accepted by the person receiving the same.

6. *Replications thereto.*

The replication may be], "that the goods were not [jewelry] as alleged within the meaning of the act" [*that is, if the declaration do not so describe them*]; *or*, 2, "That at the time the said goods were delivered at the said office, there was not affixed in legible characters, in a public and conspicuous part thereof, the notice in the plea mentioned, as therein alleged;" *or*, 3, "That the value and nature of the said goods were, at the time of the delivery thereof at the said office, declared by the plaintiff, who delivered the same, and that the increased charge was then paid;" *or*, 4, "That an engagement to pay the increased charge was then accepted by the person receiving the same." (*u*) *Or the plaintiff may reply, under the 8th section of the carriers' act; see ante*, 95, Obs.; 5, "That the loss [*or* loss and injury] of the said goods was occasioned by the felonious act of the defendant's servants, and not otherwise." (*x*)

7. *That the Goods were carried under a Special Contract.* (*y*)

That the said goods were delivered to and received by the defendants to be

(*u*) Forms, Boyce *v.* Chapman, 2 Bing. N. C. 222; Metcalfe *v.* London, Brighton & South Coast Ry. Co. 4 C. B. N. S. 307; Machin *v.* London & South Western Ry. Co. 2 Ex. 417.

(*x*) The carriers' act (1 W. 4, c. 68, s. 8) provides that nothing contained in it is to protect the carrier from the felonious acts of his servants; therefore the above replication, without alleging negligence on his part, is sufficient where the carrier relies on the statute as a defence. "The rule is, under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has no effect one way or the other. Where the defence is independent of the statute" (*i. e.* under a special contract), "negligence alone is a sufficient answer." Per Jervis C. J. Great Western Ry. Co. *v.* Rimell, 18 C. B. 57; Metcalfe *v.* London & Brighton Ry. Co. 4 C. B. N. S. 307.

(*y*) By the railway and canal traffic act, 17 & 18 Vict. c. 32, s. 7 (which see at length, ante, Obs. 96), no general notice given by a railway company shall be valid in law for the purpose of limiting its common law liability as carriers; but such common law liability may be limited by just and reasonable conditions embodied in a special written contract signed by the owner of the goods, or some one on his behalf. See Peek *v.* The North Staffordshire Ry. Co. [El., Bl. & El. 963; 10 H. L. Cas. 473;] Simons *v.* Great Western Ry. Co. 18 C. B. 805; M'Manus *v.* The Leeds & Yorkshire Ry. Co. [4 H. & N. 327; *ante*, 96; 1 Chitty Contr. (11th Am. ed.) 691 *et seq.* and notes.] It is necessary, therefore, to consider in each case whether the conditions embodied in the special contract were just and reasonable. That is a question for the judge at *nisi prius* in the first instance, but his decision may be reviewed by the court. See Lewis *v.* Great Western Ry. Co. 5 H. & N. 867; Beal *v.* South Devon Ry. Co. 5 H. & N. 875; affirmed in exchequer chamber, 21st June, 1864. In Simons *v.* The Great Western Ry. Co. 18 C. B. 105, a condition that the company should not be responsible for loss or damage from any cause whatsoever to goods conveyed at a special mileage rate, was held reasonable. "But then, as it seems, to bring a case within this principle, it must appear that the customer really had an alternative; that he had power, if he pleased, to have sent his goods at the ordinary rates and on the ordinary terms as to liability, and having that option, elected to send them otherwise." Per Blackburn, in Peek *v.* North Staffordshire Ry. Co. [El., Bl. & El. 958; 10 H. L. Cas. 473.] A condition that the company would not under any circumstances be liable for loss of market or other delay arising from detention, has been held reasonable. White *v.* The Great Western Ry. Co. 2 C. B. N. S. 7. "No claim for deficiency, damage, or detention shall be allowed unless made within three days after delivery of the goods, nor for loss unless made within seven days after the time when they should have been delivered;" and "the company will not be answerable for the loss or detention of any goods untruly or incorrectly described or declared in the declaration or receiving note furnished by the company," have been held just and reasonable. Lewis *v.* The Great Western Ry. Co. 5 H. & N. 867; [1 Chitty Contr. (11th Am. ed.) 693. See Southern Express Co. *v.* Caperton, 44 Ala. 101; Southern Express Co. *v.* Crook, 44 Ala. 468; Wolf *v.* Western Union Telegraph Co. 62 Penn. St. 83.] So,

carried under a special contract signed by the plaintiff [*or* "by A. B. on behalf of the plaintiff"], and containing certain just and reasonable conditions, and among others that [*here set out the necessary conditions*]. And [*state facts showing the conditions to be an answer*].

8. *Plea to an Action for not delivering Goods, that the Defendants could not ascertain to whom they were to be delivered.*

That the plaintiff delivered the said goods to the defendants, directed and to be delivered at B. to a certain person there, to the defendants unknown, without any information to the defendants, at any time, whereby the defendants could ascertain who the said person was, or where in B., or elsewhere, the said goods could be delivered to him; and the defendants by reason of the premises not having been able to ascertain who the said person was, or where the said goods could be delivered to him, and the said person having made no application for the same, the defendants, without any default on their part, have been unable to deliver, and have not delivered, the said goods, which is the alleged non-delivery thereof in the declaration mentioned.

a condition that the company shall not be responsible under any circumstances for loss of market, or other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud, was held reasonable. Beal *v.* The South Devon Ry. Co. 5 H. & N. 875; affirmed in exchequer chamber, 21st June, 1864. A condition "that the company will not be liable in any case for loss or damage to any horse or other animal above the value of £40, or any dog above the value of £5, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed £40, or any dog £5, the price of conveyance will, in addition to the regular fare, be after the rate of £2 10*s.* per cent., or 6*d.* per pound upon the declared value above £40, whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried," is reasonable. Harrison *v.* The London, Brighton & South Coast Ry. Co. [2 B. & S. 122, 152.] So, it was held reasonable for a company to make a condition that the company is to be held free from all risk or responsibility, in respect of any loss or damage to cattle arising in the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever. See next cases. Pardington *v.* South Wales Ry. Co. 1 H. & N. 392. In Peek *v.* The North Staffordshire Ry. Co. (*ubi sup.*), a condition, "That this company shall not be responsible for the loss of, or injury to, any marbles, musical instruments, toys, or other articles which, from their brittleness, fragility, delicacy, or liability to ignition, are more than ordinarily hazardous, unless declared and insured according to their value," was held not to be just and reasonable, as the effect of such a condition would be to exempt the company from responsibility for injury however caused, whether by their own negligence or even by fraud or dishonesty on the part of their servants. So, "This ticket is issued, subject to the owner's undertaking all risks of conveyance, loading and unloading, whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire & Yorkshire Railway, or in their vehicles," was held void. M'Manus *v.* Lancashire & Yorkshire Ry. Co. [4 H. & N. 327;] Gregory *v.* The West Midland Ry. Co. [2 H. & C. 944;] and see McCance *v.* The London & North Western Ry. Co. [7 H. & N. 477; 3 H. & C. 343.] So, also, a condition that the company should not be liable for the loss, detention, or damage of any package insufficiently packed, is unreasonable. Simons *v.* The Great Western Ry. Co. 18 C. B. 805; Garton *v.* The Bristol & Exeter Ry. Co. [1 B. & S. 112.] A declaration that the value of horses did not exceed £10 each, is binding on the owner, and he cannot recover more. McCance *v.* London & North Western Ry. Co. *ubi sup.*, affirmed in exchequer chamber, 20th June, 1864. Passengers' luggage is not within the act. Stewart *v.* The London & North Western Ry. Co. [3 H. & C. 135;] and see note (*a*) 359.

9. *Plea to a like Action, that the Goods were seized by the Sheriff under a Fi. Fa. on a Judgment against a Person who had fraudulently assigned them to the Plaintiff.*

That before the said delivery to the defendants the said goods were the goods of one S. S., and that while the said goods were his goods, and before and at the time of the bargain and conveyance hereafter mentioned, the said S. S. was justly and lawfully indebted to one J. P. in the sum of £204 15*s.* 10*d.*, which sum the said J. P. in the court of common pleas, by the judgment of the said court, before the committing of the breach of promise in the declaration mentioned, did in an action by him brought against the said S. S. recover against the said S. S., together with his costs of suit, amounting with the said debt to £228 18*s.*; and the defendants say that before the said delivery to the defendants, the said S. S. fraudulently, and by collusion with the plaintiff who knew the premises, bargained and conveyed the said goods to the plaintiff to and for the intent and purpose to delay, hinder, and defraud the said J. P. of his said just and lawful debt, whereby the said action and debt of the said J. P. were disturbed, hindered, and defrauded. And the defendants further say that after the said bargain and conveyance, and after the said delivery to the defendants, and before the breach in the declaration complained of, one G. M., — then being sheriff of the county of Lancaster, under and by virtue of a certain writ of *fi. fa.* to him directed and delivered at the suit of the said J. P. against the said S. S., issued out of the said court upon and for having execution of the said judgment, commanding the said sheriff to levy of the goods and chattels of the said S. S. in his bailiwick the said sum of £228 18*s.* so recovered as aforesaid, — seized the said goods and chattels then being in the possession of the defendants as such common carriers, and on the terms aforesaid, the same goods being liable to be so seized under the said execution, and kept and detained the same, whereby the defendants, without any default on their part, were prevented from carrying and delivering the said goods within such reasonable time as aforesaid, and were and are prevented from delivering the same to the plaintiff.

10. *Plea to an Action for the Loss of Goods left in the Cloak-room of a Railway Company, that the Defendants accepted them upon the Condition that they would not be responsible if their Value exceeded* £10; *and that they did exceed* £10.

Van Toll *v.* The South Eastern Railway Company, (*z*) 12 C. B. N. S. 75.

11. *Plea to an Action by the Consignee of Goods for not delivering them, that the Consignor gave Notice to the Carrier and stopped the Goods in Transitu.*

Jones *v.* Jones, 8 M. & W. 431. (*a*)

(*z*) The deposit of goods in the cloak-room of a railway station is not within the railway and canal traffic act, 17 & 18 Vict. c. 31, s. 7.

(*a*) See, also, Sheridan *v.* The New Quay Co. 4 C. B. N. S. 618. See Chit. & Temple on Carriers, 97–184.

12. *Plea that the Goods were seized by Plaintiff's Landlord as having been fraudulently removed to avoid a Distress, and so Defendants prevented from delivering them.*

Anderson *v.* The Midland Railway Company, 30 L. J. Q. B. 91.

13. *Plea that the Goods were received subject to a Condition that the Defendants were not to be liable for Loss or Damage from the Act of God.* (*b*)

Briddon *v.* Great Northern Railway Company, 28 L. J. Ex. 51.

14. *Plea that the Goods were carried and tendered to the Plaintiff, who refused to pay for the Carriage.*

Crouch *v.* Great Western Railway Company, 26 L. J. Ex. 418. (*c*)

15. *Replication to the above, that within a Reasonable Time Plaintiff was ready and willing to receive the Goods, and offered to pay for the Same.*

Crouch *v.* Great Western Railway Company, 26 L. J. Ex. 345; [2 H. & N. 491.]

16. *Plea of Payment into Court, to count for Non-delivery or Loss of Goods.* (*d*)

See *post*, "Payment into Court."

17. *Plea to a Declaration for negligently stowing Goods shipped on Board Plaintiff's Ship, that the Goods were of a Destructive Character.* (*e*)

Hutchinson *v.* Guion, 5 C. B. N. S. 149; 28 L. J. C. P. 63.

18. *Plea by a Carrier by Sea, that the Nature and Value of the Goods were not declared.* (*f*)

Williams *v.* The African Steam Ship Company, 1 H. & N. 300; 26 L. J. Ex. 69.

(*b*) See Blyth *v.* The Birmingham Waterworks Co. [11 Ex. 781;] Chit. & Temple on Carriers, *in voc.*; Barkworth *v.* Young, 26 L. J. Ch. 153–159.

(*c*) 2 H. & N. 491.

(*d*) Carriers may pay money into court in all actions. 1 W. 4, c. 68, s. 10; C. L. P. Act, 1852, s. 70. As to the effect of paying money into court, see Chit. & Temple on Carriers, 138; McCance *v.* The London & North Western Ry. Co. [7 H. & N. 477.]

(*e*) It is the duty of the person who sends the goods to give notice that the goods are of a dangerous nature. Farrant *v.* Barnes, 11 C. B. N. S. 553; Brass *v.* Maitland, 6 El. & Bl. 498; Alston *v.* Herring, 11 Ex. 822; [Barney *v.* Burstenbinder, 7 Lansing, 210.] By "The Railways Clauses Consolidation Act, 1845," 8 Vict. c. 20, s. 105, any person sending dangerous articles by railway is subject to a penalty. See Hearne *v.* Garton, 2 El. & El. 66; 28 L. J. M. C. 216. As to dangerous goods on board ship, see "The Merchant Shipping Act," 17 & 18 Vict. c. 104, s. 329; Williams *v.* East India Co. 3 East, 92–201. As to dangerous goods on board a passenger ship, see 18 & 19 Vict. c. 119, s. 29.

(*f*) See "Merchant Shipping Act," 17 & 18 Vict. c. 104, ss. 503, 504; 25 & 26 Vict. c. 63, s. 54. As to where and how s. 503 of the former act applies in the case of a foreign vessel in British jurisdiction, see The General Iron Screw Collier Co.

[18*a*. *Pleas to an Action by an Indorsee of a Bill of Lading for Wrong Delay, that Delay took Place after Plaintiff had indorsed the Bill of Lading to another Person, and Replication Reindorsement to Plaintiff.*

Short *v.* Simpson, 35 L. J. C. P. 147; L. R. 1 C. P. 248.

18*b*. *Plea by a Railway Company, setting up a By-law.*

Jennings *v.* Great Northern Railway Company, 35 L. J. Q. B. 15; L. R. 1 Q. B. 7.]

CHAMPERTY. See *post*, "Maintenance."

CHARTER-PARTIES.

...ns. — See *ante*, 110, and authorities cited there. In general, pleas to declarations on charter-parties are mere traverses of allegations in the declaration or matter constituting a condition precedent to the defendant's liability, or of denials of the breaches. See several instances, Jackson *v.* Galloway, 1 C. B. 280. As to what are conditions precedent in a charter-party, Seeger *v.* Duthie, 29 L. J. C. P. 253; Behn *v.* Burness, 3 B. & S. 751; Pust *v.* Dowie, [5 B. & S. 20.]

1. *Non Assumpsit.* (*g*)

Ante, 284.

2. *Non est Factum.* (*h*)

Ante, 285.

Plea that before the Defendant could load any Cargo, the Ship was rendered unfit to receive it by the Negligence of the Master and Crew.

Taylor *v.* Clay, 9 Q. B. 713.

Plea that the Ship was described and warranted in the Charter-party as being "A 1," and ceased to be so before loaded, wherefore the Defendants refused to load. (*i*)

Hurst *v.* Usborne, 18 C. B. 144.

...rmann, 29 L. J. Ch. 87; Cope *v.* Doherty, L. J. Ch. 600. See forms setting up a ial contract for carrying by sea, Phil- *v.* Clark, 2 C. B. N. S. 156; Phillips *v.* ards, 3 H. & N. 813; Wilton *v.* The al Atlantic Mail Steam Navigation Co. B. N. S. 453. And see, as to a col- arising from negligence not being with- ordinary exceptions in a bill of lading, d *v.* The General Iron Screw Collier L. J. Ex. 269; [3 H. & C. 284.]

(*g*) This plea is applicable when the charter is *not* under seal.

(*h*) If the charter-party is under seal, which is not now very often the case, the above is the form of the general issue.

(*i*) The description of a vessel in a charter-party as "A 1," warrants only that she was "A 1" at the time of making the charter-party, and not that she should continue to be so. See *ante*, 110, note (*y*). [Pleas to actions for not loading; that the ship did not sail for the port of loading on the appointed day as required by the charter-party; Glaholm *v.* Hays, 2 M. & G. 257; Crookewit *v.* Fletcher, 1 H. & N. 893; that the ship

5. *Plea that the Defendant was prevented performing the Voyage by some of the Excepted Causes contained in the Charter-party.* (*k*)

That the defendant was prevented by the excepted causes contained in the said charter-party, that is to say, by damages and accidents of the seas, from performing and completing the said voyage.

6. *Plea that the Defendant (the Charterer) was prevented from loading by the Restraint and Prohibition of the Ruler of the Country where the loading was to take Place.* (*l*)

Bruce *v.* Nicolopulo, 24 L. J. Ex. 321; [11 Ex. 129.]

7. *Plea that in Consequence of a Declaration of War, Defendant could not perform his Contract under the Charter-party.* (*m*)

Reid *v.* Hoskins, 24 L. J. Q. B. 315; 4 El. & Bl. 981; 25 L. J. Q. B. 55.

CHECK.

OBS. — See *ante*, 114; Chit. on Bills, 10th ed. c. 11. Although the rule T. T. 1853, r. 7, only mentions bills of exchange and promissory notes, it seems that "non assumpsit" and "never indebted" cannot be pleaded to a count on a check. The pleas (*ante*, "Bills of Exchange") are many of them applicable to checks, and may be easily adapted. The stamp upon all checks, whether payable to bearer or order on demand, is 1*d.*; 16 & 17 Vict. c. 59; 21 Vict. c. 20; which must be cancelled and made incapable of being used again, under a penalty. Ib.; 23 Vict. c. 15, s. 12. A draft payable to order is not rendered void by being post-dated. Whistler *v.* Forster, 32 L. J. C. P. 161. [A post-dated check is a bill of exchange. Forster *v.* Mackreth, 36 L. J. Ex. 94; L. R. 2 Ex. 163.] If a check be kept by the holder beyond the day after he received it, he takes the risk of the banker failing, &c.; Alexander *v.* Burchfield, 7 M. & G. 1061; [*ante*, 115, note (*r*);] but, unless the value be lost by the default, &c. the banker's delay in presenting the check, will not, as in the case of a bill, *ante*, 76, note (*e*), disentitle the holder to sue the maker. Laws *v.* Rand, 3 C. B. N. S. 442; Robinson *v.* Hawksford, 9 Q. B. 52; Serle *v.* Norton, M. & Rob. 401, and see Robson *v.* Oliver, 10 Q. B.

was not ready to load at the appointed time as required by the charter-party, Oliver *v.* Fielden, 4 Ex. 135; Seeger *v.* Duthie, 8 C. B. N. S. 45; that there was delay in the arrival of the ship at the port of loading, whereby the object of the voyage was frustrated; Clipsham *v.* Vertue, 5 Q. B. 265; Tarrahochia *v.* Hickie, 1 H. & N. 183; breach of warranties in the charter-party as to the then place of the ship; Ollive *v.* Booker, 1 Ex. 416; that the ship was not classed as "A 1" at Lloyd's as warranted by the charter-party; Hurst *v.* Usborne, 18 C. B. 144; Routh *v.* Macmillan, 2 H. & C. 750; that the ship was not of the size stipulated for in the charter-party; Windle *v.* Barker, 25 L. J. Q. B. 349; Pust *v.* Dowie, 5 B. & S. 20; that the ship was not tight, staunch, and strong, as agreed in the charter-party, whereby the object of the voyage was frustrated. Tarrahochia *v.* Hickie, 1 H. & N. 183. See Taylor *v.* Clay, 9 Q. B. 713.]

(*k*) Schilizzi *v.* Derry, 4 El. & Bl. 872; 24 L. J. Q. B. 193; for the law, see Maclachlan's Law of Merchant Shipping, and Maude & Pollock on Shipping, *in loc.*

(*l*) See Crow *v.* Tulk, 8 Q. B. 467; 15 L. J. Q. B. 183. Another form, Barrick *v.* Buba, 2 C. B. N. S. 563; 26 L. J. C. P. 280.

(*m*) See, also, for forms and law, Avery *v.* Bowden, 5 El. & Bl. 714; 26 L. J. Q. B. 3; Esposito *v.* Bowden, 4 El. & Bl. 963; 7 Ib. 763. [Plea that the liability of the charterer was to cease on loading a cargo worth the freight, on which the captain was to have a lien. Bannister *v.* Breslauer, L. R. 2 C. P. 497; Oglesby *v.* Yglesias, El., Bl. & El. 933; Milvain *v.* Perez, 3 El. & Bl. 496. Plea to action for freight to be advanced on sailing of ship, that the ship did not sail pursuant to the charter-party. Thompson *v.* Gillespie, 5 El. & Bl. 209. Plea to count for freight, that the plaintiff, the ship-owner, was not ready and willing to deliver the cargo. Paynter *v.* James, L. R. 2 C. P. 348.]

Obs. 704; [*ante*, 115, and note (*r*); Howes *v.* Austin, 36 Ill. 396; Pack *v.* Thomas, 13 Sm. & M. 11; Willetts *v.* Paine, 43 Ill. 432; 3 Kent, 88; Mohawk Bank *v.* Broderick, 10 Wend. 304; S. C. 13 Wend. 133; Keene *v.* Beard, 8 C. B. N. S. 372, 381; Smith *v.* Miller, 43 N. Y. 171. A person not a party to a check, received on account of his debt, is discharged by a failure to present it within a reasonable time, if his position is thereby altered for the worse. Hopkins *v.* Ware, L. R. 4 Ex. 268; Smith *v.* Mercer, L. R. 3 Ex. 51.] So, a country banker, who receives a check from a customer for presentment upon another country banker not resident in the same town, is not bound to transmit it for presentment by the post of the day on which he receives it, but has until post-time on the next day to do so. Hare *v.* Henty, 10 C. B. N. S. 65. And see, as to presentment by post and notice of dishonor, Bailey *v.* Bodenham, 16 C. B. N. S. 288.

The 19 & 20 Vict. c. 25, enacts that "In every case where a draft on any banker made payable to bearer or to order on demand, bears across its face an addition in writing or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker."

Under that statute it was held that the crossing was no part of the check, but only an independent addition, and that therefore an alteration of it was no forgery; therefore, where the crossing had been erased, and the bankers had paid it across the counter without negligence on their part, it was held that the payment was authorized, and that the drawee could not recover from them. Simmonds *v.* Taylor, 4 C. B. N. S. 463.

It was then enacted by 21 & 22 Vict. c. 79, s. 1, "That the crossing was to be deemed a material part of a check, and that a banker is only to pay it to the banker whose name is crossed on it, or if crossed without a banker's name, then only to a banker. And the lawful holder of an uncrossed check or crossed 'and Co.' may cross it with the name of a banker (s. 2). Persons obliterating, adding to, or altering the crossing, &c. with intent to defraud, are declared guilty of felony (s. 3). The banker is not to be responsible for paying a check which does not plainly appear to have been crossed or altered (s. 4)." A check is within the bills of exchange act. 18 & 19 Vict. c. 67, *ante*, 71; Eyre *v.* Waller, 5 H. & N. 460; 29 L. J. Ex. 246.

[CIRCUITY OF ACTION.

88. — Whenever the rights of the litigant parties are such that the defendant would be entitled to recover back from the plaintiff the same amount of damages which the plaintiff seeks to recover, the defendant may plead the facts which constitute such right as a defence, for the purpose of avoiding circuity of action. Turner *v.* Davies, 2 Wms. Saund. 150; and see Ib. note (2), where pleas held good in avoidance of circuity of action are collected; Charles *v.* Altin, 15 C. B. 46; Cannop *v.* Levy, 11 Q. B. 769; Schloss *v.* Heriot, 14 C. B. N. S. 59. A claim for unliquidated damages cannot be so pleaded, where the measure of damages is not necessarily identical in both cases. Charles *v.* Altin, *supra;* Minshull *v.* Oakes, 2 H. & N. 793; Alston *v.* Herring, 11 Ex. 822; Jackson *v.* Isaacs, 3 H. & N. 405; Dakin *v.* Oxley, 15 C. B. N. S. 646. A covenant or agreement not to sue for the same cause of action may be pleaded in bar to avoid circuity of action. It operates between the parties to the covenant or agreement as a release of the cause of action, and may be so pleaded. 2 Wms. Saund. 47 *g g*, 15, note (2); Ford *v.* Beech, 11 Q. B. 852, 871. But a covenant not to sue one of two joint debtors, does not operate as a release of the other; Dean *v.* Newhall, 8 T. R. 168; Hutton *v.* Eyre, 6 Taunt. 289; Willis *v.* De Castro, 4 C. B. N. S. 216; and a release in terms of one of two joint debtors, reserving all remedies against the other, amounts only to a covenant not to sue and not to a release. Willis *v.* De Castro, *supra*. A covenant or agreement not to sue for a limited time cannot be pleaded. Thimbleby *v.* Barron, 3 M. & W. 210; 2 Wms. Saund.

Obs. 150 *a*; unless accompanied by a proviso that it may be pleaded in bar to an action brought during the time. Walker *v.* Nevill, 34 L. J. Ex. 73; Corner *v.* Sweet, 35 L. J. C. P. 151.

Plea to an Action by Executors, that the Testator contracted to indemnify the Defendant against the Causes of Action.

Connop *v.* Levy, 11 Q. B. 769.]

COMPOSITION WITH CREDITORS.

Obs. — If a creditor under an arrangement with the other creditors (not necessarily all) and the debtor accept or agree to accept part of his debt as a composition or in full for his demand, his claim to the remainder is in law extinguished, even although there be not any release by deed. Norman *v.* Thompson, 4 Ex. 755; Massey *v.* Johnson, 1 Ex. 241–255; Good *v.* Cheeseman, 2 B. & Ad. 328; Lewis *v.* Jones, 4 B. & C. 506; Harry *v.* Wall, 1 B. & Ald. 103; Tatlock *v.* Smith, 6 Bing. 339; [Dauchy *v.* Goodrich, 20 Vt. 127; Wells J. in Perkins *v.* Lockwood, 100 Mass. 249; Eaton *v.* Lincoln, 13 Mass. 424; Steinman *v.* Magnus, 11 East, 390.] A creditor who joins in a composition which purports that all the debts of the debtor are thereby settled and released, cannot by signing for part of his claim privately keep back and sue for the remainder; Britten *v.* Hughes, 5 Bing. 460; and when a creditor releases a debt by executing a composition deed, he loses the right to retain a written instrument deposited by the debtor as a security for the debt; and if the debtor has previously accepted bills for the original debt, and the creditor has negotiated them, it is his duty to take them up at maturity. Cowper *v.* Green, 7 M. & W. 633; Mallalieu *v.* Hodgson, 16 Q. B. 689; 20 L. J. Q. B. 339; Hawley *v.* Beverley, 6 M. & G. 221. If bills be given for the composition, and there be a covenant not to sue the debtor until default in payment of them, the creditors are remitted to their original rights on such default. Leake *v.* Young, 5 El. & Bl. 955; 25 L. J. Q. B. 266. Any private agreement between the debtor and one of the creditors who professes to join in the general arrangement that the former, or a third person for him, shall pay a further sum of money or give a better or further security, is void as a fraud on the other creditors. Gibson *v.* Bruce, 5 M. & G. 399; [Danglish *v.* Tennent, L. R. 2 Q. B. 49; 2 Chitty Contr. (11th Am. ed.) 1060, *et seq.*;] Wilson *v.* Ray, 10 Ad. & E. 82; Cockshott *v.* Bennett, 2 T. R. 763; Jackson *v.* Lomas, 4 T. R. 166; Leicester *v.* Rose, 4 East, 371; Jackson *v.* Davison, 4 B. & Ald. 695, 697; Wells *v.* Girling, 1 B. & B. 447; Lewis *v.* Jones, 4 B. & C. 511, 515; Geere *v.* Mare, 33 L. J. Ex. 50; [2 H. & C. 339.] And if one creditor do make any such stipulation, the effect will be to destroy any security which may have been given to him even for the amount of the composition. Howden *v.* Haigh, 11 Ad. & E. 1032; Knight *v.* Hunt, 5 Bing. 432; Higgins *v.* Pitts, 4 Ex. 312, 324; [Case *v.* Gerrish, 15 Pick. 50; Payne *v.* Eden, 3 Caines, 213; Wiggin *v.* Bush, 12 John. 306; Clark *v.* White, 12 Peters, 178; Trumbull *v.* Tilton, 21 N. H. 128.] A gratuitous payment, or an additional security made or given to a particular creditor *after* he has signed the composition deed, is not a fraud on the other creditors, provided it was not made or given in pursuance of a prior fraudulent agreement. Knight *v.* Hunt, 5 Bing. 432, 434. As to recovering back money paid to induce a creditor to sign a composition deed, see Wilson *v.* Ray, 10 Ad. & E. 82; Bradshaw *v.* Bradshaw, 9 M. & W. 29; Smith *v.* Cuff, 6 M. & S. 160; Atkinson *v.* Denby, 30 L. J. Ex. 361; 31 Ib. 362.

1. *Plea that Plaintiff and the Defendant's other Creditors agreed to take a Composition on Defendant's Debts.* (*o*)

That the defendant was indebted to the plaintiff as in the declaration alleged

(*o*) See forms, &c. Cooper *v.* Phillips, 1 Cr., M. & R. 649; 3 Dowl. 196; Woodham *v.* Edwards, 5 Ad. & E. 771; Reay *v.* Richardson, 2 Cr., M. & R. 422; Jones *v.* Smith

and to divers other persons respectively, and was in embarrassed circumstances, and unable to pay or satisfy the plaintiff and the said other creditors of the defendant respectively their debts in full; and thereupon the defendant then offered and agreed to and with the plaintiff and his the defendant's other creditors to pay, and the plaintiff and the said other creditors of the defendant then mutually agreed with each other and with the defendant to accept of him a certain composition, to wit, at the rate of 10*s.* in the pound, upon, and in full satisfaction and discharge of their respective debts; (*p*) * and the defendant further says that (*q*) he afterwards paid to the plaintiff, and the plaintiff then accepted and received from him the amount of such composition upon the said debt of the plaintiff, in pursuance of the said agreement.

2. *Plea, a Composition payable by Instalments, that Plaintiff discharged Defendant from tendering it at the Stipulated Times, and Tender thereof before Action.*

As in last form to the asterisk, and then proceed:] such composition of 5*s.* in the pound to be paid by the defendant to the plaintiff and the said other creditors of the defendant respectively as follows, to wit, half thereof down, and the remainder in six months then following; and the plaintiff and the said other creditors of the defendant then mutually agreed with the defendant and with each other not to proceed against the defendant for the recovery of the residue of the said respective debts and demands, unless default should be made in payment of such composition; and the defendant further says that the composition or sum of 5*s.* in the pound on the said debt amounts to the sum of £5 2*s.* 3*d.*, and that he the defendant, at the time of making the said agree-

4 M. & W. 123; Matthews *v.* Taylor, 2 M. & G. 667; Rosling *v.* Muggeridge, 16 M. & W. 181; Norman *v.* Thompson, 4 Ex. 755; Boyd *v.* Hind, 1 H. & N. 938. As to the evidence necessary to support this plea, see Deacon *v.* Stodhart, 9 C. & P. 686; C. S. 2 M. & G. 317.

(*p*) "The said composition of 10*s.* in the pound to be secured to each of the said creditors, including the plaintiff, by promissory notes of the defendant for 5*s.* in the pound upon the said respective debts, each payable respectively to the plaintiff and the said other creditors of the defendant respectively, or order, at four and eight months from the —— day of ——, A. D. ——; and the said plaintiff and the other creditors of the defendant then agreed together and with the defendant, upon the receipt of the said notes, *to execute a release to the defendant* of the remainder of their debts respectively [*as the case may be*], and in the mean time not to proceed against the defendant for the recovery of the residue of their respective demands."

(*q*) If the composition were to be paid by notes, state "he the defendant, within a reasonable time after the making of the said agreement, duly made and delivered to the plaintiff, and the plaintiff then took and received of and from the defendant, for and on account and in payment of such composition of 10*s.* in the pound on the said debt, two promissory notes for the payment respectively by the defendant to the plaintiff, or order, of 5*s.* in the pound on such debt, at the respective times so agreed upon as aforesaid." If the composition were to be paid before the action was commenced, but was not paid, the plea should, in the introductory part, be confined to the amount of the whole debt, less the composition, say £25, and there should be a plea of payment of the amount of the composition into court. See form, *post*, "Payment." In Cooper *v.* Phillips, 1 Cr., M. & R. 649; 3 Dowl. 196, S. C., where the defendant pleaded a composition as above, and alleged that defendant was ready and willing to pay the amount of the composition, but plaintiff refused to receive it, and *discharge* the defendant from tendering or paying the composition, it was held, that the plea was no answer as to the sum agreed to be taken for composition, as no consideration was stated for the plaintiff's discharging the defendant from the payment, and no tender, &c. was shown. And see Rosling *v.* Muggeridge, 16 M. & W. 181; Evans *v.* Powis, 1 Ex. 601; Hazard *v.* Mare, 6 H. & N. 434; [Perkins *v.* Lockwood, 100 Mass. 249.] See form of plea of a composition deed in Scotland, Woodhouse *v.* Edwards, 5 Ad. & E. 771.

COPYRIGHT.

Obs. — In an action for the value of a copyright bargained and sold, a defence that it was not assigned in writing as required by 5 & 6 Vict. c. 45, s. 13, need not be specially pleaded. "When by law you cannot make a particular contract, except in writing, to deny the writing, is to deny the contract." Per Lord Abinger, Johnson *v.* Dodgson, 2 M. & W. 657; and see Buttemere *v.* Hayes, 5 M. & W. 456; Da Pinna *v.* Polhill, 8 C. & P. 78. But see, also, Barnett *v.* Glossop, 1 Bing. N. C. 633, *contra*. And see *post*, "Torts." The assignment of the right to represent a dramatic production need not be registered under 5 & 6 Vict. c. 45, nor need the assignment be by deed.

COVERTURE.

Plea of Defendant's Coverture when the Contract was made. (*y*)

The defendant in person [*see ante*, 16, *note* (*h*), *ante*, 272, Form 10] says that at the time of ["making the said promise," *or* "contracting the said debt," *or* "accepting the said bill"] she was the wife (*z*) of E. F.

CREDIT UNEXPIRED.

Obs. — The defence that by the original contract the defendant was to have credit or time for payment of the debt claimed, for a period which had not elapsed when the action was commenced, may be given in evidence under *never indebted* to a common count, or *did not promise as alleged*, to a special count, or, in the case of a bill, denial of the drawing or accepting. A special plea

(*y*) See, in general, [1 Chitty Contr. (11th Am. ed.) 223 *et seq.*] When this should be pleaded in abatement or bar, *ante*, 272, note (*r*). This is an issuable plea. Birch *v.* Leake, 2 D. & L. 88; S. C. 7 M. & G. 377. Coverture must be specially pleaded. T. T. 1853, r. 8. See Moss *v.* Smith, 1 M. & G. 332, note (*a*). Marriage *pendente lite* does not abate the suit. By the C. L. P. Act, 1852, s. 141, "The marriage of a woman, plaintiff or defendant, shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment; and such judgment may be executed against the wife alone, or, by suggestion or writ of revivor pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the court." If the execution issue against the wife alone and she is taken into custody, she will be released, if she has no separate property. Thorpe *v.* Angles, 1 D. & L. 831; Edwards *v.* Martyn, 21 L. J. Q. B. 86. In such cases, therefore, it would be better to proceed against the husband also, by suggestion, or writ of revivor under ss. 129, 130; and see 2 Saund. 72 *a*. Judgment may be entered against husband and wife, on a warrant of attorney given by the wife before marriage. Metcalfe *v.* Boote, 6 D. & R. 46.

(*z*) The marriage may be proved by an examined copy of the register, showing defendant's identity; or by persons present at the ceremony, or who can prove that by general reputation the parties were married, and cohabited together as such, &c. 2 Stark. Ev. tit. "Marriage;" Leader *v.* Barry, 1 Esp. R. 353; Kay *v.* Duchess de Pienne, 3 Camp. 123; Doe *d.* Egremont *v.* Graysbrook, 4 Q. B. 506. If the plaintiff admit the coverture at the time of the contract, but rely on any exception to the general rule that a married woman cannot contract, as that her husband was transported; Jewson *v.* Read, Lofft, 142; Carrol *v.* Blencow, 4 Esp. 27; an alien enemy; "Alien," *ante*, 297, Obs. &c.; the replication must be special. See form, &c. Stretton *v.* Busnach, 1 Bing. N. C. 139. See, also, Barden *v.* Keverburg, 2 M. & W. 61; Williamson *v.* Dawes, 9 Bing. 292. Promise after marriage. Chit. jr. Contr. A replication that defendant was living in adultery at the time of the contract, and that she promised payment after her husband's death, was held bad as a departure, and as wanting consideration to support the new promise. Mayer *v.* Hawarth, 8 Ad. & E. 467.

Obs. would show a different contract to that declared upon, and deny a present debt. Bloomfield *v.* Smith, 1 M. & W. 542; Taylor *v.* Hillary, 1 Cr., M. & R. 741; *ante*, 278.

DEED.

Obs. — The defence that there *never* was a *simple* contract debt, inasmuch as the claim originally arose solely upon a *deed* and by virtue of the defendant's *covenant* therein to pay the money or perform the matter in respect of which an action (not upon the deed) is brought, is matter of defence upon *non assumpsit*, and *cannot* properly be pleaded specially. Edwards *v.* Bates, 2 D. & L. 299; Filmer *v.* Barnaby, 2 M. & G. 529. But where a remedy, as upon a simple contract, has once accrued, the defence that it has been merged in, Filmer *v.* Burnaby, 2 M. & G. 529, or satisfied by, a *subsequent* deed, must be pleaded specially. See Weston *v.* Foster, 2 Bing. N. C. 693; Mathew *v.* Blackmore, 1 H. & N. 762; 26 L. J. Ex. 150; and see Davidson *v.* Cooper, 13 M. & W. 342; Heming *v.* Trenery, 9 Ad. & E 926. An action on simple contract may, however, be supported, though there be a specialty security between the parties, provided such security be collateral and there be no *covenant* in it to pay the debt; Yates *v.* Aston, 4 Q. B. 196; or where a sum is due on an antecedent specialty, and for a new consideration the defendant contracts by parol to pay a sum including that due on the specialty. Twight *v.* Prescott, 2 Dowl. N. S. 4, where see form of declaration; and see Nash *v.* Armstrong, 10 C. B. N. S. 259; [1 Chitty Pl. 116, and note.] A covenant not to sue is not pleadable in bar of a debt. Thimbleby *v.* Barron, 3 M. & W. 210; [2 Chitty Contr. (11th Am. ed.) 1174, and cases in note (*g*).]

DRUNKENNESS.

Indorsee against Indorser of a Bill; Plea that the Defendant was drunk when he indorsed. (*a*)

That when he indorsed the said bill [*or* "made the alleged promise" *or* "agreement," *or* "executed the alleged deed," *or* "contracted the alleged debt," *according to the circumstances*], he was so drunken, intoxicated, and under the influence of liquor, and thereby so *entirely* deprived of the use of his reason, as to be unable to understand or comprehend the meaning, object, nature, or effect thereof, or to contract or promise thereby; of all which the plaintiff had full knowledge and notice.

DURESS.

Obs. — This defence has now become very rare. See, therefore, for forms of pleas, 3 Chit. on Pl. 7th ed. [Must now be specially pleaded. Reg. Gen. H. T. 16 Vict. R. 1.]

To make a valid contract, the assent of the person to be charged must be free and voluntary. *Duress*, therefore, upon the person, will avoid a contract. [1 Chitty Contr. (11th Am. ed.) 269 *et seq.*; United States *v.* Lyon, 16 Wallace,

(*a*) This defence must be specially pleaded. R. 8, T. T. 1853. The above plea was held good on special demurrer. Gore *v.* Gibson, 13 M. & W. 623, where see the law, &c. The plaintiff might reply by taking issue; Ib.; or he might reply a subsequent ratification of the bill. See *post*, "Infancy," and "Lunacy." A person who makes a contract in such a state of drunkenness as not to know what he is doing, cannot be compelled to perform that contract by the other party who knew him to be in that state. Gore *v.* Gibson, *ubi sup.* See Molton *v.* Camroux, 4 Ex. 17; [1 Chitty Contr. (11th Am. ed.) 192, 193, and cases cited in notes (*c*) and (*d*[1]).] But he may be liable for necessaries supplied for his preservation, or which he keeps after he becomes sober. Gore *v.* Gibson, *ubi sup.*; per Pollock C. B. and Alderson B. And see Chit. on Contr. *in voc.* and 1 Pothier, by Evans, 2d ed. 28, 29.

Obs. 431; Rexford *v.* Rexford, 7 Lansing, 6;] Atlee *v.* Backhouse, 3 M. & W. 650, per Parke B.; Sumner *v.* Ferryman, 11 Mod. 201; Shep. Touchstone. 61. "If the consent of any of the contracting parties is extorted by violence, the contract is vicious." 1 Pothier, by Evans, 15. Duress by threat may be through fear of loss of life, member, mayhem, imprisonment. 2 Inst. 483; [1 Chitty Contr. 271.] To constitute duress by imprisonment, the imprisonment must be unlawful and tortious. See Smith *v.* Monteith, 13 M. & W. 427; 14 L. J. Ex. 22; [Tilley *v.* Bonney, 11 Cush. 247; Soule *v.* Bonney, 37 Maine, 128; Stouffer *v.* Latshaw, 2 Watts, 167; Richardson *v.* Duncan, 3 N. H. 518; Taylor *v.* Cottrell, 16 Ill. 93; 1 Chitty Contr. (11th Am. ed.) 270, 271; Fisher *v.* Shattuck, 17 Pick. 252. So, to avoid acts done under menace of imprisonment, it must appear that the threat was of an unlawful imprisonment. Alexander *v.* Pierce, 10 N. H. 494; Wilcox *v.* Howland, 23 Pick. 167; Worcester *v.* Eaton, 13 Mass. 371; Foss *v.* Hildreth, 10 Allen, 76, 80; Whitefield *v.* Longfellow, 13 Maine, 146; Eddy *v.* Herrin, 17 Maine, 338; Waller *v.* Cralle, 8 B. Mon. 11.] Duress upon goods will not avoid a contract, for "the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert." Skeate *v.* Hale, 11 Ad. & E. 990; [1 Chitty Contr. (11th Am. ed.) 271, and note (*q*), 272; Robinson *v.* Gould, 11 Cush. 55.] But money extorted by duress of goods and paid under protest, to get them back, may be recovered as money had and received. Wakefield *v.* Newbon, 6 Q. B. 276; Parker *v.* Great Western Railway Co. 7 M. & G. 253; [Oates *v.* Hudson, 6 Ex. (Am. ed.) 348, note; Chase *v.* Dwinal, 7 Greenl. 134; Alston *v.* Durant, 2 Strobh. 257; Elliott *v.* Swartwout, 10 Peters, 138; Baltimore *v.* Lefferman, 4 Gill, 425; Smith *v.* Readfield, 27 Maine, 145; Joyner *v.* School District in Egremont, 3 Cush. 567; Henry *v.* Chester, 15 Vt. 460.] As to a bill obtained by duress, see Duncan *v.* Scott, 1 Camp. 100, and plea, Stevens *v.* Underwood, 4 Bing. N. C. 655. A contract made under duress is voidable only, and may be ratified. 2 Inst. 483; 1 Pothier, by Evans, 15; *vide* Cummins *v.* Mee, 11 Q. B. 112; [Ormes *v.* Beadel, 2 De G., F. & J. 333; Lewis *v.* Bannister, 16 Gray, 500. See, as to a surety in the contract, Fisher *v.* Shattuck, 17 Pick. 252.]

[1. *Answer of Duress in an Action on a Promissory Note.*

And as to the contract mentioned in the plaintiff's third count, the defendant says that at the time of its execution he was kept in imprisonment by the plaintiff, and executed the contract through the force of that imprisonment.

2. *Plea that the Defendant was induced to contract by Duress of Threats.*

That he was induced to make the alleged promise [*or* "agreement," *or* "to execute the alleged deed," *or, to an indebitatus count,* "to contract the alleged debt"] by duress of the plaintiff, that is to say, by the plaintiff threatening the life of [*or* "to do bodily harm to"] the defendant unless he would make [*or* "execute," *or* "contract"] the same; and the defendant then made the said promise [*or* "agreement," *or* "executed the said deed," *or* "contracted the alleged debt"] in fear that the said threats would be immediately carried into execution and to preserve his life [*or* "to avoid the said bodily harm"].]

EQUITABLE PLEAS, REPLICATIONS, &c.

Obs. — The C. L. P. Act, 1854, enacts, —

By s. 83, "It shall be lawful for the defendant or plaintiff in replevin in any cause in any of the superior courts in which if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds to

Obs. plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words 'for defence on equitable grounds,' or words to the like effect."

By s. 84, "Any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*."

By s. 85, "The plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds, provided that such replication shall begin with the words 'for replication on equitable grounds,' or words to the like effect."

By s. 86, "Provided always that in case it shall appear to the court or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out, on such terms, as to costs and otherwise, as to such court or judge may seem reasonable."

The courts have restricted the application of the 83d section to cases in which the plea and decision and judgment of the court upon it will work out and complete all the equity that belongs to the matter to which the plea refers, and do complete and final justice between the parties. Accordingly, an equitable plea must disclose matter upon which a court of equity would grant an *absolute, unconditional,* and *perpetual* injunction; Burgoyne *v.* Cottrell, 24 L. J. Q. B. 28; The Mines Royal Society *v.* Magnay, 10 Ex. 489; Phelps *v.* Prothero, 24 L. J. C. P. 225; [16 C. B. 370;] Wodehouse *v.* Farebrother, 5 El. & Bl. 277; [Buvelot *v.* Mills, 35 L. J. Q. B. 3; L. R. 1 Q. B. 104;] Wood *v.* The Copper Miners' Co. 17 C. B. 561; Drain *v.* Harvey, 17 C. B. 257; Clark *v.* Laurie, 26 L. J. Ex. 36–38; Elliott *v.* Mason, 26 L. J. Ex. 175; Flight *v.* Gray, 3 C. B. N. S. 320; and if the plea is in the nature of a bill in equity, calling on the court for that sort of conditional and manifold award which is in the nature of a decree in equity, and not a judgment at law, the court cannot entertain it. Gee *v.* Smart, 8 El. & Bl. 313, per Coleridge J.

To an action on a lease for rent and non-repair, a plea of an agreement to surrender partly performed was not allowed, as the court could not compel the defendant to execute a surrender. Mines Royal Society *v.* Magnay, *ubi sup.* A plea that a final decree and injunction had been obtained in equity in respect of the same subject-matter as the action, held bad. Phelps *v.* Prothero, *ubi sup.* A plea to an action on a bond, that the defendant was merely a surety, and was willing and had offered to pay all that was due upon having certain collateral securities handed over to him, which the plaintiff refused, held bad. Wodehouse *v.* Farebrother, *ubi sup.* A plea of the pendency of an arbitration under an agreement of reference by which no action was to be brought between the parties, and the arbitrator had power to decide on what terms the contract declared on was to be put an end to, held bad. Wood *v.* The Copper Mines Co. *ubi sup.* A plea to an action on a bill at three months, dated the 12th July, that the bill ought to have been drawn, and was represented by the plaintiff to be drawn on the 25th July, and that three months from the latter date had not elapsed at the commencement of the action, disallowed. Drain *v.* Harvey, *ubi sup.* A plea to an action for money lent, that the money was advanced on the security of consignments of goods to be sold by the plaintiffs, and out of which they might have reimbursed themselves had they not improperly sold for less than best market prices, considered doubtful, and disallowed. Atterbury *v.* Jarvie, 2 H. & N. 114. [A plea to indebitatus count, that the debt had been assigned, &c. Jeffs *v.* Day, 35 L. J. Q. B. 99; L. R. 1 Q. B. 672.] A plea of misrepresentation of facts which the plaintiff ought to have remembered but not alleged to be fraudulent, held bad. Gorsuch *v.* Cree, 8 C. B. N. S. 574; 29 L. J. C. P. 308. To an action for non-payment of money, a plea that the defendants, a company, were induced to make the contract on condition that plaintiff would guaranty to the shareholders a certain dividend, and that plaintiff had not given such guaranty, held bad, as the contracts were inde-

Obs. pendent contracts, and defendant's remedy was only by cross-action. Stears *v.* The South Essex &c. Co. [9 C. B. N. S. 180;] 30 L. J. C. P. 49. To an action of trespass for entering plaintiff's land and breaking open his gate, a plea that, there being a disputed right of way, it had been agreed between the plaintiff and defendant, and other persons, that without prejudice to the question of right, the way should remain open until the defendant and the plaintiff's solicitor should agree as to the course to be pursued to try the question, and that the trespasses were committed before any agreement had been come to, and were committed in the use of the way, held no answer at law or in equity. Hyde *v.* Graham, [1 H. & C. 593;] 32 L. J. Ex. 27. To an action for trespass and cutting down and carrying away timber, a plea setting up a parol agreement with plaintiff's devisor for the sale of the timber, with liberty for the defendant to go on the land to cut it down and carry it away, paying for it as he took it, and alleging that in the lifetime of the devisor the defendant had cut down, carried away, and paid for a portion of the timber, and that the alleged trespass was committed in further pursuance of the agreement, held bad, because a court of law could not do final justice between the parties. Wakley *v.* Froggatt, [2 H. & C. 669;] 33 L. J. Ex. 5.

With respect to *replications*, any equitable replication inconsistent with the legal right alleged in the declaration, and showing that the plaintiff's remedy, if any, is only in equity, is bad, for "it was not intended by the legislature that a court of common law should be constituted a tribunal to enforce an equitable claim." Accordingly, in an action against an executor for goods sold to his testator, a replication to a plea of the statute of limitations, that the debt was contracted within six years of the testator's death, and he had bequeathed to the defendant sufficient to pay his debts, was held bad. Gulliver *v.* Gulliver, 1 H. & N. 174. So, a replication to a plea of the statute of limitations of a fraudulent concealment of the causes of action, is bad. Hunter *v.* Gibbons, 1 H. & N. 459; Imperial Gas Co. *v.* London Gas Co. 10 Ex. 39. So, a replication to a plea of infancy, that the defendant fraudulently represented himself as of full age, and thereby induced the plaintiff to trust him. Bartlett *v.* Wells, [1 B. & S. 836, 842,] where Crompton J. says that these replications are objectionable as being departures from the declaration, and as setting up matter for a suit in equity instead of a cause of action at law. So, to a declaration claiming for alterations upon a contract under seal for building a ship, containing a stipulation that all alterations should be ordered in writing, and alleging a discharge from the stipulation, a replication to a plea that the discharge was not by deed, of facts to show that the defendants would not in equity be allowed to set up the want of a deed, was held bad. The Thames Ironworks & Shipbuilding Co. *v.* The Royal Mail Steam Packet Co. 31 L. J. C. P. 169; [16 C. B. N. S. 358.] So, where, to a declaration on a life policy containing a condition that it was to be void if the deceased departed beyond Europe, the defendants pleaded that the deceased departed beyond Europe, a replication that it was stipulated at the time of making the policy, that it should not be vitiated in such event, was not allowed. Ries *v.* The Scottish Equitable Co. 2 H. & N. 19. Where, to a declaration on the statute 4 Anne, c. 16, s. 27, by one tenant in common against another for not accounting for rent received by him, the defendant pleaded that before the receipt of the rents the plaintiff and defendant by indenture demised the premises to W. for a term of 500 years, which by divers mesne assignments vested in the defendant, the court struck out an equitable replication, that the indenture was a mortgage to secure a sum of money and interest, that the defendant received more than sufficient to pay the mortgage debt, interest, and costs, and he accordingly paid the same. Goreley *v.* Goreley, 1 H. & N. 144. But if an equitable replication is consistent with the legal right alleged in the declaration, as when it sets up an equitable answer to an equitable plea, it is good; Koper *v.* Cottrell, 26 L. J. Q. B. 7; Stears *v.* The South Essex Gas Light & Coke Co. [9 C. B. N. S. 180;] Davies *v.* Marshall, 31 L. J. C. P. 61; or where matter of discharge is pleaded and the replication avoids it on equitable grounds; Vorley *v.* Barrett, 1 C. B. N. S. 225; Lyall *v.* Edwards, 6 H. & N. 337; and see *infra*, "Mistake;" or where, there being a legal claim, a court of equity would interfere to prevent the pleading of the plea, or a court of law in exercise of

Obs. its equitable jurisdiction would have set the plea aside, such as a collusive discharge by the plaintiff to defeat the right of an assignee for whose benefit the action is brought. De Pothonier *v.* De Mattos, El., Bl. & El. 461. The case of Wood *v.* Dwarris, 11 Ex. 493, in which, to a plea setting up that the declaration delivered to the defendants with the life policy sued on contained an untrue statement, an equitable replication that the plaintiff effected the policy upon the faith of a prospectus stating that policies should be indisputable, except in case of fraud, was held good, may perhaps be supported on this ground, though questioned by the majority of the court in Wheelton *v.* Hardisty, 8 El. & Bl. 232; and see *infra*. A replication to a plea of set-off alleging an assignment of the debt by the plaintiff to the assignee, for whose benefit the action is brought without alleging notice to the defendant before the subject-matter of the set-off arose, is insufficient. Wilson *v.* Gabriel, 4 B. & S. 243. Where a previous pleading is on equitable grounds, all subsequent pleadings, except traverses, should be on equitable grounds. Per Willes J.; Vorley *v.* Barrett, *ubi sup.*

One frequent ground for the interference of a court of equity is *mistake*, but as a court of law has no means of reforming the contract which is the relief in general granted by a court of equity, it will only interfere where there is no occasion to reform the contract, as where the true contract has been completely performed, and there is nothing more to be done by either party; Steele *v.* Haddock, 10 Ex. 643; Luce *v.* Izod, 1 H. & N. 245; Vorley *v.* Barrett, *ubi supra;* or where an agent mistakenly contracting as principal, was never intended to be liable; Wake *v.* Harrop, 7 H. & N. 17; 31 L. J. Ex. 451; or where the circumstances show that if the contract be looked at in its reformed condition, the plaintiff would have no cause of action. Borrowman *v.* Rossel, 16 C. B. N. S. 58. Where the contract is executory, and relief would not be granted by a court of equity without reforming the contract, a court of law will not interfere. Perez *v.* Oleaga, 11 Ex. 506; Scott *v.* Littledale, 8 El. & Bl. 815; The Solvency Mutual Guarantee Co. *v.* Freeman, 7 H. & N. 17. A replication on equitable grounds, that a release by deed was executed in mistake of its legal effect, is bad; Teed *v.* Johnson, 25 L. J. Ex. 110; and a plea that a bill was accepted by the defendant under a mistake as to its date, was not allowed. Drain *v.* Harvey, 17 C. B. 257. But a replication on equitable grounds to a plea of release, that the release was worded by mistake to include the claim sued on, was held good. Lyall *v.* Edwards, *ubi supra*. See, further, as to mistake, Story's Equity Jurisprudence; Ball *v.* Storie, 1 Sim. & S. 210; 1 L. J. Ch. 214; Price *v.* Ley, 4 Gif. 235. The mistake must be mutual and clearly established, in order to entitle the party to relief; and an attempt merely to vary a written contract by parol evidence, is not admissible in law or equity. Hollier *v.* Eyre, 9 Cl. & Fin. 45; Reis *v.* Scottish Equitable Assurance Co. *ubi supra*. Wood *v.* Dwarris seems somewhat at variance with the last case, but may also be supported on the ground that the prospectus was part of the policy. See per Pollock C. B. in the last case, and per Lord Campbell C. J. in Wheelton *v.* Hardisty, *ubi supra*.

A claim may often be sustained in equity by way of *set-off* which cannot be set off at law. Thus a debt due from the plaintiff to a third person as a trustee for the defendant, may be equitably set off. Cochrane *v.* Green, 9 C. B. N. S. 448. So, money due to the defendant under an equitable assignment by a third person, assented to by the plaintiff. Elkin *v.* Baker, 31 L. J. C. P. 177. A plea of set-off against the principal in an action by the agent, such as was held bad as a legal plea in Isberg *v.* Bowden, 8 Ex. 852, would be good, and has been allowed at chambers. An equitable right of set-off exists only between demands connected together in their nature or by contract; Rawson *v.* Samuel, 1 Cr. & Ph. 161; 10 L. J. Ch. 214; and the mere existence of cross demands is not a sufficient ground for an equitable plea, unless the damages on either side arise out of the same matter, and are necessarily equal. A set-off on equitable grounds to an action for freight, that the goods had been negligently damaged to an amount equal to the freight, was held bad; Steinson *v.* Hall, 1 H. & N. 831; and the court refused to allow as an equitable plea to an action for money lent, that it was lent on the security of goods consigned to the plaintiff for sale sufficient in value to repay the ad-

Obs. vance, and that they had been wrongfully sold for less than proper prices. Atterbury *v.* Jarvie, 2 H. & N. 114. But a plea of adequate realized security in the hands of the plaintiff was allowed in Marcon *v.* Bloxam, 11 Ex. 586. [Equitable replication and rejoinder to set-off. Watson *v.* Mid Wales Ry. Co. L. R. 2 C. P. 593.]

At law a person who has upon the face of any written instrument contracted as *principal* cannot set up that he was merely a *surety* and avail himself of a defence he may have as such, but in equity he may do so if the creditor knew that the relation of principal and surety existed. Davies *v.* Stainbank, 6 De G., M. & G. 679, [(Am. ed.) note (1) and cases cited.] Accordingly, it is a good equitable plea to an action on a promissory note, that the defendant to the plaintiff's knowledge made it as a surety, and that the plaintiff for a good consideration gave time to the principal debtor without the defendant's consent. Pooley *v.* Harradine, 7 El. & Bl. 431; Rayner *v.* Fussey, 28 L. J. Ex. 132; Taylor *v.* Burgess, 5 H. & N. 1; Greenough *v.* McLellan, 2 El. & El. 424; Lawrence *v.* Walmsley, [12 C. B. N. S. 799. In Hall *v.* Williams, 2 Moo. & M. 58, Lord Tenterden is reported to have held that one of the makers of a joint note may, at law, show that he was a mere surety for the other maker, and so known to the plaintiff (the payee), and that the latter had taken a composition from the principal debtor. So parol evidence has been admitted at law to show that one of the makers of a joint note was only a surety of the other maker, and that the plaintiff, knowing this fact, had given time to the principal for payment, without his knowledge or consent. Grafton Bank *v.* Kent, 4 N. H. 221; Harris *v.* Brooks, 21 Pick. 195; Hollier *v.* Eyre, 9 Cl. & Fin. (Am. ed.) 1, note (1); Smith *v.* King, 3 Ohio, 185; Davis *v.* Barrington, 30 N. H. 517; Carpenter *v.* King, 9 Met. 511; Branch Bank *v.* James, 9 Ala. 949; Artcher *v.* Douglass, 5 Denio, 509; Bank of Steubenville *v.* Hoge, 6 Ohio, 17; Wilson *v.* Green, 25 Vt. 450; Holt *v.* Bodey, 18 Penn. St. 207; Grant *v.* Ferguson, 9 Missou. 123; Mariners Bank *v.* Abbott, 28 Maine, 280; Lime Rock Bank *v.* Mallett, 34 Maine, 547; Core *v.* Wilson, 40 Ind. 204; Campbell *v.* Tate, 7 Lansing, 370.] To an action on two promissory notes, it was held a good equitable defence that the defendant had given them to the plaintiff to get back his title-deeds which he had deposited with plaintiff as a security for the payment of a bill of exchange which he had accepted for the accommodation of B. who indorsed it to the plaintiff, upon the assurance by the plaintiff that nothing had happened to alter his liability, whereas the plaintiff had then given time to B. who had discharged the defendant. Bristow *v.* Brown, 13 Ir. C. L. Rep. 201. So, too, that a bond of guaranty to a limited amount was executed on the faith that the advances were not to exceed the limit, and that the limit was exceeded. Gordon *v.* Rae, 8 El. & Bl. 1065; L. J. Q. B. 185. So neglect to insure work against fire, the completion of which the defendant had guarantied, and which the plaintiff had contracted with the principal to insure. Watts *v.* Shuttleworth, 5 H. & N. 235; 7 H. & N. 353; and see Strange *v.* Fooks, 9 Jur. N. S. 943. But to an action against a surety on a bond given for the faithful discharge of the principal's duties as clerk to a loan society, an equitable plea that the defalcations arose from the negligence of the society in not calling upon the clerk for an account and payment, was held bad. Madden *v.* McMullen, 13 Ir. C. L. Rep. 305.

It is no equitable defence to an action for use and occupation, that the premises were burnt down, and that the plaintiff had neglected to expend money received by him from an insurance company in reinstating them. Lofft *v.* Dennis, 1 El. & El. 474.

A decree in equity is not necessarily a defence at law; Phelps *v.* Prothero, [16 C. B. 370;] Collins *v.* Cave, 27 L. J. Ex. 146; and a court of law will not stay proceedings in an action, because a suit in equity is pending. Pearse *v.* Robins, 26 L. J. Ex. 183. Where a defendant has taken proceedings in equity to stay the action, he will not be allowed to set up the same matter by way of equitable defence to the action. Schlumberger *v.* Lister, [2 El. & El. 855.] A defendant having pleaded an equitable defence at law, is not precluded from resorting to equity, although the common law court has full jurisdiction, and his plea is a bar to the action. Evans *v.* Bremridge, 2 Kay & J. 174. But see Terrell *v.* Higgs, 26 L. J. Ch. 837; Wild *v.* Hillas, 28 L.

Obs. J. Ch. 170. When an equitable defence is not actually pleaded at law, a court of equity will not refuse to interfere, although the defendant might plead the defence to the action. Kingsford *v.* Swinford, 28 L. J. Ch. 413; Gompertz *v.* Pooley, 28 L. J. Ch. 484. So a defendant may enforce an equitable set-off in a court of equity, though he might have pleaded it at law. Jenner *v.* Morris, 30 L. J. Ch. 361.

A plea pleaded as an equitable plea may be supported as a defence at law. Vorley *v.* Barrett, *ubi supra;* Thorne *v.* Tilbury, 3 H. & N. 534; Hyde *v.* Graham, 1 H. & C. 593.

Leave is necessary to plead an equitable defence with other pleas, but it may be pleaded alone without such leave; Atterbury *v.* Jarvie, [2 H. & N. 114;] but see per Bramwell B. in Hunter *v.* Gibbons, [1 H. & N. 459;] subject, however to it being struck out under s. 52 of the C. L. P. Act, 1852, or s. 86 of the C. L. P. Act, 1854. *Ante*, 371.

Where it is doubtful whether or not an equitable pleading is good, the court will allow it, giving the other party leave to demur. Steele *v.* Haddock, 10 Ex. 643; Elliott *v.* Mason, 26 L. J. Ex. 175.

The sections apply only to causes where there are pleadings, and therefore not to an action of ejectment. Neave *v.* Avery, [16 C. B. 328.] (*b*)

Commencements of Equitable Pleadings, ante, 22, Form 6, and note (*y*).

MISTAKE.

1. *Plea to an Action of Trover for Goods, that the Goods in question were sold to and paid for by the Defendant, but, by Mistake of the Brokers employed by Plaintiff and Defendant, were not included in the Bought and Sold Notes.*

Steele *v.* Haddock, 10 Ex. 643.

2. *Plea to an Action for not paying for Goods, part of which had been taken, and for not accepting the Residue, that the Sale was by Sample, and that the Brokers acting for Plaintiff and Defendant by Mistake omitted that Term from the Bought and Sold Notes, and Defendants, in Ignorance that the Goods were not equal to Sample, took Delivery of part, but refused to accept the Residue, which was still under the Control of the Plaintiff, and had paid into Court upon a Count for Goods sold and delivered, the Value of the Goods taken.*

Borrowman *v.* Rossel, 33 L. J. C. P. 111; [16 C. B. N. S. 58.]

3. *Plea to an Action on a Charter-party, that by Mistake, contrary to the Intention of Plaintiff and Defendant, it was signed so as to make the Defendant, who was only an Agent, personally liable.*

Wake *v.* Harrop, 7 H. & N. 17; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

4. *Plea to an Action for Breach of a Covenant not to practise as a Surgeon within a certain District, that the practising was in a part of the District which had been treated as not within the District, and never intended by the Parties to be included in the Covenant, and which was so included by mutual Mistake.*

Luce *v.* Izod, 1 H. & N. 245.

(*b*) The cases in which equitable pleadings have been allowed or held good will be found in the Observations or in the following references to precedents; the other cases will be found in the Observations.

5. *Replication to a Plea of Release, that the Release was by Mistake worded to include the Claim sued on.*

Lyall *v.* Edwards, 6 H. & N. 337. (*c*)

6. *Replication, in an Action by a Co-surety for Contribution, to a Plea of a Discharge by the Plaintiff of the Principal, that the Agreement by which it was alleged the Principal was discharged was worded by Mistake, so as to include the Claim in respect of which Contribution was sought, and that the true Agreement had been performed.*

Vorley *v.* Barrett, 1 C. B. N. S. 225.

SET-OFF.

7. *Plea of a Set-off of a Judgment Debt recovered in the Name of a Trustee who never had any Beneficial Interest in it.*

Cochrane *v.* Green, 9 C. B. N. S. 448.

8. *Plea of a Set-off of Money in the Hands of the Plaintiff equitably assigned to the Defendants with the Plaintiff's Assent.*

Elkin *v.* Baker, 11 C. B. N. S. 526.

PRINCIPAL AND SURETY.

9. *Plea to an Action on a Promissory Note, that the Defendant made the Note as Surety only for another Maker, to whom the Plaintiff gave Time.*

Pooley *v.* Harradine, 7 El. & Bl. 431; Rayner *v.* Fussey, 28 L. J. Ex. 132; Taylor *v.* Burgess, 5 H. & N. 1; Greenough *v.* McLellan, 30 L. J. Q. B. 15. 143. (*d*) *Post*, "Promissory Notes."

10. *Plea to an Action by an Indorsee against the Acceptor of a Bill for the Accommodation of the Drawer, that the Plaintiff, by entering into a Deed of Arrangement, had given Time to the Drawer.*

Bailey *v.* Edwards, 12 W. R. 537; 3 N. R. 377.

11. *Plea to an Action on a Promissory Note, that the Defendant joined in it as Surety for E., the other Maker, and that the Plaintiff, knowing this, agreed that he would call in the Note within three Years; but having omitted to do so, he lost the Means of obtaining Payment from E., who had since become Insolvent.*

Lawrence *v.* Walmsley, 12 C. B. N. S. 799.

(*c*) Mistake as to the legal effect of the release, would not be a good answer. Teed *v.* Johnson, 25 L. J. Ex. 110, and *ante*, Obs.

(*d*) And see Bristow *v.* Brown, 13 Irish C L. Rep. 201, *ante*, Obs.

12. *Plea to a Promissory Note, that the Plaintiff was Surety only for a Loan by the Plaintiff to one E., and that the Plaintiff had negligently sold Goods sufficient to cover the Loan under a Bill of Sale which, together with the Note, had been given as Security for the Loan.*

Mutual Loan Fund Association *v.* Sudlow, 5 C. B. N. S. 449.

[12*a*. *Plea to an Action on a Bill of Exchange, that Bill was accepted by Defendant as payment for Goods agreed to be sold and shipped, &c. by the Drawer to the Defendant, that part only was shipped, that Drawer paid Plaintiff's Amount of Bill, and that Defendant has a Set-off against Drawer.*

The Agra & Mastermann's Bank *v.* Leighton, L. R. 2 Ex. 56.

12*b*. *Plea to an Action for not letting, &c. that the Purposes for which, &c. were not legal.*

Cowan *v.* Milbourn, L. R. 2 Ex. 230.]

13. *Plea to a Bond of Guaranty to the Extent of* £1,000 *to secure a Banking Account, that Advances were not to be made beyond that Sum, and that greater Advances had been made.*

Gordan *v.* Rae, 8 El. & Bl. 1065.

14. *Plea to an Action on a Guaranty for the Completion of Work, that the Completion had been prevented by Fire, and that the Plaintiff had contracted with the Principal to insure against Fire, but had not done so.*

Watts *v.* Shuttleworth, 5 H. & N. 235; 7 H. & N. 353. (*e*)

GENERALLY.

15. *Plea to Detinue for Deeds, &c. against the Registered Officer of a Banking Company, an Equitable Mortgage to secure Advances to a Third Party.*

That before the said detention, one A. B. being indebted to the banking company in a certain sum of money on his banking account with the said company, the plaintiff, in order to induce the said company to make further advances to the said A. B. on his said banking account, agreed with the said company to deposit with the said company, and did then deposit the said deeds, papers, and writings with the said company, to be held by the said company as a security by way of equitable mortgage to a certain amount for and in respect of further advances to be made by the said company to the said A. B., on his said banking account, until repayment of the same, and the said company then received the said deeds, papers, and writings for the purpose and

(*e*) And see Strange *v.* Fooks, 9 Jur. N. S. 943.

upon the terms aforesaid; and the defendant says, that the said company did thereupon afterwards, from time to time, make such further advances to the said A. B. on his said banking account, to wit, to the amount aforesaid, which advances at the time of the said detention remained, and still remain, unpaid. Wherefore the defendant hath continually hitherto detained, and still detains, the said deeds, papers, and writings, as he lawfully may for the cause aforesaid, which is the detention in the declaration mentioned.

16. *Plea to an Action on a Covenant in a Mortgage Deed, for Payment of Principal Money and Interest, that the Mortgaged Property had been sold by the Plaintiff under the Power of Sale, and sufficient realized to pay the Debt.*

Marcon *v.* Bloxam, 11 Ex. 586.

17. *Plea to a like Action, that Defendant and Wife, since dead, mortgaged the Property, being the Wife's and sufficient in Value to pay off a Debt to the Defendant, contracted by the Wife before Marriage, and that the Plaintiff as the Wife's Heir-at-law is entitled to the Equity of Redemption.*

Gee *v.* Smart, 8 El. & Bl. 313.

18. *Plea setting up a Grant of Escheated Property, and suing Grantor contrary to Good Faith.*

Billing *v.* The East India Company, 31 L. J. Ex. 240.

19. *Plea to an Action for obstructing Lights, &c. that the Obstruction was occasioned by the pulling down of old Buildings and the Erection of new, at a great Expense, with the Knowledge, Acquiescence, and Consent of the Plaintiff.*

Replication, that the Plaintiff acquiesced upon the Faith of False Representations made by the Defendant.

Davies *v.* Marshall, 31 L. J. C. P. 61; [10 C. B. N. S. 697.]

20. *Plea to an Action on an Agreement for Non-payment of the Price of Bark, that Plaintiff was merely an Agent, and that the Defendant agreed to pay at a Rate mentioned in the Agreement on the Assurance that he should only be called upon to pay a Certain Price and the Actual Expenses incurred, and that the Defendant settled with the Principal, who had Notice, on the Real Terms of the Contract.*

Rogers *v.* Hadley, 32 L. J. Ex. 241.

21. *Plea to an Action by a Joint Stock Company against a Shareholder for Calls, a performed Agreement between the Defendant, who was a Director, and the other Directors, that he should retire and transfer his Shares to the Secretary, for the Benefit of the Company.*

The Plate Glass Universal Insurance Company *v.* Sunley, 26 L. J. Q. B. 316.

22. *Plea to Breaches of Covenant for Non-payment of Premiums which had accrued due after Certificate in Bankruptcy, on a Policy given to secure a Debt, that the Plaintiff proved a great part of the Debt under the Petition, and elected to take the Benefit of it.*

Elder *v.* Beaumont, 8 El. & Bl. 35.

23. *Replication to a Plea of Untrue Statement in an Action on a Life Policy, that the Policy was effected upon the Faith of a Prospectus stating that Policies should be indisputable, except in Case of Fraud.*

Wood *v.* Dwarris, 11 Ex. 493; Wheelton *v.* Hardisty, 8 El. & Bl. 232.

24. *Replication to a Plea of Accord and Satisfaction by Delivery of Money and Deeds, to so much of the Claim as the Plea alleged to have been satisfied by the Deeds, that they were never of any Value.*

Stears *v.* The South Essex Gaslight & Coke Co. 30 L. J. C. P. 40; [9 C. B. N. S. 180.]

25. *Replication to a Plea of Release, that it was collusive between the nominal Plaintiff and the Defendant, to defeat the Assignee of the Claim for whose Benefit the Action was brought.*

De Pothonier *v.* De Mattos, El., Bl. & El. 461.

ESTOPPEL.

Obs. — An estoppel is where a man is forbidden by law to speak against his own deeds, for by his act or acceptance he may be estopped to allege or speak the truth. Co. Litt. 352 *a*. "There are three kinds of estoppels, viz.: By matter of record; by matter in writing; and by matter *in pais*. By matter of record, viz. by letters-patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. By matter in writing, as by deed indented, by making an acquittance by deed indented, or by deed poll, by defeasance, by deed indented, or by deed poll. By matter *in pais*, as by hiring of seisin, by entry, by acceptance of rent, by partition, and by acceptance of an estate." Ib. See, generally as to estoppel, The Duchess of Kingston's case, 2 Smith's L. C. where all the law and cases are considered; Co. Litt. 352 *a*; Com. Dig. Estoppel; 1 Wms. Saund. 325 *a*, notes (4) and (*c*); [1 Chitty Pl. 629, 630, and notes; 1 Chitty Contr. (11th Am. ed.) 7, and note (*d*) 8, and note (*f*); Bigelow Estoppel, c. xix. p. 473 *et seq.*; Brown *v.* Wheeler, 17 Conn. 345; Preston *v.* Mann, 25 Conn. 118; Andrews *v.* Lyon, 11 Allen, 347; Hicks *v.* Cram, 17 Vt. 449; Brubaker *v.* Okeson, 36 Penn. St. 519; Darrah *v.* Bryant, 56 Penn. St. 69; Williams *v.* Chandler, 25 Texas, 4; Davidson *v.* Young, 38 Ill. 145; Heath *v.* Derry Bank, 44 N. H. 174; Garlinghouse *v.* Whitwell, 51 Barb. 208; Cummings *v.* Webster, 43 Maine, 192; Rangeley *v.* Spring, 21 Maine, 130; Wilson *v.* Castro, 31 Cal. 420; Jewett *v.* Miller, 6 Selden, 402; Manufacturers' Bank *v.* Hazard, 30 N. Y. 226; Newman *v.* Edwards, 34 Penn. St. 32; Cowles *v.* Bacon, 21 Conn. 451; Stone *v.* Britton, 22 Ala. 543; Burton *v.* Black, 32 Geo. 53; Niantic Bank *v.* Dennis, 37 Ill. 381; Williams *v.* Jackson, 28 Ind. 384; Tappan *v.* Morseman, 18 Iowa, 499; Martin *v.* Righter, 10 N. J. (Eq.) 510; Richardson *v.* Chickering, 41 N. H. 380; Strong *v.* Ellsworth, 26 Vt. 366; Montpelier & Wells River &c. R. R. Co. *v.* Langdon, 45 Vt. 137; Langdon *v.* Doud, 10 Allen, 433, 437;

Obs. Zuchtmann *v.* Roberts, 109 Mass. 53, 54 ; Carroll *v.* Manchester & Lawrence R. R. Corp. 111 Mass. 1 ; Davis *v.* Handy, 37 N. H. 65, 75, and cases cited.] Estoppel by matter of record or writing is conclusive if pleaded, where there is an opportunity of pleading it, but if only offered in evidence would not be so ; and if not then pleaded it will be taken as waived. Where there is no opportunity of pleading it, it is conclusive as evidence. Duchess of Kingston's case, 2 Smith's L. C. and notes ; Freeman *v.* Cooke, 2 M. & W. 654 ; Litchfield *v.* Ready, 5 Ex. 939 ; Outram *v.* Morewood, 3 East, 365 ; Vooght *v.* Winch, 2 B. & Ald. 662 ; Cammell *v.* Sewell, 3 H. & N. 617 ; 5 H. & N. 728. See Wilson *v.* Butler, 4 Bing. N. C. 748 ; Magrath *v.* Hardy, Ib. 782 ; [2 Chitty Contr. (11th Am. ed.) 1175, note (*x*) and cases cited ; Wright *v.* Butler, 6 Wend. 288, 289 ; Gardner *v.* Buckbee, 3 Cowen, 120 ; Young *v.* Black, 7 Cranch, 565 ; Adams *v.* Barnes, 17 Mass. 365 ; Howard *v.* Mitchell, 14 Mass. 241 ; 1 Chitty Pl. 630 ; Davis *v.* Thomas, 5 Leigh, 1 ; Isaacs *v.* Clark, 12 Vt. 642 ; Lord *v.* Bigelow, 8 Vt. 461 ; Woodhouse *v.* Williams, 3 Dev. (N. Car.) 508 ; McNair *v.* O'Fallon, 8 Missou. 188 ; Bufferlow *v.* Newsom, 1 Dev. (N. Car.) 208 ; Flandreau *v.* Downey, 23 Cal. 354 ; Whittaker *v.* Jackson, 2 H. & C. 926.] Estoppel by matter *in pais may* be pleaded, although it is conclusive in evidence without being specially pleaded. Sanderson *v.* Collman, 4 M. & G. 209 ; Lyon *v.* Reed, 13 M. & W. 285 ; Co. Litt. 322 *a*. See, also, Darlington *v.* Pritchard, 4 M. & G. 783. [Under statutes, see Wood *v.* Ostram, 29 Ind. 177 ; Ransom *v.* Stanberry, 22 Iowa, 334.] An estoppel need not be replied when it appears on the face of the pleadings. Beckett *v.* Bradley, 2 D. & L. 586 ; Macgregor *v.* Rhodes, 6 El. & Bl. 266 ; [1 Chitty Pl. 629 ; Hostler *v.* Hays, 3 Cal. 302.] It is a well established rule of law, that estoppels bind parties and privies — not strangers. Co. Litt. 352 *a;* Petrie *v.* Nuttall, 11 Ex. 569 ; Heane *v.* Rogers, 9 B. & C. 577 ; [Massure *v.* Noble, 11 Ill. 531 ; Langston *v.* M'Kinnie, 2 Murph. 67 ; Griffin *v.* Richardson, 11 Ired. (Law) 439 ; Miles *v.* Miles, 8 Watts & S. 135 ; Langer *v.* Felton, 1 Rawle, 141 ; Nutwell *v.* Tongue, 22 Md. 419 ; Braintree *v.* Hingham, 17 Mass. 432 ; Worcester *v.* Green, 2 Pick. 425 ; Deery *v.* Cray, 5 Wallace, 795 ; Williams *v.* Chandler, 25 Texas, 4 ; Griggs *v.* Smith, 12 N. J. (Law) 22 ; Bigelow C. J. in Gardner *v.* Lane, 12 Allen, 43 ; Glidden *v.* Unity, 30 N. H. 104, 119 ; Miller *v.* Holman, 1 Grant Cas. 243 ; Cottle *v.* Sydnor, 10 Missou. 763 ; Cuttle *v.* Brockway, 32 Penn. St. 45.] The doctrine of estoppel by deed only applies between the parties to the deed and to matters arising out of the deed. In collateral matters, the deed would be evidence, but no estoppel. Carter *v.* Carter, 27 L. J. Ch. 74. For every estoppel ought to be reciprocal, that is, to bind both parties; [Bolling *v.* Mayor, 3 Rand. 563 ; Schuhman *v.* Garratt, 16 Cal. 100 ; Lansing *v.* Montgomery, 2 John. 382 ; Longwell *v.* Bentley, 3 Grant Cas. 177 ; Averill *v.* Wilson, 4 Barb. 180 ; New York &c. R. R. Co. *v.* Schuyler, 38 Barb. 534 ; Cohoes Co. *v.* Goss, 13 Barb. 137 ; Louis *v.* Castleman, 27 Texas, 407 ; Wright *v.* Hazen, 24 Vt. 143] ; which is the reason that regularly a stranger shall neither take advantage of nor be bound by the estoppel.

In an action between the parties to a deed, and not collateral to it, the deed is a conclusive bar. Wiles *v.* Woodward, 5 Ex. 557 ; Carpenter *v.* Butler, 8 M. & W. 209 ; see Fraser *v.* Pendlebury, 31 L. J. C. P. 1 ; but a person is not estopped or concluded by an admission, which he may show to be mistaken, unless another person has been induced to alter his condition thereby. Heane *v.* Rogers, 9 B. & C. 584. [As to the manner and form of pleading an estoppel, see Gray *v.* Pingry, 17 Vt. 419 ; when and how far estoppel must be pleaded, see Lansing *v.* Montgomery, 2 John. 382.] Where the recovery of judgment by one of several joint contractors in an action against him is pleaded by the others as a defence to a subsequent action against them in respect of the same matter, the plea, to be good, must show that the judgment was obtained on grounds of defence open to all the joint contractors. Phillips *v.* Ward, [2 H. & C. 717 ;] 33 L. J. Ex. 7 ; [Neville *v.* Hancock, 15 Ark. 511.] As to effect of a recovery of judgment see Boileau *v.* Rutlin, 2 Ex. 665 ; Howlett *v.* Tarte, 10 C. B. N. S. 813 ; [Bigelow Estoppel, 46 *et seq.*]

1. *Commencement and Conclusion of a Plea of Matter of Estoppel.* (*f*)

The defendant, by ——, his attorney [*or* "in person"], says that the plaintiff ought not to be admitted to say [*stating the matter to which the estoppel relates*], because he says [*state the matter of estoppel, and conclude:*] And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to be admitted against his own acknowledgment by his deed aforesaid [*or otherwise according to the estoppel*] to say [*stating the matter to which the estoppel relates, as before*].

2. *Replication by way of Estoppel to a Plea.* (*g*)

That the defendant ought not to be admitted to plead the said plea by him above pleaded, because he says [*state the matter of estoppel*]. And this the plaintiff is ready to verify. Wherefore he prays judgment if the defendant ought to be admitted contrary to his own acknowledgment and deed to plead that [*here state the matter to which the estoppel relates*].

3. *Plea by Matter of Estoppel, that the Plaintiff brought an Action against the Defendant for the same Cause of Action, and that the Defendant had Judgment.* (*h*)

Commencement, supra.] That the plaintiff before this suit brought an action against the defendant in the court of ——, for the said debt [*or* "cause of action"] in the declaration mentioned, and thereupon such proceedings were had that afterwards and before this suit, it was considered by the judgment of the said court that the plaintiff should take nothing by his writ in respect

(*f*) See Stephen on Pl. 6th ed. 322. Although it is doubtful since the C. L. P. Act, 1852, s. 66, whether a plea by way of estoppel requires a formal commencement and prayer of judgment, yet in practice they have been continued as before the act. See *ante*, 17, note (*i*).

(*g*) Stephen on Pl. 6th ed. 322. A replication to a plea of estoppel should have a formal commencement and conclusion, although it only be taking issue on the plea.

(*h*) See forms, Palmer *v.* Temple, 9 Ad. & E. 508; Overton *v.* Harvey, 9 C. B. 324; Eastmore *v.* Laws, 5 Bing. N. C. 444; Gordon *v.* Whitehouse, 18 C. B. 747. A verdict obtained by a defendant should be pleaded by way of estoppel, because a defendant ought not in point of law to be twice vexed for the same cause of action, and by pleading the verdict, he shows that the plaintiff is not at liberty to try a question a second time, which had been tried before and decided against him. Vooght *v.* Winch, 2 B. & Ald. 662; Overton *v.* Harvey, 9 C. B. 324. A judgment against a defendant, however, is not matter in estoppel, but only the subject of a plea in bar, and is a merger of the plaintiff's original cause of action, because he can have an immediate remedy by writ of execution. Smith *v.* Nicholls, 5 Bing. N. C. 208, 220. A judgment against a plaintiff in a foreign or colonial court can only be pleaded by way of estoppel final and conclusive. For in Plummer *v.* Woodburne, 4 B. & C. 625, where see a form, the court says, that before you set up a foreign judgment as conclusive in the nature of an estoppel between the parties, it must appear on the record that it is decisive and binding between them in the colony where the judgment is given. See *post*, "Judgment recovered." For forms, see Plummer *v.* Woodburne, *ubi sup.* and General Steam Navigation Co. *v.* Guillon, 11 M. & W. 877; Callandar *v.* Dittrich, 4 M. & G. 68; [Frayes *v.* Worms, 10 C. B. N. S. 149.] A judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Doe *v.* Huddart, 2 Cr., M. & R. 316. Replication of estoppel in ejectment. Doe *v.* Wright, 10 Ad. & E. 763. That defendant accepted a lease from the plaintiff. Darlington *v.* Pritchard, 4 M. & G. 783; 2 Dowl. N. S. 664. Estoppel by acts *in pais*, see Lyon *v.* Reed, 13 M. & W. 285; Sanderson *v.* Collman, 4 M. & G. 209. Estoppel by deed. South Eastern Ry. Co. *v.* Warton, 6 H. & N. 520. As to effect by way of admission of accepting, &c. a bill of exchange, Sanderson *v.* Collman, 4 M. & G. 209; Macgregor *v.* Rhodes, 6 El. & Bl. 266; Ashpitel *v.* Bryan, 32 L. J. Q. B. 91; [3 B. & S. 474,] affirmed in exchequer chamber.

of the said debt [*or* "cause of action"], as by the record of the said court fully appears and which said judgment is still in full force. [*Conclude as supra.*]

[4. *Plea in Estoppel, that by Deed made between the Plaintiff and the Defendant, the Plaintiff acknowledged the Settlement of the Claim.*

South Eastern Ry. Co. *v.* Warton, 6 H. & N. 520.]

EVICTION. See *post*, "Landlord and Tenant."

EXCHANGE, CONTRACT OF.

Plea (to the Form, ante, 119) that the Defendant delivered the Goods in Exchange. (*i*)

That he did deliver to the plaintiff the said horse, and pay the plaintiff the sum of £——.

EXECUTORS AND ADMINISTRATORS. (*k*)

1. *Plea that the Plaintiff is not Executor or Administrator.*

That the plaintiff is not executor [*or* "administrator"] as alleged. (*l*)

2. *Plea that Defendant is not Administrator.*

C. D. sued as administrator, &c. ats. A. B. } That he is not nor ever has been administrator, as alleged. (*m*)

3. *Plea that Defendant is not Executor.* (*n*)

That he is not nor ever has been [*if several defendants*, "that they are not

(*i*) *Non assumpsit* merely denies the *contract*, not the breach. *Ante*, 281.

(*k*) See, in general, Williams on Executors; 2 Chit. Prac. 11th ed. 1212–1224. As to when executors are chargeable for rent of premises, and form of pleas, Rubery *v.* Stevens, 4 B. & Ad. 244; and for repairs, &c. Treemere *v.* Morison, 1 Bing. N. C. 97. Entry of one does not make both executors liable in use and occupation; and see form of pleas, Nation *v.* Tozer, 1 Cr., M. & R. 172; Woolaston *v.* Hakewill, 3 M. & G. 320; and see Hornidge *v.* Wilson, 11 Ad. & E. 655. An executor may be charged for the use and occupation of land held by him under a demise made to the testator. Atkins *v.* Humfrey, 2 C. B. 654. When liable under party-wall act, Thacker *v.* Wilson, 3 Ad. & E. 142.

(*l*) By R. 5, Trin. T. 1853, in all actions by and against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

(*m*) Com. Dig. Administrator, B. 1; Pleader, 2 D. 13; Plowd. 182; 2 Saund. 47; Picard *v.* Brown, 6 T. R. 550; 1 Wms. on Executors; 1 Saund. 275, note (3). Where a party interferes as executor without really being so or having obtained letters of administration, he should be sued as *executor*, and if sued as *administrator* he may plead as above. Where the defendant pleads *ne unques executor* or *administrator*, or a release to *himself*, and it is found against him, the judgment is, that the plaintiff do recover both the *debt and costs* in the first place, *de bonis testatoris si, &c.* and *si non, &c. de bonis propriis*. The reason alleged is, that the executor cannot but know these to be false pleas. 2 Wms. Executors, 5th ed. 1789. The plea should, therefore, not be pleaded without the strongest grounds to expect success thereon.

(*n*) See last note. Plea of non-joinder of a co-executor, *ante*, 272, form 8. The plaintiff has to prove that defendant is executor, by proving that he has acted as such by *intermeddling*, and thus establishing that he is executor *de son tort*. See 1 Wms. on Ex'ors, 225; 1 Saund. 265, note (2). Evidence of this, Serle *v.* Waterworth, 4 M. & W. 9. Ordering funeral not sufficient, Camden *v.*

nor ever have been executors, nor is nor has either of them been "] executor of the last will and testament of the said E. F., nor ever administered ["nor did either of them ever administer"] any of the goods or chattels which were of the said E. F. deceased, at the time of his death, as alleged. (*o*)

4. *Never Indebted.* (*p*)

That the said E. F. in his lifetime never was indebted [*if the declaration contain a count on a claim against the executor, state,* "that neither the said E. F. in his lifetime, nor the defendant, as executor as aforesaid, ever was indebted"] as alleged.

5. *Plea by an Executor of Never Indebted, except as to Part; Confession thereof; and Plene Administravit.* (*q*)

The defendant, except as to the sum of £10, parcel of the money claimed, says that the said E. F. never was indebted as alleged.

And as to the said sum of £10, parcel, &c. the defendant says that he cannot deny but that the said E. F. was indebted as alleged.

And for a further plea, the defendant says [*add plene administravit, post,* Form 6].

Fletcher, 4 M. & W. 379; and see Hoby *v.* Ruell, 1 C. & K. 716. Giving notice to produce the probate, and then producing an examined copy of the Act Book from the ecclesiastical court, is sufficient. 2 Stark. Ev. 3d ed. 445. It is doubtful, however, whether there is any legal presumption that the probate is in the possession of an executor. Waite *v.* Gale, 2 D. & L. 925. Where there are several executors who plead *ne unques executor*, the defendant may have a verdict against the real executor on a count laying a promise by the testator, the other defendants being discharged. Griffiths *v.* Franklin, Mo. & Mal. 146. The above plea admits a debt; 1 Saund. 207, note; but not the amount. If it be denied that *plaintiff* is executor, the plea must be special. Rast. Ent. 322 *a*, 329 *b*, pl. 10, 330 *a*; Co. Ent. 144 *b*; Lil. pl. 427, pl. 27; 6 Wentw. 293. If not denied, the letters of administration need not be produced at the trial; D'Aranda *v.* Houston, 6 C. & P. 511; and no advantage can be taken of their being wrongly stamped, unless *ne unques executor* be pleaded. Thynne *v.* Protheroe, 2 M. & S. 555. It is no plea that one executor plaintiff had "renounced." Creswick *v.* Woodhead, 4 M. & G. 811.

(*o*) In an action against two executors, one cannot plead that the other is not executor. Atkins *v.* Humfrey, 2 C. B. 654.

(*p*) Never indebted in an action by or against an executor has precisely the operation which belongs to it in other cases. See *ante*, 281. It admits the *character* of executor. See forms of pleas denying plaintiff's character, Lyons *v.* Barrow, 2 Bing. N. C. 486; Gurney *v.* Rawlins, 2 M. & W. 87. It is always inexpedient to plead never indebted without due cause, as the costs of the issue joined thereon, and evidence applicable thereto, fall on the defendant if he fail, although he obtain a verdict on a special plea. In the case of an executor defendant, if he plead never indebted (or any other plea by which the debt is put in issue), *and plene administravit*, and the plaintiff reply to the first plea, and, instead of denying the plea of *plene administravit*, take judgment thereon of *future* assets (see *post*, form 7), and at the trial the plaintiff succeed in establishing his debt, the defendant will be liable at once out of the assets, if any, otherwise personally, for the plaintiff's *costs*; for in such case the plaintiff is driven to trial solely to prove his debt. 2 Chit. Pract. 11th ed. 1222. Where the plaintiff, upon such pleas, adopts the course alluded to, the defendant should take out a summons and obtain an order for leave to withdraw never indebted, or other plea denying the debt, if it be probable the plaintiff can establish his demand. Marshall *v.* Wilder, 9 B. & C. 655. Where, however, the plaintiff *denies plene administravit*, the defendant will be entitled to the *general* costs if he succeed thereon, although he fail on never indebted, subject to a deduction for the costs occasioned by the latter plea. Hogg *v.* Graham, 4 Taunt. 135; Iggulden *v.* Terson, 2 Dowl. 277; Edwards *v.* Bethel, 1 B. & Ald. 254; Marshall *v.* Wilder, 9 B. & C. 655, 657. Where the debt is admitted *in part only*, and a claim in the particulars is disputed on good grounds, form 5, *post*, should be adopted.

(*q*) This form, though not very usual, appears to be judicious in cases where a debt to a certain amount is admitted, and the remainder of the claim is disputed, and the defendant has no assets in hand applicable to any part of the demand. Where the defendant has present assets applicable to the plaintiff's demand, he should pay money into court upon the common plea (see *post* "Payment"), to the extent of the debt admitted to be due, pleading only such plea.

6. *Plea of Plene Administravit.*

Obs. — See, as to this form, 2 Saund. 220, and note (3); 216, note (1); 2 Wms. on Ex. 5th ed. 1767. Evidence, &c. Jackson *v.* Lyon, 1 Car. & M. 97. Form of plea of *plene administravit* by the executor *of an executor*. Wells *v.* Fydell, 10 East, 315. See the form where defendant has assets to some extent, *post*, 386, form 10. Unless defendant plead *plene administravit* he admits assets, and is liable out of the assets, if any, or if not any, then personally, if the plaintiff obtain judgment for his debt; 1 Saund. 219 *b*, 335, note (10); but this plea only admits that the defendant is executor *de son tort*, and in such case he is only liable for assets which actually come to his hands. Yardley *v.* Arnold, 1 Car. & M. 434. The plaintiff may either have execution on his judgment, or proceed by action thereon, suggesting a *devastavit*. On issue joined on the above plea, it is incumbent on the *plaintiff* to prove affirmatively that defendant had, or might by due caution have had, assets before writ; Cooper *v.* Taylor, 6 M. & G. 789; and then the defendant must show a due administration of assets, before the commencement of the suit, to the extent proved. See 2 Wms. on Ex. 1786; Stroud *v.* Dandridge, 1 Car. & K. 455. Where the action was in assumpsit, the plea admitted a debt, but not its amount; otherwise when the action was in debt. 2 Wms. Ex. 1786. The defendant is only liable to the amount of assets proved to be in his hands, though less than the debt. Harrison *v.* Beccles, 3 T. R. 688; 2 Wms. Ex. 1790. If there be several executors defendants, who plead *plene administravit* jointly, it seems that the plaintiff may succeed against one only, who is shown to have assets. 1 Saund. 336, note; 2 Wms. Ex. 1792; Parsons *v.* Hancock, 1 M. & Mal. 330. If one of several executors plead no assets, and be defeated, he alone is liable. Ib. In Stearn *v.* Mills, 4 B. & Ad. 657, the inventory exhibited in the ecclesiastical court by an executor for the purpose of obtaining probate, was held not to be, generally, even *primâ facie* evidence of his having *received* assets. It seems to have been considered by Park J. in that case, that where the inventory only described effects on a farm with which the executor was acquainted, it may be *primâ facie* evidence, but that this is rebutted if it appear that no effects actually came to the executor's hands, though his co-executor has with his knowledge intermeddled with the property. See 2 Wms. Ex. 1781–1784. In the same case Littledale J. and Park J. appear to have entertained an opinion that a probate stamp is not *primâ facie* evidence that the executor has received assets to the amount covered by the stamp; but the contrary is laid down in Foster *v.* Blakelock, 9 B. & C. 328. See Mann *v.* Long, 3 Ad. & E. 689. The probate is, at all events, evidence only of the smallest amount which the stamp would cover. Curtis *v.* Hunt, 1 C. & P. 180. *Outstanding* specialty debts or judgments (or *payments* on account of such claims *after* action brought), must be *specially* pleaded, and cannot be set up on *plene administravit*. See 1 Saund. 333 *a*, note (8); 2 Wms. Ex. 1770; Oxenham *v.* Clapp, 2 B. & Ad. 314, per Littledale J. *Plene administravit* in the following form may be pleaded to a judgment debt, without alleging that the judgment was not docketed. See 2 Wms. Ex. 901, 902; Hall *v.* Tapper, 3 B. & Ad. 655; Gaunt *v.* Taylor, 3 Scott N. R. 700; 2 & 3 Vict. c. 10. Where a defendant, in an action against him as administrator, being under terms to plead issuably, pleads first, *plene administravit*, and secondly, *his own bankruptcy*, the plaintiff may sign judgment as for want of a plea; the latter being a bad plea and not issuable. Serle *v.* Bradshaw, 2 Cr. & M. 148; 2 Dowl. 289, S. C.

Plead never indebted, Form 1, *if the debt can be successfully denied, otherwise not* (*ante*, 383, note (*p*)).] That he has fully administered the goods and chattels which were of the said E. F. deceased, at the time of his death and which have ever come to the hands of the defendant as executor [*or* "administrator"] as aforesaid to be administered, and that the defendant had not [*if several defendants, state* "the defendants had not nor had either of them"] at

the commencement of this suit, (*r*) or at any time since, nor has he ["nor have they, nor has either of them"] any (*s*) goods or chattels which were of the said E. F. at the time of his death, in the hands of the defendant as executor [*or* "administrator," *or* "executors," *or* "administrators"] as aforesaid to be administered.

7. *Replication joining Issue and Award of Venire; where the Debt is not denied, and the Plaintiff joins Issue upon the Defendant's Plea.* (*t*)

[*After joining issue, proceed:*] And inasmuch as the defendant hath not denied the said causes of action, or that the plaintiff ought to recover in this action by reason thereof, the plaintiff prays judgment and his ["debt and"] damages aforesaid to be levied of the goods and chattels which were of the said E. F. at the time of his death; but because it is not known what damages the plaintiff hath sustained in this behalf, or whether or not the defendant will be convicted upon the issue so joined between the parties, let the giving of judgment herein be stayed until the said issue is determined, and as well to try the said issue as to inquire what damages the plaintiff hath sustained by reason of the said premises, let a jury come [*&c.*].

8. *Replication that Defendant received Assets after the Commencement of the Suit.* (*u*)

The plaintiff says that after the commencement of this suit, and before the said plea was pleaded, divers goods and chattels which were of the said E. F. at the time of his death, of great value, to wit, to the amount of the causes of action in the declaration mentioned, came to and were in the hands of the defendant, as executor [*or* "administrator"] as aforesaid, to be administered, and wherewith he could and ought to have satisfied those causes of action.

9. *Issue, where there is a Plea denying the Debt, besides Plene Administravit, and the Plaintiff takes Judgment of future Assets upon the latter Plea.* (*x*)

[*After defendant's pleas and replication to the plea disputing the debt as*

(*r*) Evidence of payments made by the executor, between the times of suing out the writ and filing the declaration, is inadmissible under this issue. Rees *v.* Morgan, 5 B. & Ad. 1935.

(*s*) If there be assets to any small amount applicable to the plaintiff's debt, the plea should be as *post*, 386, form 10.

(*t*) Where never indebted, &c. is pleaded with *plene administravit*, it is better, on account of costs, to take judgment of assets *in futuro* on the latter plea, if there be not clear evidence of assets in hand. See *ante*, 383, note (*p*). Or if the defendant had assets after writ issued, see form 8, *infra*.

(*u*) According to Mara *v.* Quin, 6 T. R. 10; 1 Saund. 336, this should be specially replied. But in Smith *v.* Tateham, 2 Ex. 205, a replication, that after *plea* pleaded the defendant had assets, was held bad, and an opinion was expressed that a judgment of assets *quando* embraces not only assets actually received after judgment signed, but also those which came between the issuing of the writ and the judgment, and which *are* or ought to be in his hands in a due cause of administration after judgment, and the dicta in Mara *v.* Quin were disapproved of. But see 2 Wms. Ex'ors, 1796, note (*a*). According to Smith *v.* Tateham, a joinder of issue would be sufficient.

(*x*) When and why this course is advisable, see *ante*, 383, note (*p*). If the plaintiff establish his death in this case he has costs without proving future assets. Ib. Where the defendant pleads *only plene administravit*, and there is no proof of present assets, the plaintiff should take judgment of *future* assets, and when they come to hand, should issue a *scire facias* on the judgment, and will *then* be entitled to his costs. 2 Chit. Prac. 1122 and 1132. And see C. L. P. Act, 1854, as to mode of proceeding. By taking judgment of assets *quando acciderint*,

usual, proceed thus:] And as to the said plea [*i. e. plene administravit*], the plaintiff, inasmuch as he cannot deny the several matters therein alleged, prays judgment and his damages by him sustained on occasion of the causes of action in the declaration mentioned to be adjudged to him, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which since the pleading of the said last plea of the defendant have come or which shall hereafter come to the hands of the defendant as executor [*or* "administrator"] as aforesaid to be administered [*or, if the plea be of a judgment or bond, &c. outstanding, and plene administravit præter, here add these words,* "after satisfying the moneys due and owing on the said judgment," *or* "writing obligatory," in "the said plea mentioned"]; but because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, let a jury come [*&c.*].

10. *Plene Administravit Præter.* (*y*)

The defendant, except as to the sum of £—— [*the amount of assets in hand*], says that he hath fully administered the goods and chattels which were of the said E. F. deceased at the time of his death, and which have ever come to the hands of him the defendant to be administered, except goods and chattels of the value of £——; and that he the defendant had not, at the commencement of this suit, or at any time since, nor has he any goods or chattels which were of the said E. F. deceased at the time of his death in his the defendant's hands to be administered, except the said goods and chattels of the value aforesaid * [and the defendant brings into court the said sum of £—— ready to be paid to the plaintiff]. (*z*)

11. *Plea of an Outstanding Judgment Debt, or Specialty, against the Testator, and Plene Administravit Præter.* (*a*)

The defendant says that in the lifetime of the said E. F., to wit, on [*&c.; state the recovery against deceased; see* "Judgment"]. (*b*) And the defendant

the plaintiff admits that defendant has duly administered to that time. Taylor *v.* Holman, Bull. N. P. 169. The plaintiff cannot take judgment of future assets after falling on *issue* taken on *plene administravit*. 2 Saund. 319 *a*, note (2); 2 Wms. Ex'ors, 1794.

(*y*) As to the form of this plea, &c. see 1 Saund. 333, note (7); 2 Wms. Ex'ors, 1770; 3 Went. 211, 214. Where there are some assets in hand, this plea should be pleaded; or the plaintiff will succeed at the trial and obtain judgment for his debt to the extent of such assets, and his costs. And it may often be advisable to adopt form 4 in regard to the debt. The plaintiff may take judgment as to the assets admitted, and judgment of future assets as to the rest of his claim, including the costs. Cox *v.* Peacock, 2 Scott, 125; S. C. 4 Dowl. 134; 2 Chit. Prac.; 3 Chit. Pl. 7th ed. 131, note (*l*).

(*z*) See 3 Wentw. 211, 214. It is not necessary that the assets should be brought into court. It seems, however, to be a proper step, except, that by allowing the plaintiff to take judgment, the defendant will have the advantage of being able, in case of another action, to plead the judgment. See *post*, 387, note (*h*).

(*a*) See forms, &c. 1 Saund. 329, 337, notes; Ib. 333 *a*, note (7); 2 Saund. 50, note (3); 3 Wentw. Ind. xxvi.; 2 Wms. on Executors, 1770–1773. It is essential to plead specially an outstanding judgment or specialty debt. Ib. If any part has been satisfied by defendant since the writ, that matter should be pleaded specially. See next form.

(*b*) R. 10 of H. T. 1853 (see *post*, and "Judgment recovered"), requiring the record to be referred to in the margin, does not apply to this plea. Power *v.* Izod, 1 Bing. N. C. 304. As to pleading a judgment, see 2 Wms. Ex'ors, 1771.

further says that the said E. F. in his lifetime, to wit, on [*&c.*], by his certain writing obligatory, sealed with his seal, became held and firmly bound to one G. H. in the penal sum of £——, to be paid to the said G. H.; (*c*) which said writing obligatory was made to secure and was and is conditioned for the payment of a just debt, (*d*) to wit, the sum of £——, with interest, at a time which has elapsed [*according to the fact*], and at the time of the death of the said E. F. was and still is in full force; and at the commencement of this suit there was and still is due and owing (*f*) upon and by virtue of the said writing obligatory a large sum of money, to wit, the sum of £——; and the defendant further says that he has fully administered [*&c.; plene administravit præter, as in* Form 10, *to the asterisk*], which are not sufficient to satisfy the said debts due and owing upon the said judgment and writing obligatory respectively [*as the case may be*], and which are subject and liable to satisfy such debts.

12. *To a Plea of Plene Administravit, and an Outstanding Judgment against the Testator; Replication, that the Testator satisfied the Judgment, and that it is fraudulently kept on Foot.* (*g*)

And the plaintiff says that the said E. F. in his lifetime satisfied and discharged the claim of the said G. H. [*the judgment creditor*] upon and in respect of the said judgment by payment; but the defendant, executor as aforesaid, with intent to defraud the plaintiff, has hitherto deferred and still defers procuring acknowledgment of satisfaction of the said judgment to be entered, and still permits the same to remain in full force, to the intent aforesaid.

13. *Plea of Judgment recovered against an Executor, and Payment thereon by him, after Action brought.* (*h*)

That one G. H., after the death of the said E. F., and after the commence-

(*c*) At law the *penalties* are, the debts as to those bonds where the days of payment are past, and the bonds of course forfeited; therefore an executor may either plead the penalty as the debt or the sum really due. But with regard to those bonds where the days of payment are not yet come, the sums in the conditions are the debts, and the assets can only be covered for them, for the executor can save the penalty by payment of the less sums at the times specified in the conditions, and if he does not, it will be a *devastavit* in him if he have assets. 2 Wms. 1773; 1 Saund. 333 *a*, note (7); Cox *v.* Joseph, 5 T. R. 307.

(*d*) The averment that the debt was a just debt, though usual, is not necessary, and so an averment that a judgment remains in force seems unnecessary. If the debt is not a just one, the other side may show it in the replication. 1 Saund. 329 *a*, note (4).

(*f*) 1 Saund. 333, note (7); Cox *v.* Joseph, 5 T. R. 309.

(*g*) See form, &c. Jones *v.* Roberts, 2 Cr. & M. 219. It was there held, on general demurrer, that the *rejoinder* to the above replication was bad, as in instead of traversing the *fraud*, it denied the payment and satisfaction, which, being mere inducement, could not properly be traversed. See form 14, *post*. The above must be specially pleaded. *Nul tiel record* would merely put in issue the existence of the judgment.

(*h*) This must be pleaded specially. If the judgment were obtained against the executor after he had pleaded to the pending action, the plea must be *puis darrein continuance*, with an affidavit of the truth, &c. See Alder *v.* Pack, 2 Harr. 78. It is settled that an executor may prefer one creditor to another whose claim is of equal degree, by confessing a judgment to the former, that is, by giving him a warrant of attorney or cognovit even after the other has commenced an action, and then pleading such judgment in bar. See 1 Saund. 329, note (3), 330, 331, notes (4) and (5); Prince *v.* Nicholson, 5 Taunt. 333 and 664; Lyttleton *v.* Cross, 3 B. & C. 317. He is not bound to take advantage of the statute of limitations, but may confess judgment for such a debt. Hunter *v.* Baxter, 31 L. J. C. 432; [3 Giff. 214; Hodgdon

ment of this suit, in the court of —— sued the defendant, as executor as aforesaid [*according to the fact, see* Form 19, (4) *post*], for the sum of £—— (*i*) due and owing to the said G. H. from the said E. F. in his lifetime and at the time of his death, and which was unsatisfied when such action was commenced; and such proceedings were thereupon had in that action, that the said G. H. afterwards, on [*&c.*], by the judgment of the said court, recovered against the defendant, as executor as aforesaid, £——, and £—— for his costs of suit, to be levied [*&c. as in judgment*, Form 17, *post*, 389]; which said judgment was obtained for a true and just debt due and owing to the said G. H. from the said E. F. in his lifetime and at the time of his death (*k*) [whereupon the defendant, as such executor, was afterwards, and after the commencement of this suit, called upon and obliged to pay and did pay to the said G. H., upon and on account of the said judgment, the sum of £——, parcel of the said sum so due thereon (*l*)]; and there now is due and owing to the said G. H., upon and by virtue of the said judgment, a large sum of money, to wit, the sum of £——; and as to the same the said judgment is in force (*m*) and unsatisfied; and the defendant further says that he hath fully administered [*&c.; add plene administravit, ante*, 384, Form 6, *or plene administravit præter, as ante*, Form 10; *if the payment be stated, the plea will be that there were no assets at the time of payment, except the sum paid, and not any since*, Form 19, (3) *post*].

14. *Replication thereto, that the Judgment is fraudulent.* (*n*)

That the said judgment in the said plea mentioned was had and obtained by the fraud and covin of the defendant, and with intent to defraud the plaintiff of his said claim.

v. White, 11 N. H. 208; Briggs *v.* Wilson, 5 De G., M. & G. (Am. ed.) 12, note (2) and cases cited; Emerson *v.* Thompson, 16 Mass. 428; Foster *v.* Starkey, 12 Cush. 324; Johnson *v.* Beardslee, 15 John. 3; 2 Kent, 416, note (*c*); 2 Chitty Contr. (11th Am. ed.), 1258, note (*n*[1]); Hill *v.* Walker, 4 Kay & J. 166; Lowis *v.* Rumney, L. R. 4 Eq. 451.] An equal distribution among creditors of equal degree may be obtained by filing a creditors' bill in equity. Where a defendant executor applies for an order for time to plead, the plaintiff's attorney should claim that it be made part of the terms that defendant do not confess (and plead) a judgment to another creditor of equal degree. Anon. 8 Mod. 308. In an action against an administrator, the defendant, after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets ultra, the court gave leave to the plaintiff to sign judgment as for want of a plea, the defendant having, since the commencement of the action, admitted by letter the possession of assets sufficient to cover the judgment and also the plaintiff's demand. Roberts *v.* Wood, 3 Dowl. P. C. 797. Rule 10 of H. T. 1853, which requires the party who pleads a plea of judgment recovered to set out its date, &c. in the margin of the plea, does not apply to a plea by an executor of judgment recovered against the estate. Power *v.* Izod, 1 Bing. N. C. 304; 5 M. & Sc. 119; S. C. 3 Dowl. 140.

(*i*) When the action to which this is pleaded is on a *specialty*, it is necessary to show in the plea either that the judgment pleaded was on a specialty, or was obtained before the executor had notice of the specialty debt sued for. 2 Wms. on Ex'ors, 1772.

(*k*) Not a necessary allegation. 1 Saund. 329 *a*, note (4); *ante*, 415, note (*e*).

(*l*) The allegation between the brackets should be inserted where warranted by the facts. Where no payment has been made, it should of course be omitted; and it should merely be stated that a certain sum is due upon the judgment. Plaintiff may reply assets *ultra*.

(*m*) The allegation that the judgment is in force, is not necessary. 1 Saund. 329 *a*, note (4).

(*n*) See *ante*, 387, note (*g*); 1 Lutw. 660; Tresham's case, 9 Co. R. 110; 2 Saund. 49; Com. Dig. Pleader, 2 D. 9. Replication in case of several judgments being pleaded, 1 Saund. 334, 335, 337 *b*, note (2); 2 Wms. on Ex'ors, 1775, 1776.

15. *Plea of Retainer by an Executor for his own Debt.* (*o*)

That the said E. F. in his lifetime, and at the time of his death, was indebted to the defendant for [*&c. stating the debt* (*p*)], and the defendant's claim in respect thereof remains unsatisfied to the defendant; and the defendant further says that the said E. F. in his lifetime duly made and published his last will and testament in writing, and thereby constituted and appointed the defendant executor thereof, and afterwards the said E. F. died without revoking or altering his said will as to the said appointment; after whose death the defendant proved the said will; and the defendant further says that he hath fully administered [*&c.; plene adm. præter, as ante*, Form 10, *to the asterisk*], which are not sufficient to pay or satisfy the defendant's said claim, and which he retains in his hands towards and in part satisfaction and payment thereof.

16. *Replication thereto, Denial of the Debt retained for.* (*q*)

That the said E. F. was not indebted to the defendant, as in the said [——] plea alleged.

17. *Form of Judgment by Cognovit against an Executor.* (*r*)

And on [*day of signing judgment*] the defendant, by —— his attorney [*or* "in person"], says that he cannot deny the action of the plaintiff; nor but that the plaintiff is entitled to recover against him as executor [*or* "administrator"] as aforesaid £——, besides his costs of suit; and hereupon the plaintiff prays judgment for the said £—— so acknowledged, together with his costs aforesaid; therefore it is considered that the plaintiff do recover against the defendant as executor [*or* "administrator"] as aforesaid the said £——, in form aforesaid acknowledged, and also £—— for his costs of suit by the court here adjudged to the plaintiff, which said moneys in the whole amount to £——, to be levied of the goods and chattels which were of the said —— at the time of his death in the hands of the defendant as executor [*or* "administrator"] as aforesaid, to be administered if he hath so much thereof in his hands to be administered, and if he hath not so much thereof in his hands to be administered, then £——, being for the costs aforesaid, to be levied of the proper goods and chattels of the defendant.

18. *Plea to an Action by an Executor, that the Testator died before breach of the Agreement sued on.*

Wentworth *v.* Cock, 10 Ad. & E. 42.

(*o*) A rightful executor, but not an executor *de son tort*, may retain for his own debt, it not being of an inferior degree to that sued for. See 2 Wms. E'xors (7th ed.), 1039 *et seq.*; [Boyd *v.* Brooks, 34 Beav. 7.] The retainer may be relied upon under *plene administravit*; 1 Saund. 333, note (6); [2 Wms. Ex'ors (7th ed.), 1050;] but it is better to plead it, as it may drive the plaintiff to admit the debt, or that there are not assets for him.

(*p*) A debt of equal degree with that sued for must be shown. For form of pleading a retainer for a specialty debt, Jones *v.* Harvey, 4 Price, 89.

(*q*) Or the plaintiff may reply assets *ultra* the debt. A joinder of issue would traverse *every* material allegation in the plea.

(*r*) See Chitty's Forms, 9th ed. 696.

[19. *Plea to an Action charging the Defendant for Rent as Assignee of the Term, that the Defendant became Assignee only as Executor, and that the Premises yielded no Profit, and Plene Administravit.* (*s*)

That after the making of the alleged deed and during the term thereby granted the said G. H. died possessed of the said demised premises, having first duly made his last will, and thereby appointed the defendant executor thereof; and the defendant afterwards as such executor duly proved the said will, and entered into the said demised premises, and became possessed thereof for the residue of the said term as such executor as aforesaid and not otherwise; and the estate of the said G. H. therein did not at any time vest in the defendant by assignment otherwise than as such executor as aforesaid; and the defendant has not at any time since the death of the said G. H. received or derived, nor could he during any part of that time receive or derive any profit from the said demanded premises, and the said demanded premises have not since the death of the said G. H. yielded any profit whatever; and the defendant had not at the commencement of this suit, nor has he since had, nor has he, any personal estate or effects which was or were of the said G. H. in the hands of the defendant as executor as aforesaid to be administered.

20. *Plea to a like Action, that the Defendant became Assignee only as Administrator, that the Premises yielded only £——, and Plene Administravit Præter.*

That after the making of the alleged deed and during the term thereby granted the said G. H. died intestate, possessed of the said demised premises, and, after the death of the said G. H., letters of administration of the personal estate and effects which were of the said G. H. were duly granted to the defendant [by her majesty's court of probate]; and the defendant afterwards entered into the said demised premises and became and was possessed thereof for the residue of the said term as such administrator as aforesaid and not otherwise, and the estate of the said G. H. therein did not at any time vest in the defendant by assignment otherwise than as such administrator as aforesaid;

(*s*) For rent incurred in the lifetime of the testator, the action must be brought against the executor in his representative character, and the judgment must be *de bonis testatoris*. For rent incurred after the death, if the executor enters on the premises, the lessor may either sue him as executor or charge him personally as assignee without naming him executor in respect of the perception of the profits. 2 Wms. Ex'ors, 1587; 1 Saund. 1, note (1). If the executor does not enter, he is still chargeable as executor, because he cannot so waive the term as not to be liable for the rent, so far as he has assets. Where the executor is sued as assignee, he cannot plead *plene administravit*; for the land being *primâ facie* of more value than the rent, so much of the profits as make up the rent is appropriated to the lessor, and cannot be applied to anything else. If there be no profits at all, he may so plead, and that he has no other assets, as in (2); if the profits cover a part only of the rent, that part should be confessed, and the plea pleaded to the remainder, as in (3). Rubery *v.* Stevens, 4 B. & Ad. 241; Wollaston *v.* Hakewill, 3 M. & G. 297; Hornidge *v.* Wilson, 11 Ad. & E. 645–655; Hopwood *v.* Whaley, 6 C. B. 744; 18 L. J. C. P. 43; 2 Wms. Ex'ors, 1590; 1 Saund. 1, note (1). If the value is less than the rent, and there is a deficiency of assets, the executor may waive the lease. Reid *v.* Lord Tenterden, 4 Tyrw. 118–120; 2 Wms. Ex'ors, 1591. The value is what the executor might have got by the exercise of reasonable diligence. Hopwood *v.* Whaley, *ubi sup.* This qualification of the personal liability of an executor in respect of rent, does not extend to a covenant for repairs Tremeere *v.* Morison, 1 Bing. N. C. 89.

and the defendant has not since the death of the said G. H. received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises except to the amount of $——; and the said premises have not since the death of the said G. H. yielded any profit whatever except the said $——; and the defendant had not at the commencement of this suit, nor has he since had, nor has he, any personal estate or effects which was or were of the said G. H. in the hands of the defendant as administrator as aforesaid to be administered, except the said rents and profits to the amount of $——; and the defendant brings here into court the said $—— ready to be paid to the plaintiff.]

FELONY.

Obs. — A plea of attainder of felony or treason may be pleaded either in abatement or bar; 1 Chitty Pl. 7th ed.; but see Sowerby *v.* Wadsworth, 33 L. J. Ex. 57; [2 H. & C. 701]; where it was held that the outlawry of the plaintiff on civil process is the subject of a plea in abatement. A felon is *civiliter mortuus* and forfeits to the crown all his personal property and rights of action accruing to him either before or after attainder. Bullock *v.* Dodds, 2 B. & Ald. 258. And so, if the wife of a felon die leaving property acquired after the conviction of her husband, it belongs to the crown and not to the next of kin of the wife. Coombes *v.* The Queen's Proctor, 16 Jur. 820. And the property vests in the crown, notwithstanding a conditional free pardon in a penal colony. Re T. Church's Will, 16 Jur. 517. The forfeiture dates from the conviction. Whitaker *v.* Wisby, 12 C. B. 44. A voluntary settlement of personal property made by a felon before conviction, but after the felonious act, is fraudulent and void as against the crown. Re Saunder's estate; Saunders *v.* Wharton, 32 L. J. Chan. 224. But an executor who, after the testator's death, is convicted of felony, is entitled to probate. Smethurst *v.* Tomlin, 30 L. J. P. 269. See Lambert *v.* Taylor, 4 B. & C. 138. But the right of a convicted person to sue and contract is only suspended, and may be restored by a pardon; [1 Chitty Contr. (11th Am. ed.) 262]; and he may be sued on a contract made during his incapacity. Ib. As to forfeiture of a lease by conviction for felony, see Doe *d.* Griffith *v.* Pritchard, 5 B. & Ad. 765. As to the costs under a plea of plaintiff's conviction for felony, *puis darrein continuance*, see Barnett *v.* The London & North Western Ry. Co. 5 H. & N. 604. See *ante*, "Reward," p. 233. [See 1 Chitty Contr. (11th Am. ed.) 261, note (n^1).

Plea of the Plaintiff's Conviction of Felony. (*t*)

Bullock *v.* Dodds, 2 B. & Ald. 258.

FORBEARANCE.

Obs. — See observations, *ante*, 131, and form 8, *ante*, 141. *Non assumpsit* merely disputes that the promise laid in the declaration was ever made. If the existence or validity of the debt to be forborne be denied, the plea should be special. It is also necessary to plead specially that the plaintiff did not forbear, or that the defendant paid the money. See Isaac *v.* Daniel, 8 Q. B. 500; 15 L. J. Q. B. 149. See, also, *ante*, 346, note (*f*).

1. *Non Assumpsit.*

Ante, 284, and *supra*, Obs.

(*t*) *Ante*, 347. For a form replying a pardon, see 3 Chit. on Pl. *in voc.*

2. *Plea, Denial of the Debt forborne.* (*u*)

That he never was indebted to the plaintiff in the said sum of £—— as alleged.

3. *Plea that Plaintiff did not forbear, &c.*

That the plaintiff did not cease to prosecute the said action [*or* "stay all proceedings therein"] as alleged.

4. *Plea denying that the Plaintiff had any Cause of Action against the Defendant.* (*x*)

That the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action brought as alleged, which he the plaintiff at the time of the making of the alleged promise well knew.

FOREIGN ATTACHMENT.

Obs. — See *ante*, "Attachment," Obs. 302 and 304; also Crosby *v.* Hetherington, 4 M. & G. 933; 12 L. J. C. P. 261. *Quære*, whether a notice of attachment out of the lord mayor's court, is an answer to an order under the garnishee clauses of the C. L. P. Act, 1854. Newman *v.* Rook, 4 C. B. N. S. 434. And see, as to the effect of a notice, Pillot *v.* Wilkinson, 32 L. J. Ex. 201.

FOREIGN JUDGMENT. See *post*, "Judgment."

FRAUD.

Obs. — "The term fraud (*dolus*) is applied to every artifice made use of by one person for the purpose of deceiving another." 1 Pothier, by Evans, 19; [2 Chitty Contr. (11th Am. ed.) 1038, 1039, and notes (*n*) and (*z*).] Fraud gives a right to avoid a contract (*ab initio*) both at law and in equity. "Fraud and covin may in judgment of the law avoid every kind of act. Many instances are put in Fermor's case, 3 Co. 77," per Lord Mansfield. Bright *v.* Eynon, 1 Burr. 395; [2 Chitty Contr. (11th Am. ed.) 1035; Hoitt *v.* Holcomb, 23 N. H. 535]. But it is not necessary that the fraud should arise from either party personally, for the fraud of an authorized agent will vitiate a contract made on behalf of his principal, although he does not personally take any part in the fraud. Udell *v.* Atherton, 30 L. J. Ex. 336; [7 H. & N. 172; Barwick *v.* English Joint Stock Bank, L. R. 259; Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511;] Doe *d.* Willis *v.* Martin, 4 T. R. 39; Fitzherbert *v.* Mather, 1 T. R. 12. See Cornfoot *v.* Fowke, 6 M. & W. 358; [1 Chitty Contr. (11th Am. ed.) 281, note (*l*); 2 Ib. 1036, and notes (*h*) and (*k*); 1 Sugden V. & P. (8th Am. ed.) 2, and note (*g*), 250, and note (*q*); Wheelton *v.* Hardisty, 8 El. & Bl. 232, 260; Bowman *v.* Caruthers, 40 Ind. 90, 91, and cases; Fitzsimmons *v.* Joslyn, 21 Vt. 129, 140–142.] But the party guilty of the fraud cannot take advantage of it, and it is solely at the option of the party aggrieved whether he will be bound or not. Murray *v.* Mann, 2 Ex. 538; 17 L. J. Ex. 256; White *v.* Gordon, 20 L. J. C. P. 166; [White *v.* Hunter, 23 N. H. 128; Ayers *v.* Hewett, 19 Maine, 281; Taylor *v.*

(*u*) This plea admits the promise, but puts the plaintiff on proof of the original demand. It would sometimes be necessary to traverse the allegation in the declaration according as it is framed.

(*x*) Wade *v.* Simeon, 2 C. B. 548; 15 L. J. C. P. 114; [Hooper *v.* Bristol &c. Co. 35 L. J. C. P. 299;] and see Cook *v.* Wright, 1 B. & S. 559; Cooper *v.* Parker, 15 C. B. 822.

Obs. Weld, 5 Mass. 116 ; Woods *v.* Kirk, 28 N. H. 324.] But if, after the fraud is discovered, it is acquiesced in, the party aggrieved cannot take advantage of it. Campbell *v.* Fleming, 1 Ad. & E. 40 ; Selway *v.* Fogg, 5 M. & W. 81; The Deposit & General Life Company *v.* Ayscough, 8 El. & Bl. 761 ; [Treat *v.* Orono, 26 Maine, 217 ; 2 Chitty Contr. (11th Am. ed.) 1037, and cases in note (*o*).] If both parties are guilty of fraud, neither can take advantage of it. Doe *d.* Roberts *v.* Roberts, 2 B. & Ald. 367 ; per Lord Tenterden, Jones *v.* Yates, 9 B. & C. 538 ; [Bessy *v.* Windham, 6 Q. B. 166 ; Dyer *v.* Homer, 22 Pick. 253 ; Reichart *v.* Castator, 5 Binney, 109 ; Thompson *v.* Moore, 36 Maine, 47.] Misrepresentation or concealment of a material fact, which it is the duty of the party knowing it to disclose, amounts to fraud. Pidcock *v.* Bishop, 3 B. & C. 605; [Bramwell B. in Horsfall *v.* Thomas, 1 H. & C. 90, 100 ; Irvine *v.* Kirkpatrick, 7 Bell Sc. Ap. 186 ; Otis *v.* Raymond, 3 Conn. 413 ; Van Arsdale *v.* Howard, 5 Ala. 596; Paddock *v.* Strobridge, 29 Vt. 470 ; Hanson *v.* Edgerly, 29 N. H. 343 ; Sides *v.* Hilleary, 6 Hart. & J. 86 ; Matthews *v.* Bliss, 22 Pick. 48; Nickley *v.* Thomas, 22 Barb. 652.] Representations made by a man to induce another to enter into an agreement, which are untrue to his knowledge, will constitute fraud, but not if they are believed at the time and afterwards turned out differently. Per Tindal C. J. Neeley *v.* Lock, 8 C. & P. 532. And "if an ignorant person be induced to execute an instrument, supposing it to operate [in one way] and it really operates in another, such instrument is invalid." Per Coleridge J. Doe *d.* Lloyd *v.* Bennett, 8 C. & P. 124. [Public company. Misrepresentation in prospectus. Kennedy *v.* Panama &c. Co. L. R. 2 Q. B. 580. See 2 Chitty Contr. (11th Am. ed.) 1035 *et seq.*], and *post*, Torts, "Fraud."

1. *Plea that the Agreement or Promise was obtained by Fraud.* (*y*)

That the defendant was induced to enter into and to make the said agreement [*or* "promise"] by the fraud of the plaintiff.

2. *Plea of Fraud to an Action on a Specialty.* (*z*)

That he was induced to execute the said supposed deed by the fraud of the plaintiff.

3. *Plea that the Defendant's Acceptance to a Bill was obtained by the Fraud of the Plaintiff.* (*a*)

That he was induced to accept the said bill by the fraud of the plaintiff.

(*y*) Fraud must be specially pleaded. R. 8, T. T. 1853. It has been generally considered that the particulars of the fraud need not be stated, but that this general form is correct, "because covin is secret, whereof by intendment another man cannot have knowledge." 9 Coke Rep. 110; Plowd. 54 *b*. But in Connop *v.* Holmes, 2 Cr., M. & R. 720, Parke B. observed, "It is not clear that the authorities bear out that position to its full extent." *Sed vide* Robson *v.* Luscombe, 2 D. & L. 859 ; Raphael *v.* Goodman, 8 Ad. & E. 565 ; and see Hill *v.* Montague, 2 M. & S. 378 ; Mason *v.* Ditchbourne, 2 Cr., M. & R. 720 ; D'Aranda *v.* Houston, 6 C. & P. 511 ; Edwards *v.* Brown, 3 Y. & J. 423. An order for particulars of the fraud relied on may in most cases be obtained. The plea of fraud in the usual form to the common counts is good, and leave was refused to reply and demur. Lawton *v.* Elmore, 27 L. J. Ex. 141. Shareholder, after he became aware of the fraud. The Deposit &c. Assurance Co. *v.* Ayscough, 6 El. & Bl. 761. There may be considerable risk in pleading the fraud specially. See Tooke *v.* Tuck, 4 Bing. 227 ; S. C. 9 B. & C. 444. [Plea of fraud, stating the particulars Canham *v.* Barry, 15 C. B. 597.]

(*z*) See Spencer *v.* Handley, 4 M. & G. 414 ; also, Evans *v.* Edmonds, 13 C. B. 777 ; Raphael *v.* Goodman, 8 Ad. & E. 565 ; [Redman *v.* Wilson, 14 M. & W. 476 ; on a contract of indemnity; Way *v.* Hearne, 13 C. B. N. S. 292 ; on a contract of guaranty; North British Ins. Co. *v.* Lloyd, 10 Ex. 523 ; Lee *v.* Jones, 17 C. B. N. S. 482.]

(*a*) Form, Stone *v.* Compton, 5 Bing. N. C. 142. See *ante*, 345, note (*z*). As to what amounts to obtaining a bill by fraud, see Lewis *v.* Cosgrave, 2 Taunt. 2 ; Green *v.* Beavan, 3 Stark. 134 ; Archer *v.* Bamford, Ib. 175.

4. *Plea in an Action for Calls, that the Defendant was induced to become a Shareholder by Fraud, and had repudiated the Contract.* (*b*)

That he was induced to become the holder of the said shares by the fraud of the plaintiffs, and that within a reasonable time after he discovered the fraud, and before he had received any benefit from or in respect of the said shares, he repudiated the said shares and gave notice thereof to the plaintiffs. (*c*)

[5. *Plea that the Defendant was induced to contract by Fraud, and afterwards repudiated the Contract.*

That he was induced to make the alleged contract [*or* "agreement"] by the fraud of the plaintiff, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit under the said contract [*or* "agreement"] he repudiated and abandoned the same, and gave notice of his repudiation and abandonment thereof to the plaintiff.

6. *Replication of Fraud and Repudiation to a Plea of a Bill of Exchange given on account, or in discharge, of a Debt.*

That he was induced to receive the said bill as alleged by the fraud of the defendant, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from the said bill, the plaintiff repudiated the said bill and the receipt thereof by him, and refused to have or retain the same for and on account [*or* "in satisfaction and discharge"] of the said debt and the cause of action in respect thereof, and then gave notice thereof to the defendant, and delivered back [*or* "tendered and offered to deliver back"] the same to the defendant.]

FRAUDS, STATUTE OF.

OBS. — A defence founded on any section of the statute of frauds (29 Car. 2, c. 3) may be given in evidence under the general issue. Buttermere *v.* Hayes, 5 M. & W. 456; Eastwood *v.* Kenyon, 11 Ad. & E. 438; Reed *v.* Lamb, 6 Ex. 130; [Reuss *v.* Picksley, Q. R. 1 Ex. 342; Smith *v.* Neale, 2 C. B. N. S. 67,] decided on the 4th section of the act; Elliott *v.* Thomas, 3 M. & W. 170; Trecher *v.* Tomlinson, 1 M. & G. 772, decided on the 17th section of the act. The same rule holds good as to representations required to be in writing, under 9 Geo. 4, c. 14; Turnley *v.* M'Gregor, 6 M. & G. 46. [In Massachusetts, this defence of the statute of frauds, to be available, must be set up in the answer. Middlesex Co. *v.* Osgood, 4 Gray, 447; Gardner *v.* Webber, 17 Pick. 406. And in Maine it must be specially set forth in a plea or brief statement. Lawrence *v.* Chase, 54 Maine, 196; 1 Chitty Pl. 506, note (*u*).]

(*b*) To a declaration for calls, a plea that the defendant was induced to become a shareholder by the fraud of the plaintiffs is bad, for not averring that the defendant had repudiated the contract and had done nothing to make himself liable as a shareholder after he became aware of the fraud. The Deposit &c. Assurance Co. *v.* Ayscough, 6 El. & Bl. 761; [Bwlch y Plwm Mining Co. *v.* Baynes, L. R. 2 Ex. 324. A shareholder, induced to become so by the fraud of the company, cannot repudiate his liability as against creditors of the company not parties to the fraud. Henderson *v.* Royal British Bank, 7 El. & Bl. 356; Powis *v.* Harding, 1 C. B. N. S. 533; Re Overend, Gurney & Co. Oakes & Peek's case, L. R. 3 Eq. 576; L. R. 2 H. L. 325; Langer's case, 37 L. J. C. 292.] A plea of fraud and repudiation of a contract in consequence, may easily be framed from the above.

(*c*) [Like pleas. M'Creight *v.* Stevens, 1 H. & C. 454 [where particulars of the fraud were ordered]; Bwlch y Plwm Mining Co. *v.* Baynes, L. R. 2 Ex. 324.]

GAMING.

Obs. — By the 9 Anne, c. 14, s. 1, "all notes, bills, bonds, judgments (see Lane *v.* Chapman, 11 Ad. & E. 966), mortgages, or other securitie sor conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly *void*." But now by 5 & 6 W. 4, c. 41, s. 1, instead of being *void*, they are to be deemed as given for an *illegal consideration* only. Such securities cannot be enforced except in the hands of a *bonâ fide* holder for value without notice. Hay *v.* Ayling, 16 Q. B. 423–431. See Johnson *v.* Lausley, 12 C. B. 468; Oulds *v.* Harrison, 10 Ex. 572; Fitch *v.* Jones, 5 El. & Bl. 238. See Chit. on Bills, 10th ed. 58. The above provisions are left unrepealed by the 8 & 9 Vict. c. 109; but the 18th section of that act enacts that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." As this statute (s. 15) repeals the 16 Car. 2, c. 7, and the whole of the above statute of Anne except the part before quoted, and also so much of the 18 Geo. 2, c. 34, as relates thereto, it would seem that *money* lent for the purpose of gaming is now recoverable, unless lent when the gaming is unlawful, as by a licensed publican to game on his own premises. Foot *v.* Baker, 5 M. & G. 335, where see form of plea; and see M'Kinnel *v.* Robinson, 3 M. & W. 435; 7 L. J. Ex. 149; Cannan *v.* Bryce, 3 B. & Ald. 184. And money lent for the purpose of paying losses on gaming may be recovered. Hill *v.* Fox, 4 H. & N. 359. It would appear from the proviso in s. 18, 8 & 9 Vict. c. 109, that all games of mere skill are lawful. Batty *v.* Marriott, 5 C. B. 818. But the proviso does not except betting between two persons at the game of billiards, which is a lawful game, where no money is produced or staked at the time. Parsons *v.* Alexander, 5 El. & Bl. 263. But it is no answer to an action for money paid by the plaintiff for the defendant's use at his request, that the money was paid in respect of losses on wagering contracts void by the statute. Knight *v.* Cambers, 15 C. B. 562; Jessop *v.* Lutwyche, 10 Ex. 614; 24 L. J. Ex. 65; Knight *v.* Fitch, 15 C. B. 565; Rosewarne *v.* Billing, 33 L. J. C. P. 55; [15 C. B. N. S. 316. See Combs *v.* Dibble, L. R. 1 Ex. 248.] Gaming debts, contracted abroad where gaming is not illegal, are recoverable here. Quarrier *v.* Colston, 1 Ph. 147.

In order to maintain an action against a stakeholder for the stakes deposited with him to abide the determination of certain persons on a legal event, the plaintiff must either have the decision in his favor, or show that it was not practicable to obtain it. Brown *v.* Overbury, 11 Ex. 715. A party who repudiates the wager before the event is ascertained, can recover back from the stakeholder the amount of his deposit. Varney *v.* Hickman, 5 C. B. 27; Martin *v.* Hewson, 10 Ex. 737. Betting houses are gaming houses within 8 & 9 Vict. c. 109, by 16 & 17 Vict. c. 119, s. 2; and by s. 5, money received as a deposit may be recovered as money had and received. As to what is a betting place, Doggett *v.* Catterns, 11 L. J. N. S. 422; 5 N. R. 132, C. P. reversed in Ex. Ch.; [34 L. J. C. P. 159; 19 C. B. N. S. 765.] As to what are now lawful games, see Chit. on Contr. *in voc.* As to wagering in marine

Obs. insurances, see *ante*, 158, Obs. ; fire insurance, Ib. and *ante*, 170, note (*t*). The stockjobbing act, 7 Geo. 2, c. 8, is repealed by 23 Vict. c. 28.

1. *Plea to Money had, &c. that it was deposited with the Defendant to abide the Result of an Illegal Lottery (a Derby Sweepstakes).* (*d*)

Allport *v.* Nutt, 1 C. B. 947; and see Gattie *v.* Field, 9 Q. B. 431; Howes *v.* Lock, 1 C. B. 524; [Savage *v.* Madder, 36 L. J. Ex. 178.]

2. *Pleas that the Contracts were Time Bargains in Shares contrary to* 8 *&* 9 *Vict. c.* 109.

Lynes *v.* Siesfield, 1 H. & N. 278; Jessopp *v.* Lutwyche, 10 Ex. 614; Knight *v.* Cambers, 15 C. B. 562; Knight *v.* Fitch, 15 C. B. 566; Rosewarne *v.* Billing, 32 L. J. C. P. 55; [15 C. B. N. S. 316.]

3. *Pleas to a Bill that it was given on a Gaming Consideration.* (*e*)

That before the acceptance [*or* "indorsement"] of the said bill, and before this action, "the plaintiff and the defendant respectively did game together by playing at a certain game for money, that is to say ——." (*f*)

Or ["The plaintiff and the defendant respectively did bet on the sides of two persons, one A. B. and one C. D., who were then gaming by playing together for money at a certain game called ——."]

Or ["The plaintiff lent and advanced to the defendant £——, for the purpose, as the plaintiff knew, of gaming, and to enable the defendant to game therewith by playing for money at a certain game, called ——."]

Or ["The plaintiff lent and advanced to the defendant £——, for the purpose, as the plaintiff knew, of the defendant betting, and to enable him to bet on the sides of two other persons, who were then gaming by playing together for money at a certain game, called ——."]

Or ["The plaintiff lent and advanced to the defendant £——, when and where two persons respectively were gaming, by playing together for money at a certain game, called ——, he the defendant betting on the sides of the said two persons respectively while they were so gaming, as the plaintiff then well knew."]

Or ["The plaintiff did game, by playing for money with another person, at a game called ——, and the plaintiff lent and advanced to the defendant £——, at the same time and place when and where the defendant was so gaming as aforesaid, as the plaintiff then well knew."]

And the defendant says that the said bill was accepted (*g*) [*or* "inclosed"] by him to secure to the plaintiff the sum of £—— then won by the plaintiff from the defendant by such gaming as aforesaid [*or* "by betting on the sides of the said persons so gaming as aforesaid;" *or* "to secure to the plaintiff the repay-

(*d*) Lotteries are forbidden by 10 & 11 W. 3, c. 17, and 42 Geo. 3, c. 119.

(*e*) See the forms referred to under the head of illegality, *post*.

(*f*) A mistake in the name of the game would probably be amended at the trial. Cooke *v.* Stratford, 13 M. & W. 379. The plea should show in what the illegality consisted. Grizewood *v.* Blane, 11 C. B. 538; Knight *v.* Fitch, 15 C. B. 566.

(*g*) If the bill sued on was one substituted for a former one, the latter of which was given for the gaming consideration, the plea must be altered accordingly. Boulton *v.* Coglan, 1 Bing. N. C. 640.

ment of the said sum so lent and advanced as aforesaid "]; and except as aforesaid, there never was any value or consideration for the accepting [*or* "indorsement"] of the said bill by the defendant.

[*If the action be brought by an indorsee of the party to whom the bill was originally given, add one of the averments at the end of* Form 29, *ante*, 340.]

GARNISHEE. See "Attachment of Debts," *ante*, 301.

GENERAL ISSUE. *Ante*, 274–276.

GOODS. See "Sale of Goods."

GUARANTY.

Obs. — See Obs. forms of declarations, and notes, *ante*, 137; "Indemnity," *ante*, 151, and *post*. The general issue *non assumpsit*, would deny that in fact the contract alleged was made, as also that it was made on the consideration alleged by the plaintiff. Raikes *v.* Todd, 8 Ad. & E. 854. See Obs. *ante*, 277. A plea to an action on a guaranty for the fidelity of a clerk, that the plaintiff took the clerk into his service before the defendant guarantied his fidelity, and therefore that the defendant's promise was *nudum pactum*, was held bad, as amounting to *non assumpsit*. Lyall *v.* Higgins, 4 Q. B. 528. The insufficiency of the contract under the statute of frauds, and the mercantile law amendment act, 19 & 20 Vict. c. 97, s. 3, *ante*, Obs. 137, may be objected to under the general issue *non assumpsit*. Eastwood *v.* Kenyon, 11 Ad. & E. 438; Glover *v.* Halkett, 2 H. & N. 487; *ante*, "Frauds," 394. The plaintiff's omission to supply goods under the contract, or the performance of the defendant's promise, must be specially pleaded. If it is intended to deny performance of conditions precedent, or to deny the breach alleged, it must be done by a specific traverse.

If the guaranty be under seal, it is denied by the general issue *non est factum*. *Ante*, Obs. 285.

1. *General Issue.*

That he did not promise as alleged; (*h*)

or

That the alleged deed is not his deed. (*i*)

2. *Plea that the Plaintiff did not supply the Goods under the Guaranty according to its Terms.* (*k*)

That the plaintiff did not sell and deliver the said goods to E. F. on credit [*according to the allegation in the declaration*], as alleged.

(*h*) *Ante*, 284.

(*i*) *Ante*, 286.

(*k*) See Bacon *v.* Chesney, 1 Stark. R. 192; 2 Stark. R. 426; Holt *v.* Hadley, 5 Bing. 54; Chit. on Contr. *in voc.* This plea would be proper when the credit on which the goods was actually supplied was a different credit from that stipulated for in the guaranty. The defence could not be given in evidence under the general issue *non assumpsit*. Taylor *v.* Hillary, 7 C. & P. 30. To an action for not indemnifying against the fraudulent conduct of a clerk; *ante*, form 2, p. 138; defendant might plead that the plaintiff did not engage the clerk, &c. and see Norton *v.* Powell, 4 M. & G. 46, note (*a*). Plea to a declaration for not indemnifying for goods purchased by a prin-

3. *Plea that the Credit was unreasonable.* (*l*)

That the defendant guarantied the payment of the price of goods to be sold and delivered by the plaintiff to the said E. F. upon the terms that the plaintiff should sell and deliver such goods upon a fair, reasonable, and usual credit; and that the plaintiff, after the defendant's promise, sold and delivered the said goods to the said E. F. upon an unfair, unreasonable, and unusual credit, which, at the time of such sale, the plaintiff agreed to give and allow without the defendant's consent.

4. *Plea that the Principal paid the Price.* (*m*)

That the said E. F. before action satisfied and discharged the plaintiff's claim by payment.

5. *Plea that the Guaranty was discharged by a New Agreement with Defendant for a different Mode of Dealing.*

Taylor *v.* Hillary, 7 C. & P. 30; S. C. 1 Cr., M. & R. 741; [Portsea Union *v.* Whillier, 29 L. J. Q. B. 150.]

6. *Plea that the Plaintiff released the Principal.* (*n*)

Bain *v.* Cooper, 8 M. & W. 751.

7. *Plea that the Principal was not indebted.* (*o*)

That the said E. F. was not indebted to the plaintiff, as alleged.

8. *Plea of Discharge by taking a Composition from the Principal; and Replication that it was taken with a Defendant's Consent.*

Davidson *v.* M'Gregor, 8 M. & W. 755. (*p*)

cipal, that the latter did not purchase the goods. Hitchcock *v.* Humfrey, 5 M. & G. 561. [Plea that the defendant revoked the guaranty before it was acted upon. Offord *v.* Davies, 12 C. B. N. S. 748.]

(*l*) This should be pleaded when no special credit was agreed upon or charged in the declaration. See Simpson *v.* Manley, 2 Cr. & J. 12; Coombe *v.* Woolf, 8 Bing. 161, per Tindall C. J.; Chit. Contr.

(*m*) Forms, Moses *v.* Levy, 4 Q. B. 213; Mayer *v.* Isaac, 6 M. & W. 606. Where the satisfaction was not in money, it should be pleaded accordingly. See *ante*, 288, "Accord and Satisfaction." See a form stating that plaintiff was indebted to the principal, and that he, on the plaintiff's assent, retained that debt in payment of the guaranty. Lyall *v.* Higgins, 4 Q. B. 528. It seems doubtful whether under this plea the defendant can contend that the whole guaranty was satisfied, in case of its being a *continuing* one. See Mayer *v.* Isaac, *supra*; see, also, Pritchard *v.* Hitchcock, 6 M. & G. 155. The plea will be proper when the defendant contends that the guaranty was not a *continuing* engagement, but had reference to one sale only, to be made after the guaranty, and that the price of the goods sold on that occasion has been paid. See *ante*, 137. If the above plea be pleaded to part only of the sum claimed, the plea must be framed accordingly. *Semble*, it is not a good plea, that the principal has not been required to pay. Lilly *v.* Hewitt, 11 Price, 494.

(*n*) See, also, Kearsley *v.* Cole, 16 M. & W. 128; Price *v.* Barker, 4 El. & Bl. 760; Willis *v.* De Castro, 4 C. B. N. S. 216; and for law, Bonser *v.* Cox, 6 Beav. 110.

(*o*) Form, &c. Davidson *v.* M'Gregor, 8 M. & W. 755. The effect of this plea would be to deny that there ever was any such debt as alleged, not merely that it was due at the commencement of the suit. Ib.

(*p*) See, also, Cowper *v.* Smith, 4 M. & W. 19.

9. *Plea that the Guaranty was altered by being converted into a Specialty without the Defendant's Consent.* (*q*)

Davidson *v.* Cooper, 11 M. & W. 778; in error, 13 M. & W. 343.

10. *Plea of Discharge by giving Time to the Principal.* (*r*)

That after the said E. F. became indebted to the plaintiff, it was, without the defendant's consent, for a good and sufficient consideration, agreed by and between the plaintiff and E. F., that the plaintiff should give E. F. time for payment of the said debt, being a longer time than the time of credit which the plaintiff ought to have given to E. F.; and in pursuance of such agreement the plaintiff gave to E. F. a longer time of credit than he ought to have given without the defendant's consent.

[11. *Pleas that the Guaranty was obtained by Fraud.* (*s*)

North British Insurance Co. *v.* Lloyd, 10 Ex. 523; Lee *v.* Jones, 17 C. B. N. S. 482.

12. *Replication to the Plea of Time given to the Debtor, that the Remedies against the Surety were reserved.* (*s*[1])

That by the alleged agreement between the plaintiff and the said G. H. it was also further agreed by and between them as part thereof, that neither the said agreement nor the performance thereof should discharge or affect the liability of said defendant upon his said guaranty, and that all the defendant's

(*q*) See *ante*, 298, "Alteration." An alteration of the terms of the contract as between the creditor and the principal, will discharge the surety. See Stewart *v.* M'Kean, 10 Ex. 675–689, per Parke B.; [Frank *v.* Edwards, 8 Ex. 214; Holland *v.* Lea, 9 Ex. 430; New Hampshire Savings Bank *v.* Colcord, 15 N. H. 119; Watriss *v.* Pierce, 32 N. H. 560, 574 *et seq.*; Taylor *v.* Johnson, 17 Geo. 521; Brigham *v.* Wentworth, 11 Cush. 123; Miller *v.* Stewart, 9 Wheat. 680; 1 Chitty Contr. (11th Am. ed.) 776, and note (*y*).] As by a change of salary; North Western Ry. Co. *v.* Whinray, 10 Ex. 77; by change of duties, even though by act of parliament; Pybus *v.* Gibb, 6 El. & Bl. 902; and see Oswald *v.* Mayor of Berwick, 25 L. J. Q. B. 383; [5 H. L. Cas. 856;] The Guardians of Portsea Island Union *v.* Whillier, 29 L. J. Q. B. 150; [Grocers' Bank *v.* Kingman, 16 Gray, 473; Bonar *v.* McDonald, 3 H. L. Cas. 226; 1 Chitty Contr. (11th Am. ed.) 765; Harrison *v.* Seymour, L. R. 1 C. P. 518.] As to changing the tenure of office, see Mayor of Dartmouth *v.* Lilly, 9 El. & Bl. 97; 26 L. J. Q. B. 90. See, also, The Mayor of Cambridge *v.* Dennis, El., Bl. & El. 660.

(*r*) [1 Chitty Contr. (11th Am. ed.) 781, and note (*x*).] See a form, Mayer *v.* Isaac, 6 M. & W. 605; and see *ante*, 347, form 45, and notes thereto for the law. See, also, *ante*, 376, equitable pleas. As to the effect of taking a mortgage with the usual covenant from the principal, see Bingham *v.* Corbitt, 34 L. J. Q. B. 37.

(*s*) [The relationship of creditor and surety does not, like the contract of insurance, require a full disclosure by the former to the latter of all material facts relating to the principal debtor; and the mere non-communication of such facts, without actual fraud, does not invalidate the guaranty. Hamilton *v.* Watson, 12 Cl. & Fin. (Am. ed.) 109, and cases in note (1); Railton *v.* Mathews, 10 Cl. & Fin. (Am. ed.) 934, and note (1); North British Ins. Co. *v.* Lloyd, 10 Ex. 523; Wythes *v.* Labouchere, 3 De G. & J. 609; Lee *v.* Jones, 17 C. B. N. S. 482; Franklin Bank *v.* Cooper, 36 Maine, 179; S. C. 39 Maine, 542; Atlas Bank *v.* Brownell, 9 R. I. 168; 1 Chitty Contr. (11th Am. ed.) 772, 773, and note (*j*).]

(*s*[1]) [That a creditor may reserve his remedies against a surety, see 1 Chitty Contr. (11th Am. ed.) 775, and note (*v*); Owen *v.* Homan, 3 Mac. & G. 378, 406; S. C. 4 H. L. Cas. 997, 1038; Davies *v.* Stainbank, 6 De G., M. & G. 679, (Am. ed.) 689, note (1) and cases; Thomas *v.* Lack, 3 C. B. 540; Price *v.* Barker, 4 El. & Bl. 760; Willis *v.* De Castro, 4 C. B. N. S. 216; Bailey *v.* Edwards, 4 B. & S. 761, 775, and note; Clagett *v.* Salmon, 5 Gill & J. 314; Sohier *v.* Loring, 6 Cush. 537; Hutchins *v.* Nichols, 10 Cush. 299; Viele *v.* Hoag, 24 Vt. 240; Peay *v.* Poston, 10 Yerger, 111.]

liabilities and all the plaintiff's rights upon the said guaranty should be and the same then were reserved and continued as fully as if the alleged agreement had never been entered into or performed.]

HEIRS AND DEVISEES.

OBS. — See *ante*, 143, "Heirs and Devisees," and notes to the forms there given. If the action is brought upon the bond or covenant of the ancestor or testator, the defendant may plead *non est factum*, or pleas in confession and avoidance.

1. *Plea by an Heir, sued on the Covenant of his Ancestor, of Riens per Descent.* (*t*)

That he had not at the commencement of this suit, nor has he had at any time before or since, any lands, tenements, or hereditaments by descent from his said father [*or* "brother," *&c.*] in fee simple.

2. *Replication thereto.* (*u*)

That the defendant, before the commencement of this suit, had lands, tenements, and hereditaments by descent from his said father [*or* "brother," *&c.*] in fee simple.

3. *Plea by a Devisee, sued on the Covenant of his Testator, of Riens per Devise.* (*x*)

That he had not at the commencement of this suit, nor has he had at any

(*t*) By 11 Geo. 4 & 1 W. 4, c. 47, s. 7, "Where any action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought, or the bill filed against him, anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and, if upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; and if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended." See forms on the old statute, 3 & 4 W. & M. c. 14; Gott *v.* Atkinson, Willes R. 521; Briant *v.* Farley, 3 Ad. & E. 839. See the law on this subject, 2 Saund. 7, note (4); Com. Dig. Pleader, 2 E. 3; Bac. Abr. Heir, F. These pleas, however, seem inapplicable to the case of an estate *pur autre vie* which comes to the heir as special occupant. The defendant may plead that he is not heir, &c. A plea by an heir, that he claimed to lay out a sum of money in repairing premises, would be bad; Shetleworth *v.* Neville, 1 T. B. 454. If the jury do not inquire of the value of the lands descended, on finding that there are such lands, a *venire de novo* will be awarded. Brown *v.* Shuker, 1 Cr. & J. 583. The jury cannot give a larger sum than the value of the lands descended; at least, if they do, execution cannot be levied to a greater amount. Brown *v.* Shuker, 2 Cr. & J. 311. Of course, the heir may in addition to the above plea, deny the deed, or show that the covenant has been performed, or justify the non-performance, as the ancestor might have done; but this should, on account of costs, be avoided, unless there be a good ground for such a line of defence. See Buckley *v.* Nightingale, 1 Str. 665, for a form of plea by the heir of payment of another specialty debt.

(*u*) See last note. Form, Brown *v.* Shuker, 1 Cr. & J. 583.

(*x*) 11 Geo. 4 & 1 W. 4, c. 47, s. 8, "that all and every the devisee and devisors made liable by this act, shall be liable and chargeable in the same manner as the heir-at-law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought." See form, &c. Farley *v.* Briant, 3 Ad. & E 839, and last note. Special plea, Gott *v.* Atkinson, Willes R. 521. Plea, that the debt due did not accrue due until after the testator's death. Farley *v* Briant, *supra*.

time before or since, any lands, tenements, or hereditaments by devise from the said E. F. deceased.

HIRE OF GOODS.

Obs. — See *ante*, 146. In an action for the hire of goods, it may be shown under the general issue that the goods were never hired, or that they were not fit for the purpose for which they were let for hire, or any other circumstances tending to show that no debt ever existed.

Plea to an Action against the Hirer of a Horse for Carelessness (Form 2, ante, 144), Denial thereof.

That he did use the horse in a careful, proper, and reasonable manner, and took due and proper care thereof whilst he had the same on hire.

HUSBAND AND WIFE.

Obs. — See *ante*, 146 *et seq.* In an action for necessaries supplied to the defendant's wife, it may be shown under the general issue that they were furnished under such circumstances as that the husband never in law became liable to pay the debt; as that the necessaries were furnished whilst the wife was separated from him under a deed of separate maintenance; see Chit. Contr.; Ladd *v.* Lynn, 2 M. & W. 265; Grindell *v.* Godmond, 5 Ad. & E. 755; Atkins *v.* Curwood, 7 C. & P. 756; or after she had committed adultery. Symes *v.* Goodfellow, 2 Bing. N. C. 532. [As to evidence of adultery, Needham *v.* Bremner, L. R. 1 C. P. 583.] When a husband means to defend an action for necessaries supplied to his wife as to part, he should plead as to that part and pay the rest into court. Emmett *v.* Norton, 8 C. & P. 506; Hardie *v.* Grant, Ib. 512. As to when a dissolution of the marriage is no defence, even on equitable grounds, to an action against the husband by the former wife's trustees for breach of the husband's covenant to pay her an annuity, see Goslin *v.* Clark, 31 L. J. C. P. 330. See, also, as to the liability of the husband for goods supplied to the wife, Jolly *v.* Rees, 33 L. J. C. P. 177; [15 C. B. N. S. 628.] Marriage *pendente lite* does not abate the suit. C. L. P. Act, 1852, s. 141. As to when right of action of the wife passes to the husband's assignees, see Richbell *v.* Alexander, 10 C. B. N. S. 324, 30 L. J. C. P. 268. When to plead in abatement, see *ante*, 272, 273, forms 9, 10, 11, and notes thereto. A married woman must plead in person, as she cannot appoint an attorney. *Ante*, 16, note (*g*). Pleas of coverture, *ante*, 368. [See the remarks of Foster J. in Dutton *v.* Rice, 53 N. H. 496, 502.]

1. *General Issue.*

Ante, 274, 284.

2. *Plea of Husband's Discharge under Insolvent Act.*

Lockwood *v.* Salter, 5 B. & Ad. 303.

3. *Plea of Wife's Discharge dum sola.*

Storr *v.* Lee, 9 Ad. & E. 868.

ILLEGAL CONSIDERATION.

Obs. — This must be pleaded specially, *ante*, 276, [1 Chitty Pl. 503, 506,] and cannot be relied upon under the general issue, Martin *v.* Smith, 4 Bing. N. C.

Obs. 436, even though the fact of the illegality appear from the plaintiff's own evidence in the conduct of the cause, such as that goods sold consisted of fireworks whose sale was illegal by 9 & 10 W. 3, c. 7. Fenwick *v.* Laycock, 1 Q. B. 414; and see Daintree *v.* Hutchinson, 10 M. & W. 92. In a plea of illegality the plaintiff's participation in the illegality must be clearly shown; Pellecat *v.* Angell, 2 Cr., M. & R. 311; but it is not necessary, after showing the illegality, to aver that there was no other consideration for the contract; Davis *v.* Holding, 1 M. & W. 159; nor to aver that it was contrary to the form of the statute, &c. Peate *v.* Dicken, 1 Cr., M. & R. 422. The allegation of illegality in a plea is one compounded of law and fact, and therefore traversable, consequently to a plea (bad for generality) to a bill of exchange, that the plaintiffs were a banking company, consisting of more than six persons, and were illegally associated together under 3 & 4 W. 4, c. 98, a replication that they were not illegally associated together, &c. was held to include all such facts as were necessary to constitute such illegality; and therefore that the plea was not made out by proof that the company consisted of more than six partners, and was in the habit of drawing short bills on London, without proof also that they so carried on their business as bankers, within the prohibited distance of sixty-five miles from the metropolis. Ransford *v.* Copeland, 6 Ad. & E. 482. So in Findon *v.* Parker, 11 M. & W. 675, where to an action on an attorney's bill, the defendant pleaded that the bill was incurred for defending a tithe suit, which the defendant and others had agreed (contrary to the law of *maintenance*) to defend. it was held that a traverse of the illegality of the agreement put in issue the facts whether the different persons defending the suit had reasonable ground for believing that they had a common interest in it; for that if they had, they could not be guilty of maintenance.

When the violation of a statute is a defence. See the judgment in Cope *v.* Rowlands, 2 M. & W. 157; Smith *v.* Mawhead, 14 M. & W. 452.

Every contract the consideration for which is tainted with illegality, is void. And "when the cause for which the engagement is contracted is repugnant to justice, good faith, or morals, the engagement and the contract containing it are null." Pothier on Obl. 43; [2 Chitty Contr. (11th Am. ed.) 971 *et seq.* and notes; Planters' Bank *v.* Union Bank, 16 Wallace, 483, 500; King *v.* Winants, 71 N. Car. 469; Whitaker *v.* Bond, 63 N. Car. 290; Blythe *v.* Lovinwood, 2 Ired. 20; Ingram *v.* Ingram, 4 Jones, 188; Brooks *v.* Martin, 2 Wallace, 70; Sharpe *v.* Farmer, 4 Dev. & Bat. 122; McRea *v.* Atlantic & N. Car. R. R. Co. 5 Jones Eq. 395; Pearce *v.* Brooks, L. R. 1 Ex. 213.] Thus a contract may be illegal. 1. If contrary to public policy or morality. [2 Chitty Contr. (11th Am. ed.) 982 *et seq.* and notes; Union Bridge Co. *v.* Troy & Lansingburgh R. R. Co. 7 Lansing, 240.] 2. If contrary to the special requirements of a statute. Cope *v.* Rowlands, 2 M. & W. 149; 6 L. J. Ex. 65; per Parke B.; Gas Light Co. *v.* Turner, 5 Bing. N. C. 666, 675; [2 Chitty Contr. (11th Am. ed.) 1001 *et seq.* and notes.] And when a contract is made on general considerations, one of which is illegal, the whole contract is void. Waite *v.* Jones, 1 Bing. N. C. 662; Shackell *v.* Rosier, 2 Bing. N. C. 634; [1 Chitty Pl. 301, and note (*u*) and cases cited; 2 Chitty Contr. (11th Am. ed.) 973, and note (*g*), 1001, and note (*k*).] But the merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but, to effect that, it is necessary that the vendor should be a sharer in the illegal transaction. Hodgson *v.* Temple, 5 Taunt. 181; [Smith *v.* Godfrey, 28 N. H. 379; Hill *v.* Spear, 50 N. H. 253, 261, 262; M'Intyre *v.* Parks, 3 Met. 207; Kreiss *v.* Seligman, 8 Barb. 439; Tracy *v.* Talmadge, 4 Kernan, 162; Merchants Bank of New York *v.* Spalding, 5 Selden, 53.] The illegality may be taken advantage of by either party. Holman *v.* Johnson, Cowp. 343; [Bailey *v.* Taber, 5 Mass. 296; Wheeler *v.* Russell, 17 Mass. 258. The law in such cases leaves the parties where it finds them. Horton *v.* Buffington, 105 Mass. 400; Sampson *v.* Shaw, 101 Mass. 149. 150; King *v.* Green, 6 Allen, 139; Buck *v.* Albee, 26 Vt. 184; Foote *v.* Emerson, 10 Vt. 338; Dixon *v.* Olmstead, 9 Vt. 310; 2 Chitty Contr. (11th Am. ed.) 975. In Myers *v.* Meinrath, 101 Mass. 367, Wells J. said: "In such cases, the defence of illegality prevails, not as a protection to the defendant, but as a disability of the plaintiff."]

Obs. See Chit. on Contr. "Illegal Contracts," "Maintenance;" *ante*, 307, note (*t*), and *post*.

1. *Plea to a Bill of Exchange, that it was given in Pursuance of an Illegal Agreement between a Petitioning Creditor and a Bankrupt to abandon the Prosecution of the Fiat.* (*y*)

Davis *v.* Holding, 1 M. & W. 159.

2. *Plea to a Note, that it was given for Money lent to Game with.* (*z*)

Slegg *v.* Phillips, 4 Ad. & E. 852; Foot *v.* Baker, 5 M. & G. 335.

3. *Plea to an Action by the Transferee of a Banker's Check, that it was given to an Intermediate Party on a Gambling Consideration, of which Plaintiff had Notice.*

Bingham *v.* Stanley, 9 C. & P. 375; S. C. 2 Q. B. 117. See form, *ante*, 429.

4. *Plea to an Action for Money lent, that it was lent in furtherance of an Illegal Contract to abandon a Petition against the return of one A. B. to Parliament, and for other Illegal Considerations connected therewith.*

Coppock *v.* Bower, 4 M. & W. 361.

5. *Plea to a Declaration for not opening a Theatre according to Agreement, that the Theatre was within Twenty Miles of Westminster and London, and that it was not in Westminster, or any place where the Sovereign resided, and therefore was illegal under* 10 *Geo.* 2, *c.* 28.

Levy *v.* Yates, 8 Ad. & E. 129.

6. *Plea to a Declaration for Work done, that it was done under an Illegal Contract, contrary to the Building Act.*

Stevens *v.* Gourley, 7 C. B. N. S. 99.

7. *Plea to an Action for Use and Occupation, that the Land was demised to deposit Night Soil on, within certain Limits prohibited by a Local Act.* (*a*)

Flight *v.* Clarke, 11 M. & W. 155.

8. *Plea to an Action on Contract, that the Goods were sold by Illegal Weights.* (*b*)

Jones *v.* Giles, 10 Ex. 119; 11 Ib. 393; 23 L. J. Ex. 292.

(*y*) Another form, Warner *v.* Haines, 6 C. & P. 666; and see *ante*, 319, form 7, and Chit. on Bills, 10th ed. 55.

(*z*) See *ante*, 395, "Gaming."

(*a*) See Andell *v.* Dawson, 4 C. B. 376.

(*b*) See 5 & 6 W. 4, c. 63; Rosseter *v.* Cahlman, 8 Ex. 361; Hughes *v.* Humphreys, 3 El. & Bl. 954.

9. *Plea that a Promise to pay Money was made to stifle a Prosecution for an Offence of a Public Nature, and Law.* (*c*)

Keir *v.* Leeman, [6 Q. B. 308; 9 Q. B. 371;] 13 L. J. Q. B. 259; and see Ex parte Critchley, 15 Law J. Q. B. 124; and Ward *v.* Lloyd, 1 D. & L. 763; [Fivaz *v.* Nicholls, 2 C. B. 501; Clubb *v.* Hutson, 18 C. B. N. S. 414.]

10. *Plea that a Note was given to secure Money lent to satisfy Illegal Stock-jobbing Wagers.* (*d*)

Slegg *v.* Phillips, 4 Ad. & E. 852.

11. *Plea that the Sale and Removal of Goods was illegal, because no Permit was taken out under the Excise Laws.*

Nicholson *v.* Hood, 9 M. & W. 365.

12. *Plea to an Action for Work, &c. by a London Broker, that he was not licensed.* (*e*)

Cope *v.* Rowlands, 2 M. & W. 149.

13. *Plea of an Illegal Agreement to antedate the Indentures of a Surgeon's Apprentice, in order to make it falsely appear that he had served Five Years.*

Prole *v.* Wiggins, 3 Bing. N. C. 230; and see Reg. *v.* Barmston, 3 N. & P. 167; S. C. 7 Ad. & E. 858.

14. *Plea of Maintenance to an Attorney's Bill.*

Findon *v.* Parker, 11 M. & W. 675, cited *ante*, 307, and note (*t*); Law, &c. Flight *v.* Leman, 4 Q. B. 883; Pechell *v.* Watson, 8 M. & W. 691. Embracery, Doe *d.* Williams *v.* Evans, 14 L. J. C. P. 237.

15. *Plea to Action on a Bond, that it was given in Consideration of future Illicit Cohabitation.* (*f*)

That the said bond was executed and delivered to the plaintiff by the defendant in consideration of the plaintiff then agreeing unlawfully and immorally to cohabit and commit fornication with the defendant. [See Walker *v.* Perkins, 1 W. Bl. 517.]

For other pleas of illegality, see Porritt *v.* Baker, 10 Ex. 759; Attenborough *v.* London, 8 Ex. 661; Hamilton *v.* Grainger, 5 H. & N. 40; Ritchie *v.* Smith, 6 C. B. 400; [Hindley *v.* Marquis of Westmeath, 6 B. & C. 200; Pearce *v.* Brooks, L. R. 1 Ex. 213; Hilton *v.* Eckersley, 6 El. & Bl. 47.]

(*c*) See Fivaz *v.* Nicholls, 2 C. B. 501.

(*d*) See Knight *v.* Fitch, 15 C. B. 566.

(*e*) See *ante*, 319. Also, Smith *v.* Lindo, 4 C. B. N. S. 395.

(*f*) It is necessary to plead this specially. A bond under seal given in consideration of *past* cohabitation is valid. Hall *v.* Palmer, 3 Hare, 532; Nye *v.* Moseley, 6 B. & C. 132. *Aliter*, if given in contemplation of future cohabitation; Smith *v.* Griffin, 13 Sim. 245; Friend *v.* Harrison, 2 C. & P. 584; but in no case is such a contract not under seal valid. Beaumont *v.* Reeve, 8 Q. B. 483; Binnington *v.* Wallace, 4 B. & Ald. 650. As to contracts for the support of illegitimate children, see Crowhurst *v.* Laverach, 8 Ex. 208; Smithe *v.* Roche, 6 C. B. N. S. 223; Follitt *v.* Koetzow, 29 L. J. M. C. 128; [2 El. & El. 730.]

INCOME TAX.

Obs. — See, generally, Chit. Contr. "Landlord and Tenant." When it can be deducted from rent, see Taylor *v.* Evans, 1 H. & N. 101. When it can be deducted from purchase-money payable by instalments, Foley *v.* Fletcher, [3 H. & N. 769;] 28 L. J. Ex. 100. See, also, Andrews *v.* Hancock, 1 B. & B. 37; Spragg *v.* Hammond, 2 B. & B. 59; Stubbs *v.* Parsons, 3 B. & Ald. 516.

Plea of Payment of the Income Tax. (*f*[1])

Franklin *v.* Carter, 1 C. B. 750; 3 D. & L. 213.

INDEMNITY. (*g*)

Obs. — As to the *effect of non assumpsit*, and the necessity of *denying* the alleged consideration specially, see *ante*, 275–277. It is *essential to plead* specially that the defendant *indemnified* the plaintiff, &c. See form, *infra*; and see the pleas, *ante*, p. 397, "Guaranty." To an action for not indemnifying plaintiff for all moneys which plaintiff's agent received in his service, the defendant might traverse the receipt of the money by the agent, and in another plea state that the agent did account or pay over the moneys, &c. according to the fact. Ward *v.* Suffield, 5 Bing. N. C. 381. As to set-off, see *post*, "Set-off."

1. *General Issue.*

That he did not promise as alleged; (*h*)

or

That the alleged deed is not his deed. (*i*)

2. *Plea to Form* 1, *ante*, 152, *that Defendant did indemnify the Plaintiff.* (*k*)

That he did indemnify and save harmless the plaintiff from any loss or damage by reason of ["his said acceptance of the said bill of exchange," *traversing the declaration according to the averments.* See *ante*, 151. See form, &c. Groom *v.* Black, 2 M. & G. 567].

3. *Plea to an Action for Indemnity, Payment of a Certain Sum in Satisfaction, whilst the Damages were unliquidated.*

Field *v.* Robins, 8 Ad. & E. 90.

4. *Traverse that the Plaintiff was damnified.* (*l*)

That the defendant was not damnified, as alleged.

5. *Plea that Plaintiff was damnified by his own Wrong.*

White *v.* Ansdell, 1 M. & W. 348. [See Warre *v.* Calvert, 7 Ad. & E. 143, 155.]

(*f*[1]) See Smith *v.* Humble, 15 C. B. 321.
(*g*) See forms of declaration, 151–157.
(*h*) *Ante*, 284.
(*i*) *Ante*, 286.
(*k*) *Semble*, that plaintiff upon this plea must prove that he was damnified, as alleged in the declaration. See another form and law, Jones *v.* Williams, 7 M. & W. 495.
(*l*) As to the plea of *non damnificatus*, see 1 Saund. 115, 116, note (1).

INFANCY.

Obs. — Infancy must be specially pleaded. R. 8, T. T. 1853.

As a general rule all contracts made by infants are void or voidable, except where the contract is for necessaries. Bac. Abr. Infancy J. 3. The contracts of infants may be divided into three classes: 1. Those absolutely void, because positively injurious to the interests of the infant, and which can only operate to his prejudice. And such a void contract, it would appear, is incapable of ratification, because a promise cannot revive that which never existed. Bac. Abr. Infancy J. 3.

2. Those which may be avoided or affirmed when he comes of age, because they are such as may inure to his benefit as an infant. Bac. Abr. Infancy, J. 8. Such contracts may be ratified on his coming of age, although there is no new consideration for his subsequent promise. [1 Chitty Contr. (11th Am. ed.) 215, 226, note (*t*), and cases cited; Bradford *v.* French, 110 Mass. 365, 366, and cases cited; Fetrow *v.* Wiseman, 40 Ind. 148, 155–158, and cases cited; Benj. Sales (1st Am. ed.), § 27, and note (*r*).] But the ratification must be voluntary, [1 Chitty Contr. (11th Am. ed.) 215; Ford *v.* Phillips, 1 Pick. 202; Smith *v.* Kelley, 309, 310,] and in writing, for, —

"No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." 9 Geo. 4, c. 14, s. 5. [A writing is made necessary in such case, by statute in Maine, Thurlow *v.* Gilmore, 40 Maine, 378; and in Kentucky, Bonney *v.* Reardin, 6 Bush (Ky.), 34.] Any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. Harris *v.* Wall, 1 Ex. 122. See, also, Hartley *v.* Wharton, 11 Ad. & E. 934; Mawson *v.* Blane, 10 Ex. 206; [1 Chitty Contr. (11th Am. ed.) 215, 216, note (*t*), and cases cited; Benj. Sales (1st Am. ed.), § 27, and note (*r*), § 28; Rowe *v.* Hopwood, L. R. 4 Q. B. 1.] The writing must be signed by the infant himself, for 19 & 20 Vict. c. 97, s. 13, only enables a duly authorized agent to sign in cases within the statute of limitations. The ratification must in all cases be made before action brought. Thornton *v.* Illingworth, 2 B. & C. 824; [Merriam *v.* Wilkins, 6 N. H. 432; Hale *v.* Gerrish, 8 N. H. 374; Conn *v.* Coburn, 7 N. H. 372; Goodridge *v.* Ross, 6 Met. 487, 490; Thing *v.* Libbey, 16 Maine, 55.] As to the rule in the case of a continuing contract, see [1 Chitty Contr. (11th Am. ed.) 216–218, and notes; Forsyth *v.* Hastings, 27 Vt. 646; Richardson *v.* Boright, 9 Vt. 368; Dana *v.* Stearns, 3 Cush. 372; Miller *v.* Sims, 2 Hill (S. Car.), 479; Boody *v.* Kenney, 23 Maine, 524; Robbins *v.* Eaton, 10 N. H. 561; Armfield *v.* Tate, 7 Ired. 258; Kline *v.* Beebe, 6 Conn. 494.] It would appear that an infant is not liable for a fraudulent representation that he was of full age, whereby a party has been induced to contract with him. The Liverpool Adelphi Loan Association *v.* Fairhurst, 9 Ex. 422; [1 Chitty Contr. (11th Am. ed.) 208, note (*t*[1]); Burley *v.* Russell, 10 N. H. 184; Merriam *v.* Cunningham, 11 Cush. 40; De Roo *v.* Foster, 12 C. B. N. S. 172, and cases cited; Studwell *v.* Shafter, 54 N. Y. 249; Kerr F. & M. (1st Am. ed.) 147, 148; Stoolfoos *v.* Jenkins, 12 Serg. & R. 399; Prescott *v.* Morris, 32 N. H. 101.] See, also, Wright *v.* Leonard, 30 L. J. C. P. 365. See, also, 1 Story's Equity Jurisprudence, 311, 2d ed. by which it would appear to be otherwise in equity. An equitable replication of the fraud is not good. Bartlett *v.* Wells, 31 L. J. Q. B. 57; [1 B. & S. 836.]

3. Those which are binding on him as being for necessaries. [1 Chitty Contr. (11th Am. ed.) 195 *et seq.*; Ryder *v.* Wombell, L. R. 3 Ex. 90.] But he is not liable for money lent to him to purchase necessaries, even if he apply the money to that purpose. [Swift *v.* Bennett, 10 Cush. 436. But an infant is liable for money paid at his request by the plaintiff to a third person for necessaries furnished to the infant. Swift *v.* Bennett, 10 Cush. 436; 1 Chitty Contr. (11th Am. ed.) 198. So, if one, who is a surety on a note given by an infant for necessaries, pays the money, the infant is liable to him in an action

Obs. for reimbursement. Conn *v.* Coburn, 7 N. H. 368. An infant may bind himself for necessaries by a contract the consideration of which is open to inquiry. Stone *v.* Dennison, 13 Pick. 1; Earle *v.* Reed, 10 Met. 387, 389, 390; Breed *v.* Judd, 1 Gray, 455; Locke *v.* Smith, 41 N. H. 346; Dubose *v.* Whiddon, 4 McCord, 221; Bradley *v.* Pratt, 23 Vt. 378. Anything which an infant is required to do by law binds him, although done without suit. Co. Litt. 38 *a*, 172 *a*; Parsons C. J. in Baker *v.* Lovett, 6 Mass. 78, 80. "Also other things of necessity shall bind him, as a presentation to a benefice, for otherwise the lapse shall inure against him." Co. Litt. 172 *a*; Gray J. in Bradford *v.* French, 110 Mass. 366. An infant may execute a mere power, or, perhaps, a power coupled with an interest; see King *v.* Bellord, 32 L. J. C. 646, 647; although he cannot bind himself by contract to convey an estate vested in him as trustee. Ib.; 1 Chitty Contr. 207.]

As to the liability of an infant for his tortious acts, see *post*, Torts, "Infants." [1 Chitty Contr. (11th Am. ed.) 208, note (t^1), 209, note (x); Benj. Sales (1st Am. ed.), 22, note (1); 1 Chitty Pl. 85, 138. An infant is liable for tort or fraud wholly unconnected with contract. Fitts *v.* Hall, 9 N. H. 441; Eaton *v.* Hill, 50 N. H. 235; Prescott *v.* Norris, 32 N. H. 101; Walker *v.* Davis, 1 Gray, 506; Baxter *v.* Bush, 29 Vt. 465; Hartfield *v.* Roper, 21 Wend. 615; Wallace *v.* Morss, 6 Hill, 391; 2 Kent, 241; Lewis *v.* Littlefield, 15 Maine, 233.]

1. *Infancy of Defendant.* (*m*)

And the defendant, by —— his attorney [*or, if the defendant be still an infant, state* "by E. F., admitted by the said court here as *guardian* (*n*) of the defendant to defend for him, he being an infant within the age of twenty-one years"], says that at the time of the making of the said contract [*or* "promise," *or* "agreement," *or* "accepting the said bill"] (*o*) he was an infant within the age of twenty-one years.

[1*a*. *Another Form in Answer to Action on Promissory Note.*

And the defendant comes and answers, as to the note mentioned in the plaintiff's second count, that at the time of making the same he was a minor under the age of twenty-one years.]

(*m*) "Infancy" must be specially pleaded. [1 Chitty Pl. 503.] The *plaintiff's* infancy affords no defence. When an infant's contract is not binding on him, Chit. jr. Contr. Index, "Infancy." When father liable for necessaries furnished to his infant son, Urmston *v.* Newcomen, 4 Ad. & E. 909; Law *v.* Wilkins, 6 Ad. & E. 718; and 1 Cr., M. & R. 710, note; Mortimore *v.* Wright, 6 M. & W. 482; Clements *v.* Williams, 8 C. & P. 58. Form, &c. Burghart *v.* Angerstein, 6 C. & P. 691, note; [1 Chitty Contr. (11th Am. ed.) 210 *et seq.*, 213, and note (*k*)] Evidence, if the plaintiff deny the infancy, *post*, note (*p*). An infant defendant is liable to costs. Tidd, 9th ed. 101. [As to liability of infant plaintiff for costs, see 1 Chitty Pl. 291, note (*e*).] An infant may plead infancy to part and another plea to the rest of the claim.

(*n*) See Arch. by Chit. Ind. "Infancy;" 1 Saund. 117 *g*, note (1); Chit. jr. Contr. As to the power of guardians, Gilbert *v.* Schwank, 14 L. J. Ex. 317. See *ante*, 14, note (*a*). A *prochein ami* may be removed if he become insolvent, unless there be no other person who can be properly appointed. Lees *v.* Smith, 5 H. & N. 632. The appearance of an infant by attorney is error, of which the defendant (but not the plaintiff) may avail himself by writ of error. 2 Saund. 117 *f*, note (1), 212 *a*, 4, 5; Bird *v.* Pegg, 5 B. & Ald. 418; [1 Chitty Pl. 444, note (*r*), and cases cited.] And the court will set aside an appearance entered for the defendant (an infant) by the plaintiff, even after judgment. Stephens *v.* Lowndes, 14 L. J. C. P. 229. In an action against two on joint promises, if one plead infancy and plaintiff enter a *nolle prosequi* as to him, he cannot recover against the other, his admission on the record being conclusive evidence that there was no joint promise. Boyle *v.* Webster, 17 Q. B. 950. See Gibbs *v.* Merrill, 3 Taunt. 307; Burgess *v.* Merrill, 4 Taunt. 468, note (*a*). [The rule is otherwise in some of the American states. See Cutts *v.* Gordon, 13 Maine, 474; Hartness *v.* Thompson, 5 John. 160; Woodward *v* Newhall, 1 Pick. 500, 502; Tuttle *v.* Cooper, 10 Pick. 288; Walmsley *v.* Lindenberger, 2 Rand. (Va.) 473; Allen *v.* Butler, 9 Vt. 122; Collyer Partn. § 720, and notes; 1 Chitty Pl. 50, note (*y*).]

(*o*) [See form in Harrison *v.* Cotgreave, 4 C. B. 562.]

2. *Replication, Denial of Defendant's Infancy.* (*p*)

That the defendant, at the time of the making of the said contracts, was of the full age of twenty-one years, and not within the age of twenty-one years, as alleged.

3. *Replication, that the Action is partly for Necessaries, and Nolle Prosequi as to the Remainder of the Demand.* (*q*)

And as to the said —— plea, so far as it relates to the said meat, drink [*&c. as in declaration*], found and provided by the plaintiff for the defendant and the said goods sold and delivered by the plaintiff to the defendant [and the said money paid by the plaintiff for the defendant's use at his request, the plaintiff says that the said meat, drink (*&c.*)], and goods were, when they were respectively found and provided for and sold and delivered to the defendant respectively, (*r*) necessaries suitable to the *then degree, estate, circumstances, and condition of the defendant*, (*s*) [and that the said money so paid for the defendant's use was so paid by the plaintiff in the purchase of necessaries fit and suitable to the then degree, estate, circumstances, and condition of the defendant].

And as to the said plea, so far as it relates to the residue of the declaration, the plaintiff says that (*t*) he will not further prosecute his action against the defendant as to the said residue or any part thereof, therefore as to the same let the defendant be acquitted and go thereof without day [*&c.*].

(*p*) Form, &c. 2 Saund. 211. The defendant has, upon this issue, to prove his minority at the time the debt was contracted. See Borthwick *v.* Carruthers, 1 T. R. 648. In an action against a defendant as acceptor of a bill, if the issue be infancy, he must distinctly prove not only his real age, but also (if not shown to have been under age when the action was commenced) the day on which he accepted the bill; and the date of the bill will not be even presumptive evidence of the time of acceptance. Harrison *v.* Clifton, 17 L. J. Ex. 233; [Bay *v.* Gunn, 1 Denio, 108.] The infancy may be proved by calling some of defendant's family, &c. The register of the birth or christening will not, though it state the time of birth, be evidence of the fact. Wilhen *v.* Law, 3 Stark. R. 63; Rex *v.* Claphan, 4 C. & P. 29; Burghart *v.* Angerstein, 6 C. & P. 690. But possibly this would be different with respect to a register made under 6 & 7 W. 4, c. 86. [In computing the age of a person the day of his birth is included. See Herbert *v.* Torball, 1 Sid. 142; State *v.* Clark, 3 Harring. 557; Hamlin *v.* Stevenson, 4 Dana, 597; Wells *v.* Wells, 6 Ind. 447.] The plaintiff may reply denying the infancy as to part, and as to the remainder of the claim that it was for necessaries or was confirmed after full age, &c. See *post*, form 5. An infant purchaser of railway shares may, while under age, suspend his liability to pay calls until he is of age, by disclaiming the property in them altogether, or by showing that the contract for them was prejudicial to him; if over age he can only by such disclaimer defeat an action for calls. London & North Western Ry. Co. *v.* Michael, 5 Ex. 114. See, also, Cork & Bandon Ry. Co. *v.* Cazenove, 10 Q. B. 935; Dublin & Wicklow Ry. Co. *v.* Black, 8 Ex. 181; Newry & Enniskillen Ry. Co. *v.* Combe, 3 Ex. 364.

(*q*) Form, &c. Burghart *v.* Angerstein, 6 C. & P. 692, note. As to the law on this subject, see Chit. jr. Contr. Index, "Infancy." The *nollé prosequi* is in general proper to a count on a bill of exchange or for money lent, or on an account stated, &c. (if in the declaration), because for such claims an infant is not liable. [1 Chitty Pl. 606, 607.]

(*r*) He need not, on issue joined on this averment, prove that they *all* were necessaries. Tapley *v.* Wainwright, 5 B. & Ad. 399, per Denman C. J.

(*s*) Meaning of this. Peters *v.* Fleming, 6 M. & W. 43; *post*, note (*t*).

(*t*) Or sometimes it may be better, instead of this *nolle prosequi*, to put the infancy in issue as to the remainder of the claim, if any doubt as to the fact; or plaintiff may *pro tanto* reply a new promise after twenty-one. It must be remembered, however, that after a *nol pros.* the plaintiff can bring a fresh action for that part. Amor *v.* Cuthbert, 3 M. & G. 1; S. C. 1 Dowl. N. S. 160; *post*, "*Nolle Prosequi.*"

[*3a. Another Form of Replication.*

And the plaintiff replies that he is ignorant of the fact, so that he can neither admit nor deny that the plaintiff was a minor, as stated in his answer, but leaves the defendant to prove the same. He further says, the articles mentioned in his bill of particulars were necessaries for the defendant, and suitable to his estate and degree.]

4. Rejoinder, that the Goods, &c. were not Necessaries. (*u*)

And the defendant, as to the replication to the —— plea, so far as it relates to [*&c. as before*], say that the said meat [*&c.*] were not, nor was any part thereof, necessaries suitable to the then degree, estate, circumstances, and condition of the defendant [nor was the said money so paid by the plaintiff, or any part thereof paid by him in the purchase of necessaries fit and suitable to the then degree, estate, and condition of the defendant], as alleged.

5. To a Plea of Infancy, that Defendant confirmed his Promise after he became of Age. (*v*)

That the defendant, before this suit, and after he attained his age of twenty-one years, by a writing made and signed by him, ratified and confirmed the said contract [*as in the declaration*] in the declaration mentioned.

INSANITY. See *post*, "Lunacy."

INSOLVENT ACT. (*x*) See the last edition of this work, pp. 332–335.

(*u*) The usual course would now be to join issue upon the replication. On this issue it will be sufficient for the plaintiff to prove that the goods were proper for the defendant's rank in life. If he was supplied with money *aliunde*, it will be for him to prove it; Burghart *v.* Hall, 4 M. & W. 731; unless the goods were of such a nature that they are not *primâ facie* necessaries, when the onus of proof will lie on the plaintiff. Brooker *v.* Scott, 11 M. & W. 67; Wharton *v.* Mackenzie, 5 Q. B. 606; [Ryder *v.* Wombwell, L. R. 4 Ex. 32; Johnson *v.* Lines, 6 Watts & S. 80; 1 Chitty Contr. (11th Am. ed.) 195.] An infant widow is liable on her contract for her husband's funeral, though he left no assets. Chapple *v.* Cooper, 13 M. & W. 252.

(*v*) See, in general, Chit. jr. Contr. Index, "Infancy." The new promise must be in writing, and signed by the infant himself. 9 Geo. 4, c. 14, s. 5. And should be made before action. Thornton *v.* Ulingworth, 2 B. & C. 824. Letter dated after full age sufficient. Hunt *v.* Massey, 5 B. & Ad. 902. If the defendant traverse the new promise, the plaintiff has to prove it, and defendant must prove he was under age when he made such *subsequent* promise, or the contrary will be inferred. Barthwick *v.* Carruthers, 1 T. R. 648; Hortley *v.* Wharton, 11 Ad. & E. 934. When the declaration contains counts, such as the account stated, &c. which are not properly for necessaries, and the defendant has ratified the promise since he came of age, it was left unsettled in Williams *v.* Moor, 11 M. & W. 258, whether the ratification should be replied, or whether the plaintiff should new assign. If the ratification or second promise did not correspond with the original promise, it would be safer to *declare* specially, stating the facts. See *ante*, "Limitations," form, p. 202. If the promise were *conditional*, the declaration should, it seems, be framed specially thereon.

(*x*) By the bankruptcy act, 1861, ss. 19, 20, the jurisdiction of the court for the relief of insolvent debtors ceased. It has not therefore been thought necessary to insert the forms applicable to the insolvent act, but merely to refer to the former editions of this work.

INSURANCE.

I. MARINE POLICIES.

OBS. — See the declarations, *ante*, 166. If the policy is not under seal the general issue *non assumpsit* puts in issue the subscription to the alleged policy by the defendant (R. 6, T. T. 1853), and also whether the policy was effected on plaintiff's behalf, and the payment of the premiums by him; Sutherland *v.* Pratt, 11 M. & W. 296; Redmond *v.* Smith, 7 M. & G. 457; S. C. 2 D. & L. 280; the affirmative of which the plaintiff would have to prove, and would by so doing establish his case upon that plea. But *non assumpsit* does not deny the interest; Stainbank *v.* Fenning, 20 L. J. C. P. 226; [11 C. B. 51;] the commencement of the risk, the loss, or the alleged compliance with warranties; R. 1, T. T. 1853; such as unseaworthiness; Small *v.* Gibson, [16 Q. B. 128;] 20 L. J. Q. B. 152; deviation (Ib.), concealment, misrepresentation, &c. These must be specially pleaded. R. 8, T. T. 1853. The non-compliance with a warranty should be pleaded specially. The following traverses will suffice to show the mode in which pleas in denial to such actions should be framed; the defendant might plead in addition to these denials, traverses that the goods were loaded on board, that they were placed on board the ship to be carried on the voyage, or that the ship was lost. Reid *v.* Rew, 2 Dowl. N. S. 543. See other traverses, Devaux *v.* Janson, 5 Bing. N. C. 519. There should of course be a plea to the common count, if any. If the defendant be entitled to recover back the premium, it should be paid into court upon a plea of payment of money into court on the common count. See Park Ins.; Marshall; Hughes Ins. 439; Arnould Ins.; Duckett *v.* Williams, 2 Cr. & M. 348. As to getting the benefit of the payment into court on the common count in diminution of the damages on the count on the policy, see Carr *v.* Montefiore, 34 L. J. Q. B. 21. If the policy be under seal, the general issue will be *non est factum*. The averment of persons interested in accordance with 28 Geo. 3, c. 56, s. 1 (*ante*, 158), is a material averment and may be traversed. Bell *v.* Janson, 1 M. & S. 201. As to the mode of pleading by the London Assurance and the Royal Exchange Assurance Companies, see Carr *v.* The Royal Exchange Assurance Corporation, 31 L. J. Q. B. 93; [1 B. & S. 956.]

1. *Non Assumpsit.*

Ante, 284.

2. *Non est Factum.*

Ante, 286.

3. *Denial of Plaintiff's Interest in the Goods when lost.* (*y*)

That the plaintiff (*z*) was not interested in the said goods [*or* "ship"] as alleged.

4. *Denial that the Goods were damaged or lost.* (*a*)

That the said cotton [*or* "ship"] was not [nor was any part thereof] damaged [*or* "lost"], as alleged.

(*y*) See 19 Geo. 2, c. 37, s. 1; *ante*, 158; Pim *v.* Reid, 6 M. & G. 1; Smith *v.* Reynolds, 1 H. & N. 221, and form of plea. Proof that the contract for the goods insured was verbal only and incapable of being enforced, establishes this plea. Stockdale *v.* Dunlop, 6 M. & W. 224.

(*z*) When a person who has assigned his interest after insurance may sue, Powles *v.* Innes, 11 M. & W. 10; as to loss before policy effected, Sutherland *v.* Pratt, 1 M. & W. 296.

(*a*) See Dawson *v.* Wrench, 3 Ex. 359.

5. *That the Damage was an Average Loss within the Usual Exception in the Policy.* (*b*)

That the supposed loss of the said goods was an average loss under three pounds per cent. within the meaning of the said policy, and not a general average loss, and the said ship during the said voyage was not stranded.

[5*a*. *Answer, denying Loss to be total.*

And the defendants come and say that they deny, upon information and belief, that said loss was actually total, and they deny that any abandonment was made.]

6. *Plea to a Declaration on an Insurance on a Ship; Denial that it was lost by the Perils of the Sea, &c.* (*c*)

Redman *v.* Wilson, 14 M. & W. 476.

7. *That the Plaintiff did not incur the Expenses alleged.* (*d*)

That the plaintiff did not, in suing, laboring, or travelling for, in, or about the recovery of the said goods, or in preventing or recovering the loss of the said freight, expend the said sum of money, or any part thereof, as alleged.

8. *That the Ship was not seaworthy.* (*e*)

That at the time of the commencement of the said risk (*f*) the said ship was unseaworthy.

(*b*) See Corcoran *v.* Gurney, 1 El. & Bl. 456; Stewart *v.* Steele, 4 M. & G. 669. Average loss on freight, Benson *v.* Chapman, 6 M. & G. 792.

(*c*) Negligence in loading, which produces unseaworthiness, rendering it necessary to run the vessel on shore to prevent her sinking, is a loss by perils of the sea, so as to render the insurers liable as for a total loss. Redman *v.* Wilson, 14 M. & W. 476.

(*d*) This plea applies where the policy contains a stipulation for the payment of these expenses, and the plaintiff declares for them. See Stewart *v.* Steele, 4 M. & G. 669.

(*e*) This must be pleaded specially. *Ante*, 158, Obs. See another form, Redman *v.* Wilson, 14 M. & W. 476. As to the law, see Abbott on Ship. by Serjt. Shee; Maude & Pollock on Ship. Unseaworthiness by overloading. Weir *v.* Aberdeen, 2 B. & Ald. 320; Gould *v.* Oliver, 2 M. & G. 213. In time policies there is not an implied warranty that the ship is seaworthy at the commencement of the risk. The above plea would therefore be no defence on such a policy. Small *v.* Gibson, 16 Q. B. 128; 4 H. of L. 353; Michael *v.* Tredwin, 17 C. B. 551; [Capen *v.* Washington Ins. Co. 12 Cush. 517; Hoxie *v.* Pacific Mut. Ins. Co. 7 Allen, 211, 217; Jones *v.* Insurance Co. 2 Wallace, jr. 278.] And this is so whether the ship at the commencement of the risk be at sea on her voyage, or be at the date of the policy in a port about to sail where there are means of making her seaworthy. Fawcus *v.* Sarsfield, 6 El. & Bl. 192. But if she sail on her first voyage after the policy in an unseaworthy condition, the underwriter is not liable for repairs necessary, not by the perils of the sea, but by the bad condition of the ship at the commencement of the risk. Ib. [It was held in a recent case in Massachusetts, that in a time policy on a vessel which at the commencement of the risk is in a foreign port, where full repairs may be made, there is an implied warranty of seaworthiness, both for port and in setting out therefrom. Hoxie *v.* Pacific Mut. Ins. Co. 7 Allen, 211. This case was argued with great learning and a full citation of authorities, and the opinion by Bigelow C. J. is able and exhaustive. But, in an earlier case, it was decided by the same court that there is no implied warranty of seaworthiness under a policy upon a vessel which is at sea at the inception of the risk. Capen *v.* Washington Ins. Co. 12 Cush. 517; Macy *v.* Mut. Mar. Ins. Co. 12 Gray, 497.] A plea that the plaintiff knowingly, &c. sent the ship to sea in an unseaworthy state is a good plea. See a form, Thomson *v.* Hopper, 6 El. & Bl. 172; 25 L.

(*f*) The implied warranty of seaworthiness refers to the commencement of the risk, except where pilots are necessary as part of the crew. Per Patteson J. Hollingsworth *v.* Brodrick, 7 Ad. & E. 40.

[8*a*. *Answer denying Seaworthiness.*

And the defendants come and say they deny, upon information and belief, that said vessel was seaworthy for the voyage in said policy mentioned, at the inception of said voyage.]

9. *Plea that the Ship improperly deviated.* (*g*)

That before the alleged loss the said ship was unnecessarily delayed in prosecuting the said voyage, and departed and deviated therefrom.

[9*a*. *Answer that Vessel was not proceeding on Voyage insured.*

And the defendants come [*&c.*], but deny, upon information and belief, that said vessel was lost while proceeding on the voyage in said policy described.]

10. *Plea that Material Facts were concealed at the Time of effecting the Insurance.* (*h*)

That a material fact known to the plaintiff, and not known to the defendant, was concealed from the defendant, and was not communicated to him by the plaintiff, namely, that the ship had been aground, and was in the port of —— requiring repairs.

11. *Plea of a Custom between the Insurance Broker and the Underwriters to settle the Loss by way of Discharge by the Defendant crediting the Broker with the Amount.* (*i*)

Stewart *v.* Aberdein, 4 M. & W. 226.

J. Q. B. 240; 26 L. J. Q. B. 18; 27 L. J. Q. B. 441; [Michael *v.* Gillespy, 2 C. B. N. S. 627.] The mere fact of goods being stowed on deck, is not sufficient of itself to exempt the underwriters; Milward *v.* Hibbert, 3 Q. B. 120; [1 Arnould (1st Am. ed.), 70; Lapham *v.* Atlas Ins. Co. 24 Pick. 1; Taunton Copper Co. *v.* Merchants' Ins. Co. 22 Pick. 108;] and they are liable for the wilful, but not barratrous, act of the master and crew in rendering the vessel unseaworthy during the voyage by throwing ballast overboard. Dixon *v.* Sadler, 5 M. & W. 405; S. C. 8 M. & W. 895. See, also, Redman *v.* Wilson, *supra*, and cases cited in that case. [Biccard *v.* Shepherd, 14 Moore P. C. 471, 493; Thompson *v.* Hopper, 6 El. & Bl. 172, 181; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 139; 1 Arnould Ins. (1st Am. ed.) 655, 656. The great leading principle of the English doctrine of seaworthiness is, that there is no implied warranty of seaworthiness except at the commencement of the risk. On this point the law of the American states is at variance with the English, and gives a wider extent to the implied warranty. The rule under the American decisions, is that the assured must not only have his vessel seaworthy at the commencement of the voyage, but must keep her so, as far as it depends on himself during the continuance thereof, and at the commencement of all its subsequent stages. See 1 Arnould Ins. (1st Am. ed.) 666; Paddock *v.* Franklin Ins. Co. 11 Pick. 227; Starbuck *v.* New Eng. Mar. Ins. Co. 19 Pick. 198; Cope *v.* New Eng. Mar. Ins. Co. 2 Met. 432, 439; 3 Kent, 288. This duty to keep the vessel seaworthy is not, however, a technical warranty. See Capen *v.* Washington Ins. Co. 12 Cush. 517, 540; Dabney *v.* New Eng. Mar. Ins. Co. 14 Allen, 300, 305.] A plea alleging unseaworthiness after the commencement of the risk and a neglect to repair, must also show knowledge and opportunity to repair. Hollingsworth *v.* Brodrick, 7 Ad. & E. 40. Seaworthiness is a relative term depending on the nature of the ship as well as of the voyage insured for. Burgess *v.* Wickham, 33 L. J. Q. B. 17; Bouillon *v.* Lupton, [15 C. B. N. S. 113; Lane *v.* Nixon, L. R. 1 C. P. 412.]

(*g*) This must be specially pleaded. *Ante*, 410, Obs. See form, &c. Lindsay *v.* Janson, 4 H. & N. 699; Hamilton *v.* Sheddon, 3 M. & W. 50, and a form of plea that the ship was employed on different purposes than those mentioned in the policy. Ib. As to the law, see Park Ins.; Marshall; Hughes, 180; Arnould. See Phillips *v.* Irvine, 7 M. & G. 325, as to when delay is equal to deviation.

(*h*) Forms, Russell *v.* Thornton, 4 H. & N. 788; 29 L. J. Ex. 9; 30 L. J. Ex. 69; [Ellis *v.* Lafone, 8 Ex. 546;] Elkin *v.* Janson, 13 M. & W. 655; [Bates *v.* Hewitt, L. R. 2 Q. B. 595.] See Mackintosh *v.* Marshall, 11 M. & W. 116. For law, 1 Arnould Ins. 584 *et seq.*

(*i*) See 1 Arnould Ins. 120; Sweeting *v.*

12. *Plea that the Voyage is illegal.*

Cunard *v.* Hyde, 27 L. J. Q. B. 408; 29 Ib. Q. B. 6; [El., Bl. & El. 670; Wilson *v.* Rankin, 6 B. & S. 208.]

13. *Plea of Cancellation of Time Policy.*

Baines *v.* Woodfall, 6 C. B. N. S. 657; 28 L. J. C. P. 338; [Xenos *v.* Wickham, 13 C. B. N. S. 381.]

14. *Plea that the Claim in the Policy sued on had been discharged by Payment of another Policy on the same Risk.*

Morgan *v.* Price, 4 Ex. 615; 19 L. J. Ex. 201; Bruce *v.* Jones, 33 L. J. Ex. 132.

15. *Plea of a Custom that Underwriters are not liable to General Average on Account of Jettison of Timber stowed on Deck.*

Miller *v.* Titherington, 30 L. J. Ex. 217; [6 H. & N. 278.]

16. *Plea that the Ship and Goods were lost by Perils from which they were warranted free.*

Powell *v.* Hyde, 5 El. & Bl. 607; 25 L. J. Q. B. 65.

II. FIRE POLICIES.

1. *General Issue.*

Ante, 410.

2. *Denial that the Goods were burnt.* (*k*)

That the said household goods, utensils [*&c.*], were not burnt or destroyed by fire, as alleged.

3. *That the Plaintiff would not produce Proofs of his Loss according to the Policy.* (*l*)

That the plaintiff did not, although he was, after the alleged loss, and before this suit, reasonably required by the said company so to do, in or by his books of accounts or other proper vouchers, make proof of his alleged loss and damage, according to the conditions of the said policy. [See "Replication," Form 10.]

4. *That the Plaintiff did not give Notice of the Loss.*

That the plaintiff did not forthwith give notice of the said loss to the defendants at their office [in Lombard Street], as alleged [*or* "according to the conditions of the said policy"].

Pearce, [7 C. B. N. S. 449; 9 Ib. 534;] 29 L. J. C. P. 265. See, also, Macfarlane *v.* Gianocopulo, 28 L. J. Ex. 72.

(*k*) *Ante*, 170. Form denying plaintiff's loss by the fire, London & North Western Ry. Co. *v.* Glynn, 1 El. & El. 652.

(*l*) See Worsley *v.* Wood, 6 T. R. 710. If by the conditions of the policy the plaintiff was to make proof of the loss without being required so to do, then of course the declaration must allege that he did so, and the plea should then traverse the fact. See Pim *v.* Reid, M. & G. 16.

5. *That the Plaintiff did not give in an Account of his Loss to the Office.*

That the plaintiff did not, as soon as possible after the said loss [*or* "within —— days"] deliver in as particular an account of his said loss or damage as the nature of the case did admit, as alleged [*or* "according to the conditions of the said policy"].

6. *Plea that the Defendants were induced to make the Policy by Fraud.*

That the defendants were induced to make the said policy by the fraud of the plaintiff.

7. *That there was Fraud in Plaintiff's Account of the Loss.*

That after the said fire, and before this suit, the plaintiff, with intent to defraud the defendants, and to cause them to pay him a larger sum than the loss sustained on occasion of the said fire, made and delivered in to the defendants a false and fraudulent account of the alleged loss and damage as and for such account as in the said conditions mentioned; in which said account he represented and stated that insured goods and property of him the plaintiff to the amount of £—— had been burnt and destroyed by the said fire; whereas the said loss and damage were of much less amount than the said amount of £——, as the plaintiff well knew.

8. *Plea of Alteration of Risk not communicated to the Defendants.* (*m*) Pim *v.* Reid, 6 M. & G. 1; 12 L. J. C. P. 299.

9. *That the Plaintiff made a False Affidavit of his Loss.*

That the plaintiff, to support his claim for the loss and damage in the declaration mentioned, went before S. T., Esquire, then being one of the justices of the peace of our lady the now queen, sitting at the public office in Worship Street, in the county of Middlesex, and then made an affidavit in support of the said claim for the said loss and damage; and that in the said affidavit so made by the plaintiff there was false swearing within the true intent and meaning of the tenth article of the printed proposals in the policy of insurance mentioned and referred to, that is to say, false swearing in this, to wit, that the plaintiff thereby then swore that the estimate or account annexed to the said affidavit contained, to the best of his knowledge and belief, a true and faithful account of the loss and damage sustained by him on his said household goods, utensils [*&c.*], and on his fixtures, stock, and utensils, and that all of

(*m*) See, also, Sillem *v.* Thornton, 3 El. & Bl. 868; Baxendale *v.* Harvey, 4 H. & N. 445, S. C.; Baxendale *v.* Harding, 28 L. J. Ex. 236; Stokes *v.* Cox, 1 H. & N. 533; 25 L. J. Ex. 291; 26 Ib. Ex. 113; Glen *v.* Lewis, 8 Ex. 607; [Williams *v.* New Eng. Mut. Fire Ins. Co. 31 Maine, 219; Houghton *v.* Manuf. Mut. Ins. Co. 8 Met. 114, 122; Crocker *v.* People's Mut. Fire Ins. Co. 8 Cush. 79; Jones Manuf. Co. *v.* Manufacturers' Mut. Fire Ins. Co. 8 Cush. 82. As to the effect of descriptive words in a policy, see Smith *v.* Mechanics' & Traders' Ins. Co. 32 N. Y. 399; Aurora Fire Ins. Co. *v.* Eddy, 55 Ill. 213; Blood *v.* Howard Ins. Co. 12 Cush. 472, 474; Joyce *v.* Marine Ins. Co. 45 Maine, 168; Gilliat *v.* Pawtucket M. Ins. Co. 8 R. I. 282; May *v.* Buckeye Mut. Ins. Co. 25 Wisc. 291, 306; Stokes *v.* Cox, 1 H. & N. 533; Luce *v.* Dorchester Mut. Fire Ins. Co. 105 Mass. 297; S. C. 110 Mass. 361.]

them were his own property and were in his premises, situate [*&c.*] aforesaid, when the said fire happened, and were burned, lost, or destroyed by the said fire; and that his real and just loss on the said household goods, utensils [*&c.*], occasioned by the said fire, amounted to the sum of £——; whereas the said estimate or account annexed to the said affidavit did not contain, to the best of his plaintiff's knowledge or belief, a true or faithful account of the said loss or damage, contrary to the tenth article of the said printed proposals.

10. *Replication to Form* 9, *Denial that the Affidavit was false.*

That in the said affidavit so made by the plaintiff there was not the said alleged false swearing within the true intent and meaning of the tenth article of the printed proposals in the declaration mentioned, as in the said —— plea alleged.

III. PLEAS, &c. IN ACTIONS ON POLICIES ON LIFE. (*n*)

1. *General Issue.*

Ante, 410.

2. *Denial of Plaintiff's Interest in the Life insured.* (*o*)

That the plaintiff was not, at the time of the making the policy [or before or at the time of the death of E. F.], interested (*p*) in the life of E. F., as alleged.

3. *Plea that the Declaration as to the Health of the Person whose Life was assured was false.* (*p*)

That the declaration in the said policy mentioned was untrue (*q*) in this,

(*n*) *Ante*, 172.

(*o*) Shilling *v.* Accidental Death Co. 2 H. & N. 42; 29 L. J. Ex. 266; 27 Ib. 16; *ante*, 174, note (*a*). The statute 14 Geo. 3, c. 48, s. 1, enacts "that no insurance shall be made on lives or any other event wherein the person for whose benefit the policy shall be made shall have no interest, and that every such assurance shall be void;" and by section 3, "that in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life or other event." In order to render a policy on the life of a third person valid within the meaning of this act, the party for whose benefit it is effected must have a *pecuniary* interest in the life or event insured; and therefore a policy effected by a father in his own name on the life of his son, he not having any pecuniary interest therein, is void. Halford *v.* Kymer, 10 B. & C. 724. But in Reed *v.* Key, Peake Add. Cases, 70, Lord Kenyon held that a wife might insure her husband's life. Insurance by a husband on his wife's life. Huckman *v.* Fernie, 3 M. & W. 505. Insurance by a creditor, see Dalby *v.* The India & London Life Assurance Co. 15 C. B. 365; overruling Godsall *v.* Boldero, 9 East, 72; 2 S. L. Cas. Where a person effects an assurance on the life of another, the above statute, permits him after the death to recover from the company so much of the sum insured and no more, as his interest in the life extended to at the time of effecting the policy, and it is no defence that the interest had ceased during life. Ib.; Law *v.* The London Indisputable Life Policy Co. 24 L. J. Ch. 196; and see Hebden *v.* West, 32 L. J. Q. B. 85; [3 B. & S. 579.]

(*p*) Form, Palmer *v.* Powell, 9 Bing. 320.

(*q*) This was pleaded in a case where the *policy contained an express stipulation* that the declaration as to health should be true; and when that is the case, the proof lies on plaintiff, and therefore he has the right to begin at the trial. Rawlins *v.* Desborough, 2 M. & R. 70; Jones *v.* Provincial Insurance Co. 3 C. B. N. S. 65; Foster *v.* The Mentor Life Assurance Co. 3 El. & Bl. 48; Geach *v.* Ingall, 14 M. & W. 95, *sed qu.*? Erle J. ruled otherwise at Lewes, July 15, 1856. The form of this plea will vary according to the terms of the policy, which should in each case be followed. For forms of like pleas, see Wood *v.* Dwarris, 11 Ex. 493; Wheelton *v.* Hardisty, 8 El. & Bl. 232; 26 L. J. Q. B. 265; 27 Ib. 241; Cazenove *v.* British Equitable Co. [6 C. B. N. S. 437;] 28 L. J. C. P. 259; Fowkes *v.* Manchester Assurance Association, [3 B. & S. 917;] 32 L. J. Q. B. 153.

that by the said declaration it was stated that the said T. B. at the time of the making of the same was in a sound and perfect state of body; whereas the said T. B. was not then in a sound and perfect state of body, but had been and then was predisposed to a disease tending to shorten life. (*r*)

4. *Equitable Replication to like Plea, that the Policy was effected upon the Faith of a Prospectus stating that Policies should be indisputable, except in case of Fraud.*

Wood *v.* Dwarris, 11 Ex. 493; Wheelton *v.* Hardisty, 8 El. & Bl. 232; and see *ante*, "Equitable Pleas," Obs. 373, and Form, 379.

5. *That the Declaration as to Health was not signed by the usual Medical Attendant of the Party.* (*s*)

That before the granting of the insurance and making of the policy the said company caused to be delivered to the plaintiff a document, being one of the documents mentioned and referred to in the said policy, containing divers matters therein, to be signed by the [usual (*t*)] medical attendant of the said T. B. before the said company would make the said policy [and the plaintiff then had notice that the said company required that the said document, the same being material in reference to the health of the said T. B., should be signed by his usual medical attendant (*t*)]; and thereupon the said document, with the matters therein contained, was afterwards delivered by the plaintiff to the said company, signed by one G. R. as and for the [usual] medical attendant of the said T. B., and being one of the documents in the said policy mentioned and referred to; and the defendant further says, that the said company and the defendant, confiding in the authenticity of the said document, and believing the same was signed by the [usual (*t*)] medical attendant of the said T. B. as aforesaid, the defendant made the said policy; whereas in truth and in fact at the time the said G. R. signed the said document and the matters therein contained as aforesaid, the said G. R. was not the [usual (*t*)] medical attendant of the said T. B. according to the true intent and meaning of the said policy [but a certain other person then living then had been and was his usual medical attendant (*t*)].

6. *Plea that a Material Fact, viz. a Pernicious Habit of the Person whose Life was insured, was not communicated to the Defendant.* (*u*)

That before and at the time of the making of the policy of insurance in the

(*r*) Another plea was "afflicted with a disease tending to shorten life;" and another "afflicted with symptoms of a disease tending to shorten life."

(*s*) See Everett *v.* Desborough, 5 Bing. 503; 3 M. & P. 190, S. C. Even where the office does not expressly require that the certificate as to health be signed by the *usual* medical attendant, the policy may be avoided by a wilful omission to refer to him and a reference to another medical person less acquainted with the state of health. Maynard *v.* Rhode, 1 C. & P. 360.

(*t*) The above plea was framed by an able pleader, and settled by counsel. It did not contain the words between the brackets.

(*u*) The concealment or even non-communication of a material fact known to the person assuring, or to the person whose life is insured, or the medical referee, will avoid the policy, though effected for the benefit of a third person not acquainted with the facts, &c. and though no fraud be intended, and the party knowing the fact were not aware that it was material. Morrison *v.* Muspratt, 4 Bing. 60; 12 Moore, 231; Von Lindenau *v.*

declaration mentioned, the said earl had been and was in the habit of swallowing and taking frequently and from time to time large and excessive doses of opium, laudanum, and other pernicious substances and drugs, having a material tendency to impair the health and shorten the life of the said earl, of all which the plaintiff, at the time of the making of the said policy, had full knowledge, (*x*) and which said habit was a fact material and necessary to be made known to the said company before the making of the said policy, in order to enable them rightly and adequately to estimate the risk to be by them incurred in the event of their making the said policy of insurance, and for their due security in that behalf; and the defendant further says that the plaintiffs did not communicate to the said company the said last mentioned fact, but the said company, at the time of the making of the said policy, were wholly ignorant of the same.

7. *That a Material Fact, viz. a known Malady, was not communicated.* (*y*)

That at the time of making of the said policy, the said earl had been and was subject to and also frequently and from time to time afflicted with a certain disorder or malady, that is to say, rheumatism, as he well knew, which was a fact material and necessary to be made known to the said company before the making of the said policy, to enable them rightly and adequately to estimate the risk to be by them incurred in the event of their making the said policy of insurance, and for their due security in that behalf; and the defendant further says, that the plaintiff neglected and omitted to inform the defendants of such fact, and the same was not at any time before the making of the said policy of insurance in any manner communicated to the said company, but the said company were, at the time of the said policy, wholly ignorant of the same.

8. *That the Policy was obtained by Fraud.* (*z*)

That they were induced to make and enter into the said policy by the fraud of the plaintiff.

9. *Plea that Plaintiff departed beyond Europe, contrary to the Terms of the Policy.*

Reis *v.* The Scottish Equitable Life Assurance Co. 2 H. & N. 19; 26 L. J. Ex. 279.

10. *Plea that he died by his own Hand.* (*a*)

Moore *v.* Woolsey, 4 El. & Bl. 243; 24 L. J. Q. B. 40.

Desborough, 8 B. & C. 586; 3 C. & P. 350, S. C.; Everett *v.* Desborough, 5 Bing. 503; 3 M. & P. 190; Williams *v.* Duckett, cited 6 C. & P. 3; Rawlins *v.* Desborough, 2 Mood. & Rob. 328. Non-communication by a party of his former insanity. Swete *v.* Fairlie, 6 C. & P. 1. Intemperate habits. Craig *v.* Fenn, 1 Car. & M. 43; Southcombe *v.* Merriman, 1 Car. & M. 286. Meaning of clause in a policy rendering it void if the assured should "die by his own hands." Borradaile *v.* Hunter, 5 M. & G. 639; [*ante*, 173, note (*z*¹).]

(*x*) As to this allegation, see Huckman *v.* Fernie, 3 M. & W. 507.

(*y*) See Geach *v.* Ingall, 14 M. & W. 95. [Particulars must be given. Marshall *v.* The Emperor Life &c. L. R. 1 Q. B. 35.]

(*z*) See Wheelton *v.* Hardisty, 8 El. & Bl. 232; 26 L. J. Q. B. 265; 27 Ib. 241.

(*a*) Form, Borradaile *v.* Hunter, 5 M. & G. 639. See, also, as to the effect of suicide, Dufaur *v.* The Professional Life Assurance Co. 27 L. J. Ch. 817; [25 Beav. 599;] Jones *v.* The Consolidated Investment & Assurance Co. 28 L. J. Ch. 66; [26 Beav. 256;]

JUDGMENT (ACTION ON). (*b*)

1. *Plea of Nul Tiel Record.*

That there is not any record of the said supposed judgment remaining in the said court here [*or* "the said court of ——"].

2. *Replication that there is a Record of the Judgment where it was recovered in the same Court.* (*c*)

That there is such a record of the said judgment remaining in the said court here as the plaintiff has above alleged, and he prays that the said record may be seen and inspected by the court here. But because the court here are not yet advised what judgment to give in the premises, a day is therefore given to the parties aforesaid here until —— to hear judgment thereon. (*d*)

3. *Replication that there is a Record of the Judgment where it was recovered in another Court.*

That there is such a record of the said judgment remaining in the said court of ——, as the plaintiff has above alleged, and he prays that the said record may be seen and inspected by the court here; and because the plaintiff has not the said record now here in court, it is commanded that he have the same here on ——, the —— day of ——, and that he fail not at his peril. The same day is given to the defendant at the same place.

4. *Plea that the Judgment was satisfied by the Plaintiff taking the Defendant in Execution on a Ca. Sa. issued thereon.* (*e*)

That after the recovery of the said judgment, and before this suit, the plain-

Horn *v.* The Anglo-Australian &c. Life Assurance Co. 30 L. J. Ch. 511. See, also, Jackson *v.* Forster, 28 L. J. Q. B. 166; 29 L. J. Q. B. 8, as to the effect of an assignment of the policy. [As to the effect of suicide, see *ante*, 173, note (z^2).]

(*b*) *Ante*, Obs. 176. Payment may be pleaded. 4 Anne, c. 16, s. 12. Accord and satisfaction cannot be pleaded. Drake *v.* Mitchell, 3 East, 251. See, further, Com. Dig. Pleader, 2 W. 13. A release may be pleaded. Barker *v.* Quintin, 12 M. & W. 441. Where the judgment is irregular, or there are facts upon which the judgment would be set aside, the course is to apply to set it aside. No facts can be pleaded which might have been pleaded to the original action — nor can matter which is ground of error. Com. Dig. Pleader, 2 W. 39; Vin. Abr. tit. Debt, X. pl. 3; Dick *v.* Tolhausen, 4 H. & N. 695. "Never indebted" would be a bad plea, except to an action on a foreign or Irish judgment, or judgment here not of record. [1 Chitty Pl. 510, note (*b*).] What a variance in setting out the judgment; Cocks *v.* Brewer, 11 M. & W. 51; but it is no variance, if the judgment were by default on a judge's order, and the debt thereby made payable by instalments. Hopkins *v.* Francis, 13 M. & W. 668; 2 D. & L. 382. A variance between the actual date and that assigned to it under a *videlicet* in the declaration, is immaterial; Wright *v.* Egan, C. P. May 7, 1846; and when there appears a variance between the sum recovered, or the date of the judgment as stated in the declaration, and on the record an amendment will be allowed. Noble *v.* Chapman, 14 C. B. 400; Hunter *v.* Emmanuel, 15 C. B. 400.

(*c*) On an issue of *nul tiel record* the fact of its existence must be tried by the court and not by a jury, and on the trial the record itself must be produced. But a party may take issue upon a plea, involving matters of fact as well as of record. Chitty's Forms, 9th ed. 463; Boyce *v.* Webb, 15 Q. B. 84.

(*d*) When the plaintiff replies to a plea of *nul tiel record* he concludes his replication as above, and the pleadings are completed. The plaintiff may then make up and deliver his issue, and with it a notice that he will produce the record on the day named in the replication. Forty-eight hours' notice is sufficient. Hopkins *v.* Doggett, 1 L., M. & P. 541; 19 L. J. Q. B. 417. A notice on Saturday for Monday is good; Maguire *v.* Kincaid, 21 L. J. Ex. 264; and see 1 Chit. Prac. 11th ed. 925, and Chit. Forms, 9th ed. 464, as to the form of notice, proceedings, &c.

(*e*) For forms, see Collins *v.* Beaumont, 10 Ad. & E. 225; McCormick *v.* Melton, 1 Cr.,

tiff, for obtaining satisfaction thereof, sued and prosecuted out of the said court of —— a writ of *capias ad satisfaciendum* against the defendant, directed to the sheriff, by which said writ our lady the queen commanded the said sheriff that he should take the defendant, if he should be found in his bailiwick, and him safely keep, so that the said sheriff should have his body before our said lady the queen (*or in the common pleas* before the justices of our said lady the queen, *or in the exchequer* before the barons of the exchequer of our said lady the queen) at Westminster, immediately after the execution of the said writ to satisfy the plaintiff, the damages and costs, and charges so recovered, by virtue of which said writ the said sheriff afterwards, and before this suit, took and arrested the defendant by his body, and kept and detained him in custody, and in execution under and by virtue of the said writ.

5. *Replication that the Ca. Sa. was irregular, wherefore the Defendant was discharged out of Custody by a Judge's Order.* (*f*)

That afterwards, and whilst the defendant was kept and detained in custody, and in execution under and by virtue of the said writ of *capias ad satisfaciendum*, the defendant applied to and obtained an order of the honorable ——, whereby it was ordered that the defendant should be discharged out of the custody of the said sheriff as to the said action, for an irregularity; and the defendant was in pursuance of the said order discharged out of the custody aforesaid, for an irregularity, and for no other cause whatever.

JUDGMENT (ACTION ON FOREIGN).

Obs. — See *ante*, Obs. 176. A foreign judgment on the merits is conclusive, and therefore the defendant cannot plead to an action on such judgment here matter which he might have pleaded in the foreign courts. Henderson *v.* Henderson, 6 Q. B. 288; 13 L. J. Q. B. 274; Bank of Australasia *v.* Nias, 16 Q. B. 217; 20 L. J. Q. B. 284; Bank of Australasia *v.* Harding, 19 L. J. C. P. 345; [9 C. B. 661;] Castrique *v.* Imrie, 8 C. B. N. S. 405; [L. R. 4 H. L. 414;] Munroe *v.* Pilkington, 31 L. J. Q. B. 81, 89; [2 B. & S. 11;] Castrique *v.* Behrens, 30 L. J. Q. B. 163, 168; [2 El. & El. 709;] Vanquelin *v.* Bouard, 33 L. J. C. P. 78; [Kelsall *v.* Marshall, 1 C. B. N. S. 241; Ricardo *v.* Garcias, 12 Cl. & Fin. 368; Houlditch *v.* Donegall, 2 Cl. & Fin.

M. & R. 525; National Assurance Association *v.* Best, 2 H. & N. 695. The effect of taking the debtor in execution is to bar all other remedies against him, but it is not an absolute extinguishment of the debt. Thompson *v.* Parish, 5 C. B. N. S. 685; Taylor *v.* Waters, 5 M. & S. 104; Foster *v.* Jackson, Hob. 59. If the creditor voluntarily discharge the debtor out of custody, the debt is wholly extinguished, and the debtor cannot be re-arrested, although he may agree that he may be so. Cattlin *v.* Kernot, 3 C. B. N. S. 796. Debts due to the debtor cannot be attached after he has been taken in execution. Jauralde *v.* Parker, 30 L. J. Ex. 237, where see form of plea. After arrest the judgment cannot be set off in an action brought by the debtor. Taylor *v.* Waters, *ubi sup.* By 1 & 2 Vict. c. 110, s. 16, if a judgment creditor take the person of his debtor in execution, he relinquishes the benefit of his securities. If the defendant die, escape, or be rescued, the judgment is not satisfied. After an arrest and discharge, on the ground of privilege, the debtor may be re-arrested. Barrack *v.* Newton, 1 Q. B. 533; Towers *v.* Newton, Ib. 319; Baker *v.* Ridgway, 9 Mod. 122; 2 Bing. 41. An arrest on a *ca. sa.* afterwards set aside for irregularity, does not discharge the judgment. Merchant *v.* Franks, 3 Q. B. 1; Atkins *v.* Beaumont, 10 Ad. & E. 225; McCormick *v.* Melton, 3 Dowl. 215; 1 Cr., M. & R. 525. So, if the discharge be procured by fraud. Baker *v.* Ridgway, *ubi sup.*; Cattlin *v.* Kernot, *ubi sup.* [Composition deed. Braun *v.* Weller, L. R. 2 Ex. 183.]

(*f*) See last note. See forms, McCormick *v.* Melton, 1 Cr., M. & R. 525; Collins *v.* Beaumont, 10 Ad. & E. 225; Rankin *v.* De Medina, 1 C. B. 183; 2 D. & L. 813.

Obs. 470, note (2) and cases cited; De Cosse Brissac *v.* Rathbone, 6 H. & N. 301; Appleton C. J. in Rankin *v.* Goddard, 54 Maine, 28, 33; Reimers *v.* Druce, 23 Beav. 150; Cammell *v.* Sewell. 3 H. & N. 617; 5 H. & N. 728; Simpson *v.* Fogo, 29 L. J. Ch. 657; S. C. 1 J. & H. 18; 1 H. & M. 195; Monroe *v.* Douglas, 4 Sandf. Ch. 126; Cummings *v.* Banks, 2 Barb. 602; Lazier *v.* Westcott, 20 N. Y. 146; Scott *v.* Pilkinton, 2 B. & S. 11; Barrow *v.* West, 23 Pick. 270; Norwood *v.* Cobb, 20 Texas, 456; Gleason *v.* Dodd, 4 Met. 336; Middlesex Bank *v.* Butman, 29 Maine, 19; Taylor *v.* Barron, 30 N. H. 78.] And it is no answer to plead that the defendant became a party to it merely to prevent his property being seized, and that the judgment is erroneous in fact and in law on the merits, or that the enforcement of the judgment in England is contrary to natural justice, on the ground that the defendant has discovered fresh evidence, showing that the judgment is erroneous in fact and law on the merits, or that evidence was improperly admitted. De Cosse Brissac *v.* Rathbone, 6 H. & N. 301. Want of jurisdiction, or that the defendant was never served with process, or that the judgment was fraudulently obtained, [Bowles *v.* Orr, 1 Y. & C. 464.] may be shown; Bank of Australasia *v.* Nias, *ubi sup.*; *sed vide* Castrique *v.* Behrens, *ubi sup.*; [Bischoff *v.* Wethered, 9 Wallace, 812; Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; Gleason *v.* Dodd, 4 Met. 333; Starbuck *v.* Murray, 5 Wend. 158; Hall *v.* Williams, 6 Pick. 232; Aldrich *v.* Kenney, 4 Conn. 380, and other cases cited in 2 Chitty Contr. (11th Am. ed.) 1177, note (*b*); Dobson *v.* Pearce, 2 Kernan, 156; Shedden *v.* Patrick, 1 McQ. 535; Appleton C. J. in Rankin *v.* Goddard, 54 Maine, 28, 33; Houlditch *v.* Donegall, 2 Cl. & Fin. 470, note (2); Romilly M. R. in Reimers *v.* Druce, 26 L. J. Ch. 198;] or that the judgment was not a final judgment. Emerson *v.* Lashley, 2 H. Bl. 648; Fry *v.* Malcolm, 4 Taunt. 705; Patrick *v.* Shedden, 2 El. & Bl. 14. Error appearing on the face of the judgment itself may be an answer. Novelli *v.* Rossi, 2 B. & Ad. 757; Reimers *v.* Druce, 23 Beav. 150; Munroe *v.* Pilkington, *ubi sup.* [But it has recently been held otherwise, in the case of a foreign judgment *in personam*. Godard *v.* Gray, L. R. 6 Q. B. 139.] And see other grounds, *ante*, Obs. 176. The pendency of an appeal in the foreign court is no answer, although it might afford ground for staying proceedings on terms; Munroe *v.* Pilkington, *ubi sup.*; and at chambers proceedings have been stayed on security for the amount of the judgment being given. [As to the conclusive effect of a foreign judgment *in rem*, see Castrique *v.* Imrie, L. R. 4 H. L. 414, 448; 2 Chitty Contr. (11th Am. ed.) 1178, 1179; Simpson *v.* Fogo, 32 L. J. Ch. 249, 257.]

1. *Never Indebted.* (*g*)

Ante, 284.

2. *Plea to an Action on an Irish Judgment, that Defendant was not served with or had Notice of Process, and did not appear.*

Ferguson *v.* Mahon, 11 Ad. & E. 179; Sheehy *v.* Professional Assurance Co. 2 C. B. N. S. 211; 3 Ib. 597; 26 L. J. C. P. 301; 27 Ib. 233.

3. *Like Plea to an Action on a Scotch Decree.*

Cowan *v.* Braidwood, 1 M. & G. 882; 9 Dowl. 26.

4. *Like Plea to an Action on a Foreign Judgment.*

Reynolds *v.* Fenton, 3 C. B. 187; Ricardo *v.* Garcias, 12 Cl. & Fin. 338; Vallee *v.* Dumergue, 4 Ex. 200; Meeus *v.* Thellusson, 8 Ex. 638; Vanquelin *v.* Bouard, 33 L. J. C. P. 78; [15 C. B. N. S. 341.]

(*g*) *Nul tiel record* is a bad plea to an action on a foreign judgment; Walker *v.* Witter, 1 Dougl. 1; Philpott *v.* Adams, 31 L. J. Ex. 421; and cannot be supported as a traverse of a material allegation in the declaration.

5. *Like Plea to an Action on a Judgment of a Colonial Court.*

Bank of Australasia *v.* Nias, 16 Q. B. 717; 20 L. J. Q. B. 284.

6. *Plea to an Action on a Scotch Decree, that it was not final.*

Patrick *v.* Shedden, 2 El. & Bl. 14.

JUDGMENT RECOVERED.

Obs. — By a judgment recovered against the *defendant* the cause of action *transit in rem judicatam*, and is merged in the judgment, and the judgment, may be pleaded in bar. [Higgen's case, 6 Co. 45 *b*; King *v.* Hoare, 13 M. & W. 494, 504; Smith *v.* Nicolls, 5 Bing. N. C. 208, 220.] The judgment must be for the same identical cause of action, but it will be taken against the plaintiff that he recovered all he could recover on the record in the former action. Todd *v.* Stewart, 9 Q. B. 759; Lord Bagot *v.* Williams, 3 B. & C. 235; Hadley *v.* Green, 2 Cl. & Fin. 374; [Phillips *v.* Berick, 16 John. 137; Secor *v.* Sturgis, 16 N. Y. 548.] The former judgment is no defence if it be shown to have related to a different breach of the same contract; Bristowe *v.* Fairclough, 1 M. & G. 143; Thornton *v.* Jenyns, 1 M. & G. 143; Florence *v.* Jenings, 1 C. B. N. S. 584; [Butler *v.* Wright, 2 Wend. 369; S. C. 6 Wend. 284;] nor if the plaintiff failed in the former action, because it was prematurely brought. Palmer *v.* Temple, 9 Ad. & E. 379. A judgment not followed by satisfaction by an indorsee of a bill against an acceptor is no defence to an action by the drawer who has taken up the bill; Tarleton *v.* Atkinson, 2 Ad. & E. 32; and a plea of judgment recovered on account of a promissory note given for and on account of the debt was held a bad plea to an action for the debt. If the causes of action in the two suits are identical, a judgment recovered is a defence although the *forms* of action may be different. Slade's case, 4 Co. 946; Com. Dig. Action, K. 3; Thrustout *v.* Crafter, 2 Bl. 827; Phillips *v.* Berryman, 3 Dougl. 286; Buckland *v.* Johnson, 15 C. B. 145; Routledge *v.* Hislop, 29 L. J. M. C. 90; [2 El. & El. 549; King *v.* Chace, 15 N. H. 9; Doty *v.* Brown, 4 Comst. 71; Agnew *v.* McElroy, 10 Sm. & M. 552; Young *v.* Black, 7 Cranch, 565; Pinney *v.* Barnes, 17 Conn. 420.] And as to what claims a judgment covers, and as to the plea generally, see The Duchess of Kingston's case, 2 Smith L. C. 5th ed. 642; 1 Saund. 92, note (1); [Chitty Contr. (11th Am. ed.) 1171 *et seq.* and notes.] As to effect of evidence in former action, Stafford *v.* Clarke, 2 Bing. 382.

Judgment recovered in a county court is a good plea in bar; Austin *v.* Mills, 9 Ex. 288; and where the plaintiff in order to proceed to the county court has abandoned a part of his claim, the judgment recovered will be a good bar to any action for the abandoned part. Vines *v.* Arnold, 8 C. B. 632. [See Merrick *v.* Dawson, 2 Harring. (Del.) 50. So, where a creditor has chosen to compel payment of part of a single and entire demand, it operates as an extinguishment of the balance. 2 Chitty Contr. (11th Am. ed.) 1172, and note (*c*[1]).] Proceedings *in rem* in the admiralty are no bar to proceedings in the common law courts. Nelson *v.* Couch, 33 L. J. C. P. 46; [15 C. B. N. S. 99.]

A *foreign judgment* recovered against the *defendant* is no bar, for being considered here a simple contract debt only, it does not operate as a merger of the original cause of action. Hall *v.* Odber, 11 East, 124; Smith *v.* Nicolls, 5 Bing. N. C. 208; Bank of Australasia *v.* Harding, 9 C. B. 661; Bank of Australasia *v.* Nias, 16 Q. B. 717; [Lyman *v.* Brown, 2 Curtis, 559.] But followed by satisfaction of the judgment it is an answer. Barber *v.* Lamb, 8 C. B. N. S. 95.

A judgment recovered against the *plaintiff* must be pleaded by way of estoppel. See *ante*, "Estoppel." And a judgment against the *plaintiff* in a foreign court is a good plea by way of estoppel, if the judgment is final and conclusive between the parties by the foreign law, and this should appear by the plea.

Obs. Plummer *v.* Woodburne, 4 B. & C. 625; General Steam Navigation Co. *v.* Guillou, 11 M. & W. 87; Ricardo *v.* Garcias, 12 Cl. & Fin. 368; Frayes *v.* Worms, 10 C. B. N. S. 149; see "Estoppel," *ante*, 379. [See Brown *v.* Lexington & Danville R. R. Co. 2 Beasley (N. J.), 191; Low *v.* Mussey, 41 Vt. 393; Christmas *v.* Russell, 5 Wallace, 290; Dobson *v.* Pearce, 2 Kernan, 156. But in pleading a foreign judgment it is not necessary to set forth the proceeding and judgment at length. Ricardo *v.* Garcias, 12 Cl. & Fin. 368.]

By the Pr. Rules of H. T. 1853, r. 10, "Where a defendant shall plead a plea of judgment recovered, he shall, in the margin of such plea, state the date of such judgment; and if such judgment shall be in a court of record, the *number* of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea."

This rule does not apply to the case of a plea by an executor that another creditor has recovered judgment against him, &c.; or that the debt had been recovered as a set-off in a former action. Indeed, its only object was to prevent the common sham plea of judgment recovered for the same demand. Brokenshir *v.* Monger, 9 M. & W. 112. If it appear from comparing the marginal notes with the declaration, that the judgment *could not* apply to the causes of action, the plea will be bad on the general demurrer. Few *v* Backhouse, 8 Ad. & E. 789. The marginal note may be thus: "The judgment mentioned in this plea was signed on the —— day of ——, A. D. ——. The number of the roll is ——."

1. *Plea of Judgment recovered for the Debt.*

That the plaintiff heretofore on the —— day of ——, A. D. ——, in the *marginal note, ante*, Obs. court of Q. B. [*or* "C. P." *or* "exchequer of pleas"] at Westminster, impleaded the defendant in an action for the same identical debt [*or* "cause of action"] (*h*) in the declaration mentioned, and such proceedings were thereupon had in the said action, that afterwards, and before the commencement of this suit, the plaintiff, by the consideration and judgment of the said court, recovered (*i*) in the said action against the defendant £—— for his damages and his costs of suit in that behalf; which said judgment is in full force unreversed and unsatisfied.

[1*a*. *Answer of Judgment recovered.*

And the defendant comes and says, that at the supreme judicial court, held [*&c.*], the plaintiff recovered judgment against the defendant for —— dollars and —— cents damages, and —— for costs, and that said judgment was rendered upon the same cause of action mentioned in the plaintiff's declaration.]

2. *Plea of Judgment recovered by the Assignees of a Bankrupt.*

Biggs *v.* Cox, 4 B. & C. 920.

3. *Plea that in a Former Action Defendant paid a Sum into Court with Costs in Satisfaction.*

Power *v.* Butcher, 10 B. & C. 329.

(*h*) The averment of identity between the two causes of action must be distinct. Todd *v.* Stewart, 9 Q. B. 759.

(*i*) No variance, if the judgment were by default on a judge's order, and the debt thereby made payable by instalments. Hopkins *v.* Francis, 13 M. & W. 668; S. C. 2 D. & L. 382.

4. *Plea that the Debt was due from the Defendant and A. B., and Judgment recovered against A. B.*

King *v.* Hoare, 13 M. & W. 494; S. C. 2 D. & L. 382. (*k*)

5. *Plea of Judgment recovered in a County Court.*

The judgment was entered on the —— day of ——A. D.——; the number of the plaint is ——. (*l*)

That the plaintiff heretofore in the county court of ——, holden at ——, entered his plaint against the defendant for the same identical debt [*or* "cause of action"] as in the declaration mentioned, the same being a debt [*or* "cause of action"] in which the said county court had jurisdiction, and such proceedings were thereupon there had, that it was adjudged by the said court that the plaintiff should recover against the defendant £—— for the said debt and his costs of suit in that behalf; which said judgment is in full force and unsatisfied.

6. *Replication of Nul Tiel Record to Plea of Judgment recovered in the same Court.* (*m*)

Obs. — This is the proper replication where the judgment has been set aside. Nash *v.* Swinburne, 3 M. & G. 855. When the plaintiff thus replies he should give the plaintiff a four days' notice, requiring him to produce the record, otherwise judgment, see R. H. T. 1853, r. 38, which provides that "on a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment." The notice may be thus:

In the ——.

A. B. *v.* C. D.

Take notice that you are required on the —— day of —— A. D. —— to produce the record pleaded by you herein, otherwise judgment will be entered for the plaintiff. Dated this —— day of ——,

To Mr. E. F.
Defendant's attorney [*or* "agent."]

Yours, &c.
G. H.
Plaintiff's attorney [*or* "agent."]

That there is not any record of the said supposed recovery in the said plea mentioned remaining in the said court here, as the defendant has above

(*k*) The 11th section of the mercantile law amendment act, 1856, prevents a judgment recovered against one co-contractor operating to discharge another when the latter is beyond seas, and provides that a person "shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or her return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

(*l*) This is required by r. 10, H. T. 1853, see *supra*, Obs., the county court being a court of record. 9 & 10 Vict. c. 95, s. 3. And see No. 45 of the county court forms. S. 89 of the 9 & 10 Vict. c. 95, provides that every judgment of the county court shall be final and conclusive, subject to the power of the judge to nonsuit or to order a new trial.

(*m*) Practice, &c. hereon and on next replication. 2 Arch. by Chit. 11th ed. 824; Hopkins *v.* Francis, 13 M. & W. 494; S. C. 2 D. & L. 382. Forms, &c. Chit. Forms, 9th ed. 463, 464. See forms of replication denying that the causes of action are the same, Todd *v.* Stewart, 9 Q. B. 759; Gordon *v.* Whitehouse, 18 C. B. 747; Florence *v.* Jennings, 1 C. B. N. S. 584; though according to Parke B. in King *v.* Hoare, 13 M. & W. 494, the plaintiff should in such case new assign, and see Palmer *v.* Temple, 9 Ad. & E. 379.

alleged; and because the court here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid here until —— to hear judgment thereon, for that the said court here are not yet advised thereof [*&c.*].

7. *Replication of Nul Tiel Record to Plea of Judgment recovered in Another Court.* (*n*)

Commencement, ante, 20, 21.] That there is not any record of the said supposed recovery in the said plea mentioned remaining in the said court of ——, as the defendant has above alleged; and hereupon the defendant is commanded that he have the said record here on ——, and that he fail not at his peril; the same day is given to the plaintiff at the same place.

8. *New Assignment to a Plea of Judgment recovered.* (*o*)

That he sues not [*or* not only *as the case requires*] for the debt [*or* "causes of action"] in the said plea mentioned; but [*or* but also] for debts [*or* "causes of action"] other than those in respect whereof the said judgment was recovered.

LANDLORD AND TENANT.

OBS. — Declarations and law, *ante*, 179. The general issue to the common count is *nunquam indebitatus*, *ante*, 281–284. It denies the tenancy and the amount of rent due. Beech *v.* White, 12 Ad. & E. 668. An eviction; Prentice *v.* Elliott, 5 M. & W. 606; Selby *v.* Browne, 14 L. J. Q. B. 307; Upton *v.* Townend, 17 C. B. 30; a surrender; Dodd *v.* Acklon, 6 M. & G. 672; Washington *v.* Harthan, 6 Jur. 127; or that the defendant quitted because the premises became uninhabitable; Smith *v.* Marrable, 11 M. & W. 5; Sutton *v.* Temple, 12 M. & W. 64; and see Hart *v.* Windsor, 12 M. & W. 68, [but see Royce *v.* Guggenheim, 106 Mass. 202, 203 and cases cited; De Witt *v.* Pierson, 112 Mass. 8; *ante*, 183;] may be shown under it. So, also, the defendant may show the existence of a lease under seal, although if the tenancy were created by contract not under seal the common count for use and occupation would be sufficient. Gibson *v.* Kirk, 1 Q. B. 850. So, the defence that *before* the rent became due a mortgagee of the plaintiff gave the defendant notice to pay the rent due *after* the notice to him is admissible under the general issue, because such defence amounts to a *denial* of the use and occupation by the permission of the plaintiff; Waddilove *v.* Barnett, 2 Bing. N. C. 538; Pope *v.* Biggs, 9 B. & C. 245; see, also, Doe *v.* Bucknell, 8 C. & P. 566; but the mortgagee's claim must be pleaded specially as to arrears of rent which accrued due *before* he gave the defendant notice, because in this case the plaintiff's right of action had *vested*, and the defence is matter in confession and avoidance. Waddilove *v.* Barnett, 2 Bing. N. C. 538; see Evans *v.* Elliott, 5 Ad. & E. 142; Partington *v.* Woodcock, 6 Ad. & E. 690; Johnson *v.* Jones, 9 Ad. & E. 809. So, a defence that the defendant had paid the rent to a person who had recovered in ejectment, and had given him notice to pay the rent to him under a threat of turning him out must be specially pleaded. Newport *v.* Harley, 2 D. & L. 921; 14 L. J. Q. B. 242; Johnson *v.* Jones, 9 B. & C. 809. But the assignee of a mortgagor who has let a tenant into possession after the mortgage, can sue such tenant for use and occupation, notwithstanding notice from the mortgagee to pay rent. Hickman *v.* Machin, 4 H. & N. 716; Wilton *v.* Dunn, 17 Q. B. 294; and see Emery *v.* Bartlett, 4 C. B. N. S. 423.

(*n*) See last note.

(*o*) This seems to be the proper course to adopt when the identity of the causes of action is disputed, not the existence of the judgment, see note (*m*), *ante*, 423.

OBS. If the action is brought upon an instrument under seal, the general issue is *non est factum*, *ante*, 285, 286. If the action is brought on a special agreement not under seal, the general issue varies according to the facts, and consists generally in a mere traverse.

1. *General Issue to Indebitatus Count for Use and Occupation.*

He never was indebted, as alleged, *ante*, Obs.

2. *Denial of Demise by Deed.*

Non est factum, *ante*, Obs.

3. *Denial of Demise not by Deed.*

That the plaintiff did not let [*or* "demise"] the said —— to the defendant upon the terms (*p*) alleged. (*q*)

4. *Denial of Tenancy, not being by Lease under Seal.*

That he was not tenant to the plaintiff of the said —— upon the terms (*p*) alleged.

5. *Denial that the Rent was due.*

That the said rent had not, nor had any part thereof, become due at the commencement of this suit.

6. *Plea of Payment of Rent.* (*r*)

7. *Plea that the Rent was satisfied by a Distress.* (*s*)

Aldridge *v.* Howard, 4 M. & G. 921.

8. *Plea that the Demise was subordinate to the Grant of an Easement, and was not under Seal.*

Bird *v.* Higginson, 2 Ad. & E. 696; 6 Ad. & E. 824. (*t*)

(*p*) It is important to include the "terms" in the traverse, otherwise the fact of the *tenancy* only would be in issue. Halifax *v.* Chambers, 4 M. & W. 662; S. C. 7 Dowl. 343; and see Beech *v.* White, 12 Ad. & E. 670; and see Carter *v.* James, Q. B. cited in 13 M. & W. 137; S. C. 2 D. & L. 236.

(*q*) According to the form of the declaration. See a form of plea, that the lessor did not execute the lease sued on, Swatman *v.* Ambler, 8 Ex. 72; 22 L. J. Ex. 81; Pitman *v.* Woodbury, 3 Ex. 13. If a lease, containing a covenant to repair be executed by the lessee, but not by the lessor, the former is not bound by the covenant, even though he had enjoyed the premises for a time equal to the term in the lease. Pitman *v.* Woodbury, *supra*. The plea in the text would be applicable to a declaration in which the demise was alleged as an *executory* consideration for the defendant's promise. Where the tenancy is alleged as an *executed* consideration, the tenancy on the terms alleged would seem to be denied by the general issue. See several forms of traverses in an action by a tenant against his landlord for breach of the custom of the country on his leaving the farm, Hutton *v.* Warren, 1 M. & W. 466; and see a form in case denying *the tenancy*, Bacon *v.* Smith, 1 Q. B. 346.

(*r*) See *post*, "Payment."

(*s*) The plea must show that the rent was satisfied. Lear *v.* Edmonds, 1 B. & Ald. 157.

(*t*) The declaration was in contract on a written agreement, not under seal, to let a messuage together with a right to shoot, sport, &c. over a manor, at an entire rent, the plaintiff declared specially, but the defendant entered, &c. but did not pay the rent; the court held that the grant being a part of an incorporeal hereditament should have been under seal, and that as no occupation was alleged no rent could be recovered on it. See Mayor, &c. of Carmarthen *v.* Lewis, 6 C. & P. 608. It may be questionable, however, whether the plea is not an argumentative traverse of the demise. See Johnson *v.* Hodgson, 2 M. & W. 657; per Lord Abinger.

9. *Plea to a Special Declaration by a Landlord against his Tenant for Rent, an executed Agreement that the Defendant should give up Possession of the Premises and Plaintiff abandon the Rent.*

Gore *v.* Wright, 8 Ad. & E. 118. (*u*)

10. *To the like; Plea of Surrender by operation of Law.* (*x*)

That before the said rent became due, it was agreed between the plaintiff and the defendant that the said term and tenancy should be put an end to, and in pursuance of such agreement the defendant gave up to the plaintiff, and the plaintiff took possession of the said demised premises.

11. *To the like; Plea that before the Rent became due, Plaintiff entered and resumed Possession of the Premises, by reason of the Defendant having committed a Breach of the Agreement for the Demise, involving a Forfeiture.*

Oldershaw *v.* Holt, 12 Ad. & E. 592; and see Franklin *v.* Carter, 1 C. B. 750; 14 L. J. C. P. 241.

12. *To the like; Plea of Discharge under Title paramount in Assignee of Plaintiff, an Insolvent Debtor.*

Partington *v.* Woodcock, 6 Ad. & E. 690.

13. *To the like; Plea of Eviction.* (*y*)

That before the said rent became due (*z*) and before this suit, the plaintiff,

(*u*) This plea was held good. The court said that it was not to be taken as setting up a surrender, so as to require a memorandum in writing, but that it afforded a valid excuse for non-payment of the rent, by showing the agreement, and the giving up possession. See a similar plea, Turner *v.* Hardy, 9 M. & W. 770; 1 Cr. & M. 449; Smith *v.* Lovell, 10 C. B. 6; and see Dunn *v.* Di Nuovo, 3 M. & G. 107; 9 Dowl. 841. A surrender otherwise than by operation of law must be in writing, &c. under the statute of frauds, 29 Car. 2, c. 3, and by deed, unless the interest is copyhold, or one which might by law be created without writing, 8 & 9 Vict. c. 106, s. 8, and must in a plea be shown to be in writing and signed, see 1 Saund. 235, 6, note (9); 276 *a*, note (2). Mode of pleading a surrender by deed, &c. Ib.; 2 Saund. 22; Barnard *v.* Duthy, 5 Taunt. 27. As to surrender, see Chit. on Contr. "Surrender." A surrender by act of law is when the owner of a particular estate has done some act, the validity of which he is in law afterwards estopped from disputing, and which would not be valid if the particular estate had continued to exist. Phene *v.* Popplewell, 31 L. J. C. P. 235; Lyon *v.* Reid, 13 M. & N. 285; Reeve *v.* Bird, 1 Cr., M. & R. 31; [Talbot *v.* Whipple, 14 Allen, 177, 180.] Surrender by delivery of the key by the tenant, and acceptance thereof by the landlord before the rent became due. Dodd *v.* Acklon, 6 M. & G. 672.

(*x*) Cannon *v.* Hartley, 9 C. B. 634; 19 L. J. C. P. 323; Smith *v.* Lovell, 10 C. B. 6. This need not be specially pleaded to the common count for use and occupation. Dodd *v.* Acklon, 6 M. & G. 672; 13 L. J. C. P. 11; Walls *v.* Atcheson, 3 Bing. 462. As to what amounts to a surrender by operation of law, Phene *v.* Popplewell, 31 L. J. C. P. 235.

(*y*) The entry of the lessor, or any one claiming through him, to take possession operates as a suspension of the rent, and therefore entry, into any part or the whole, and eviction is a good plea to an action for rent. Morrison *v.* Chadwick, 7 C. B. 266; 18 L. J. C. P. 189; Upton *v.* Townend, 17 C. B. 30; 25 L. J. C. P. 44; 1 Saund. 204, note (2), but it does not put an end to the

(*z*) This is necessary, as an eviction, to be a good defence, must have taken place before the rent became due. Boodle *v.* Cambell, 7 M. & G. 386; S. C. 2 D. & L. 66. See, further, as to pleas of eviction, 1 Saund. 204, note (2); *post*, Replevin, tit. "Landlord and Tenant."

against the will and consent of the defendant, wrongfully entered into and upon * the said messuage and premises, and ejected, and expelled, the defendant (*a*) from the possession, use and occupation thereof, and kept him so ejected and expelled from thence hitherto.

14. *A Similar Plea, showing a Partial Eviction, whereupon Defendant quitted the Remainder of the Premises.* (*b*)

As in the preceding form to the asterisk, and proceed:] a certain close, parcel of the said premises demised by the plaintiff to the defendant, and which was then holden by the defendant as part of the tenements in the declaration mentioned, and then ejected and expelled the defendant from the possession and enjoyment thereof, whereupon the defendant then requested the plaintiff to restore to him the defendant the possession of the said close, but the plaintiff refused so to do, whereupon the defendant then and before the said sum of £——, or any part thereof, accrued due, gave up the possession of the residue of the said tenements and premises.

15. *Plea, except as to £——, that no Part of the Rent claimed became due except that Sum.*

Bright *v.* Beard, 4 Q. B. 832.

16. *Plea of a Notice to quit before the Rent became due, and Replication that the Notice was waived.*

Jones *v.* Shears, 4 Ad. & E. 832.

17. *Plea to Declaration for Use and Occupation, that Plaintiff was satisfied part of the Arrears of Rent under a Distress made by him.* (*c*)

18. *Plea that Defendant kept the Premises in Tenantable Repair.* (*d*)

That he did at all times during the said tenancy keep the said tenements in tenantable repair, order, and condition.

tenancy. Morrison *v.* Chadwick, *supra*; Newton *v.* Allin, 1 Q. B. 518. [See Royce *v.* Guggenheim, 106 Mass. 202.] If the action is on a covenant it must be pleaded specially, but need not be pleaded to an action for use and occupation. Prentice *v.* Elliott, 5 M. & W. 606; 9 L. J. Ex. 42. As to what amounts to an eviction, see further, Dunn *v.* Di Nuovo, 3 M. & G. 105; Henderson *v.* Mears, 28 L. J. Q. B. 305; [1 F. & F. 636;] Williams *v.* Hayward, [28 L. J. Q. B.] 374; Furnival *v.* Grove, 8 C. B. N. S. 496; Wheeler *v.* Stevenson, 6 H. & N. 155; [Royce *v.* Guggenheim, 106 Mass. 201; De Witt *v.* Pierson, 112 Mass. 8;] Woodfall on Landlord and Tenant by Cole; Chit. on Contr. But if the tenant give up the premises voluntarily it is no eviction. Emery *v.* Barnett, 4 C. B. N. S. 423.

(*a*) This is necessary, as an actual expulsion must be shown. Dunn *v.* Di Nuovo, 3 M. & G. 105; [but see per Gray J. in Royce *v.* Guggenheim, 106 Mass. 202.]

(*b*) See Sutton *v.* Temple, 12 M. & W. 64; and as to the effect of a partial eviction upon the right of distress, Mackenzie *v.* Neale, 2 Cr., M. & R. 84; 1 M. & W. 747. The plea would be incorrect if pleaded to an indebitatus count. *Ante*, "Landlord," &c. For other forms, see Davies *v.* Underwood, 2 H. & N. 570; 27 L. J. Ex. 113; Franklin *v.* Carter, 1 C. B. 750; 14 L. J. C. P. 241.

(*c*) See form, Aldridge *v.* Howard, 4 M. & G. 921. The plea was there held bad, because it was pleaded to "so much of the declaration as related to £100," &c.; and therefore it afforded no answer to the *damages*, which must have accrued between the time of that rent falling due and the taking the distress. See Henry *v.* Earl, 8 M. & W. 230.

(*d*) If the liability to repair and non-repair be admitted, the defendant should pay money into court instead of pleading as above; and on a replication of damages *ultra*. the question will arise as to the state of the

19. *Plea that Defendant used the Premises in a Tenantlike Manner.*

That he did at all times during the said tenancy use the said [messuage and premises], in a tenantlike and proper manner.

20. *Plea to an Action for not cultivating, &c. in the Manner prescribed; Denial of the Breaches.*

That he did, after the said crop of wheat was grown on the said arable land, let the said land remain at fallow and out of tillage for one year, according to the said agreement [*denying the several breaches.* See Hammond *v.* Collis, 3 D. & L. 164; 1 C. B. 916].

21. *Plea to a Declaration for not cultivating a Farm according to the Custom set out; Denial of the Custom.* (*e*)

That according to the course of good husbandry, and the custom of the country where the said farm and lands were situate, the defendant ought not to have had one half only of the said arable land in corn, and one fourth part thereof in seeds, and the remaining one fourth part thereof in turnips or fallow, as alleged.

22. *Plea to an Action for not cultivating according to the Custom of the Country, that Defendant did so cultivate.*

That he did during the said tenancy use and cultivate the said farm and lands, in a husbandlike manner, and according to the custom of the country where the same are situate. (*f*)

23. *Plea to an Action on a Covenant to pay Rent, that the Defendant paid the Rent* (*f*) *when due.* (*g*)

That he paid the said rent to the plaintiff when it became due, in pursuance of the said indenture.

premises at the time of the demise. Burdett *v.* Withers, 7 Ad. & E. 136. See a form that the defendant was always ready and willing to repair, Green *v.* Eales, 2 Q. B. 225; 11 L. J. Q. B. 63.

(*e*) See *ante*, 190, note (*f*). The above form is from Angerstein *v.* Handson, 1 Cr., M. & R. 789. That was an action for not cultivating a farm according to the course of good husbandry and the custom of the country. The declaration stated that, according to the course of good husbandry and the custom of the country, the defendant ought to have had about one half only of the arable lands in corn, &c.; and alleged as a breach, that the defendant had more than one half in corn, &c., &c. The defendant pleaded as above, traversing the custom. At the trial the jury found that the custom was not as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighborhood: Held, that the plaintiff had tied himself up to the precise custom stated in the declaration, and having failed to prove it, was not entitled to recover. Where a declaration charged the defendant with removing hay without bringing back manure, a plea merely stating that there was no such custom was held good on special demurrer. Hartley *v.* Burkitt, 4 Bing. N. C. 687. Like forms, Hutton *v.* Warren, 1 M. & W. 466; Hallifax *v.* Chambers, 4 M. & W. 662.

(*f*) Where the declaration is special, showing the custom and its breach, the plea should be special, as that the defendant had not more than one half of the said arable land in corn, &c.

(*g*) *Riens in arriere* is a bad plea. Baden *v.* Flight, 3 Bing. N. C. 685. The ordinary plea of payment (see *post*, "Payment") is applicable whether the payment was made *before* or *after* the day.

24. *Plea by an Assignnee of a Lease denying the Assignment.* (*h*)

That the estate of the said E. F. of and in the said premises with the appurtenances, did not vest in the defendant by assignment as alleged.

25. *Plea by Defendant charged as Assignee of a Lease, that he assigned his Interest over before Breach.* (*i*)

That before the alleged breach [*or* "before the said rent became due," *as the case may be*] he, by deed, assigned over to E. F. the said premises for the residue and remainder of his said term therein, and the said E. F. then entered into the same and became possessed thereof.

26. *Plea to an Action by the Assignee of the Reversion denying the Assignment.* (*k*)

That the said A. B. did not assign to the plaintiff as alleged.

(*h*) See *ante*, 196, note (*a*). An assignment of a lease must be by deed. 29 Car. 2, c. 3, s. 3; 8 & 9 Vict. c. 106, s. 3. See, generally, as to assignments, Woodfall's Landlord and Tenant, by Cole, c. 6. The above plea is proper when the defendant had no interest in the premises, or as only underlessee or under-tenant, and not assignee of the whole term. Evidence that the defendant has paid the rent to the plaintiff, or is in possession of the whole of the premises, is *presumptive* evidence that the term has vested in the defendant as assignee. Doe *v.* Williams, 6 B. & C. 41. But the usual course is to show the assignment by proving the deed, giving the defendant notice to produce the deed of assignment. If the plaintiff declare that the *whole*, but can prove only that a *part*, and not the *whole*, of the term and estate demised came to the defendant by assignment, the issue on this plea must be found for the defendant. Curtis *v.* Spitty, 1 Bing. N. C. 756; Hemp *v.* Livingstone, 11 M. & W. 91. As to the liability of executor or administrator in respect of rents, covenants, or agreements, see 22 & 23 Vict. c. 35, s. 27. When the residue of a term of years vested in executors, and the yearly value was less than the reserved rent, they are still liable as assignees for so much of the rent as the premises are worth. Rubery *v.* Stevens, 4 B. & Ald. 241, where there is a form of plea; Hopwood *v.* Whaley, 6 C. B. 944; 18 L. J. C. P. 43; Tremeere *v.* Morison, 1 Bing. N. C. 89; Paul *v.* Simpson, 15 L. J. Q. B. 382. So, also, an administrator; but the latter, who has fully administered, and who is chargeable with no default or laches, may in general discharge himself from liability to a greater extent than the real value of the premises. Hornidge *v.* Wilson, 11 Ad. & E. 655; Wollaston *v.* Hakewill, 3 M. & G. 321. Upon bankruptcy, leaseholds vest in the official assignee; 12 & 13 Vict. c. 106, ss. 141, 142; but upon the appointment of a creditor's assignee they vest in him. 24 & 25 Vict. c. 134, s. 117. The assignees may elect to take the leaseholds. 12 & 13 Vict. c. 106, s. 145. See, also, 24 & 25 Vict. c. 134, s. 131. But the assignees are not liable unless they have done some act which unequivocably indicates to the lessor that they have elected to take the benefit of the lease. Goodwin *v.* Noble, 8 El. & Bl. 587; Copeland *v.* Stephens, 1 B. & Ald. 593; Turner *v.* Richardson, 7 East, 335. When they have elected to take the lease, they are liable to the rent and covenants that run within the land. Holford *v.* Hatch, 1 Dougl. 184. But they can get rid of their liability by assigning over, see Woodfall on Landlord and Tenant, by Cole, 215. In Thomas *v.* Bradbury, 1 Bing. N. C. 326, the assignees of a bankrupt sued on a release for rent were allowed to plead, 1st, that the lessee's interest did not pass to them; and, 2d, that they abandoned and renounced such interest.

(*i*) See last note, form, Harley *v.* King, 2 Cr., M. & R. 18, and replication that breaches were committed before assignment. Ib. Though *semble* the plea would be bad without this averment. This is a defence although the assignee covenanted not to assign, and the assignment be to a pauper for the express purpose of obviating future liability. Taylor *v.* Shum, 1 B. & P. 21; Paul *v.* Morse, 8 B. & C. 486. But the reassignment does not discharge the assignee from liability to the lessor, or the assignee of the reversion for breaches committed whilst the interest of the assignee as such existed. Harley *v.* King, *supra*. A re-assignment was held to be complete and to protect the assignee who had executed it, although the deed remained in the hands of his solicitor under a claim of *lien* for preparing it. Odell *v.* Wake, 3 Camp. 394. Notice to the landlord of the assignment need not be alleged or proved. Pitcher *v.* Tovey, 1 Salk. 81; Taylor *v.* Shum, *supra*.

(*k*) Although the lessee cannot deny that his lessor had any title, or the title shown by the lease, he may show anything not inconsistent with the estoppel. See pleas and

27. *Plea to an Action by an Assignee of the Reversion, denying that Lessor had the Reversion alleged.*

That such reversion of, and in the said demised premises did not belong to the said A. B. as alleged. (*k*)

28. *Plea that the Lessor assigned the Reversion before Breach.* (*l*)

Green *v.* James, M. & W. 656.

29. *Plea that Defendants, Assignees of a Bankrupt, had not elected to take the Lease.*

Goodwin *v.* Noble, 8 El. & Bl. 587; [Porter *v.* Kirkus, L. R. 2 C. P. 590.]

30. *Plea in Abatement, that the Premises vested in the Defendant and Another.*

Heap *v.* Brooks, 1 D. & L. 334. (*m*)

31. *Pleas to an Action for Non-repair, &c.* — 1. *That the Non-repair occurred through the unforeseen Act of a Third Party.* 2. *That the Defendant was ready to repair, but that a Reasonable Time to do so had not elapsed.* 3. *That the Plaintiff repaired himself, and so prevented the Defendant from repairing.*

Green *v.* Eales, 2 Q. B. 225; 11 L. J. Q. B. 63. [In an action against executor of reversioner, on a covenant to repair made between original owner and bankrupt. Coward *v.* Gregory, L. R. 1 C. P. 153.]

32. *Plea to an Action for Rent by a Transferee of a Lease, Payment to the Transferor without Notice of the Transfer.* (*n*)

Lucas *v.* Jones, 5 Q. B. 949.

33. *Plea to an Action for Rent, a Clause of Re-entry in the Deed under which the Plaintiff entered.*

Hartshorne *v.* Wilson, 4 Bing. N. C. 178; 6 Dowl. 404.

34. *Plea to an Action on a Covenant for Rent, that the Plaintiff committed a Breach of Covenant, in Consequence of which the Superior Landlord brought Ejectment and compelled the Defendant to pay the Rent to him.*

Franklin *v.* Carter, 3 D. & L. 313; 1 C. B. 750. (*o*)

law, Weld *v.* Baxter, 11 Ex. 816; 1 H. & N. 568; 25 L. J. Ex. 214; 26 L. J. Ex. 112; Phelps *v.* Prew, 3 El. & Bl. 430; Cuthbertson *v.* Irving, 4 H. & N. 742; 28 L. J. Ex. 306; Williams *v.* Hayward, 28 L. J. Q. B. 374; [1 Chitty Pl. 630, and cases in note (*m*).]

(*l*) See Bickford *v.* Parson, 5 C. B. 920; 17 L. J. C. P. 192; Pargeter *v.* Harris, 7 Q. B. 708.

(*m*) Plea setting up the interest of a third party in the premises not joined as plaintiff. Foley *v.* Addenbrooke, 4 Q. B. 197; 12 L. J. Q. B. 163.

(*n*) Like plea in action by mortgagee of payment to mortgagor without notice; Cork *v.* Moylan, 1 Ex. 67; 5 D. & L. 101; and as to the rights of mortgagor and mortgagee as against tenants, see Moss *v.* Gallimore, 1 Dougl. 279; 1 Sm. L. C. 5th ed. 542.

(*o*) [A plea in an action on a covenant for quiet enjoyment, that plaintiff never entered into possession, is bad.]

LEAVE AND LICENSE. (*p*)

LIMITATIONS, STATUTE OF.

Obs. — At common law lapse of time is no bar to an action, although it may raise a presumption of payment. Dowthwaite *v.* Tibbuts, 5 M. & S. 75; [2 Chitty Contr. (11th Am. ed.) 1103, 1104, and notes, 1214, and notes.] But by the 21 Jac. 1, c. 16, called the statute of limitations, it is enacted by s. 3, "That all actions of account and upon the case" which includes assumpsit, Battley *v.* Faulkner, 3 B. & Ald. 294, "other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, and all actions of debt, grounded upon any lending or contract, without specialty, and all actions of debt for arrearages of rent shall be commenced and sued within six years next, after the cause of such action or suit, and not after." The exception in the above section as to merchants' accounts applies only to the action of account, or on the case for not accounting, and not to an action on the common counts. Inglis *v.* Haigh, 8 M. & W. 768; Cottam *v.* Partridge, 4 M. & G. 271. Now, since 19 & 20 Vict. c. 97, s. 9, which enacts that "All actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced, and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this act: and no claim in respect of a matter which arose more than six years before the commencement of such action or suit, shall be enforceable by action or suit, by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of such action or suit;" the exception in the act of James is abolished altogether. [See 2 Chitty Contr. (11th Am. ed.) 1217–1220, and notes.]

By 21 James 1, c. 16, s. 7, "If any person or persons, that is, or shall be, entitled to any such action of accounts or actions of debts, shall be at the time of any such cause of action given or accrued, fallen, or to come, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or beyond the seas, such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done." But now a plaintiff being beyond the seas or in prison is no disability. 19 & 20 Vict. c. 97, s. 10; Cornill *v.* Hudson, 8 El. & Bl. 429; [2 Chitty Contr. (11th Am. ed.) 1221–1225, and notes.]

By 4 Anne, c. 16, s. 19, actions against persons gone beyond the seas may be brought after their return within the time limited by the act of James. And the 19 & 20 Vict. c. 97, s. 12, enacts that Great Britain and Ireland, the Isles of Man, Guernsey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her majesty, are not to be deemed to be beyond the seas. The period of limitation runs as to joint debtors in the kingdom, though some are beyond the seas. 19 & 20 Vict. c. 97, s. 11. This act has been held not to be retrospective. Jackson *v.* Woolley, 8 El. & Bl. 778; Williams *v.* Smith, 2 H. & N. 443; but see Cornill *v.* Hudson, 8 El. & Bl. 429; Flood *v.* Patterson, 30 L. J. Ch. 486.

The limitation on actions on deeds, specialties, &c. is regulated by 3 & 4 W. 4, c. 42; s. 3, enacts "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied

(*p*) A plea of leave and license before cause of action in an action on a contract is bad, as not amounting in substance to a plea of waiver or exoneration. Dobson *v.* Espie, 2 H. & N. 79; 26 L. J. Ex. 240. See, also, Harris *v.* Goodwin, 2 M. & G. 416; West *v.* Blakeway, Ib. 741; Rawlinson *v.* Clarke, 14 M. & W. 187.

Obs. on any *fieri facias*, and all actions of penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

S. 4, "That if any person or persons, that is, or are, or shall be entitled to any such action or suit, or to such *scire facias* is, or are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas."

S. 5, "Provided always, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such indenture, specially, or recognizance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

Actions for penalties given to a common informer must be brought within *one* year. 31 Eliz. c. 5, s. 5; [Dyer *v.* Best, L. R. 1 Ex. 152.]

The period of limitation runs from the time the plaintiff *might* have brought his action, unless he was subject to any of the disabilities specified. Hemp *v.* Garland, 4 Q. B. 519. And if it once commences to run no subsequent disability will stop its running. Rhodes *v.* Smethurst, 6 M. & W. 351–356; [*per cur.* Homfray *v.* Scroope, 13 Q. B. 509, 512; Pendergrast *v.* Foley, 8 Geo. 1; Young *v.* Machall, 4 Md. 362; Coventry *v.* Atherton, 9 Ohio, 34; Dillard *v.* Philson, 5 Strobh. 213; Smith *v.* Newby, 13 Missou. 159; Ruff *v.* Bull, 7 Harr. & J. 14.] In actions on special contracts the period of limitation runs from the *breach* of the contract. Battley *v.* Faulkner, 3 B. & Ald. 288; Short *v.* McCarthy, Ib. 626. [In computing the six years the day on which the cause of action arose is always included, because the action might have been commenced on that day. Little *v.* Blunt, 9 Pick. 491; Presbrey *v.* Williams, 15 Mass. 193; Cornell *v.* Moulton, 3 Denio, 12; but see Smith *v.* Cassity, 9 B. Mon. 192.] The fraudulent concealment of the cause of action by the party liable does not prevent the statute of limitations running from the accrual of the right of action. The Imperial Gas Co. *v.* The London Gas Co. 10 Ex. 39; 23 L. J. Ex. 303; Hunter *v.* Gibbons, 1 H. & N. 459; [1 Chitty Pl. 231, 232. The prevailing rule in the American states is that to a plea of the statute of limitations, in an action on the case for fraud,

Obs. it is sufficient for the plaintiff to reply generally, that he did not discover the fraud till within six years. See 2 Chitty Contr. (11th Am. ed.) 1235, and note (*l*) and cases cited: Homer *v.* Fish, 1 Pick. 435; Sherwood *v.* Sutton, 5 Mason, 143; Nudd *v.* Hamblin, 8 Allen. 130; Rouse *v.* Southard, 39 Maine, 404; Way *v.* Cutting, 20 N. H. 187.]

By 9 Geo. 4, c. 14, s. 1, in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the statute of James 1, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by, or in some writing, to be signed by the party chargeable thereby; or by part payment; and co-contractors and executors and administrators shall not lose the benefit of the act of James 1, so as to be chargeable in respect, or by reason only of any written acknowledgment or promise made, and signed by any other or others of them: provided that in actions against two or more joint contractors, executors, or administrators, it shall appear at the trial or otherwise, that the plaintiff, though barred by the act as to one or more of them, shall nevertheless be entitled to recover against the other or others, by virtue of a mere acknowledgment or promise. This proviso, and also the 3 & 4 W. 4, c. 42, s. 3, are extended by 19 & 20 Vict. c. 97, s. 14, which enacts that part payment by one contractor, &c. shall not deprive his co-contractor, &c. of the benefit of the said acts. And by s. 13 of the same act, the provisions of 9 Geo. 4, c. 14, ss. 1, 8 are extended to acknowledgments by agents. By 9 Geo. 4, c. 14, s. 2, if a defendant pleads in abatement the non-joinder of another person, if that person is within the statute of James 1, the plea shall be found against the party pleading the same. By s. 3, "No indorsement of payment on a promissory note, bill of exchange, or other writing, shall be sufficient proof of such payment, so as to take the case out of the operation of the statute of limitations. And by s. 4, the acts applies to a case of set-off. The intention of the act of 9 Geo. 4, c. 14, is well put by Tindal C. J. in Haydon *v.* Williams, 7 Bing. 166, and should be constantly borne in mind when considering the effect of the statute. He says "The statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses." To take a case out of the statute of limitations there must be a writing containing either an express promise or an acknowledgment, from which a promise can be implied. Per Parke B. Williams *v.* Griffith, 3 Ex. 342; Tanner *v.* Smart, 6 B. & C. 603; Smith *v.* Thorne, 18 Q. B. 134. [The American cases are generally in harmony with this rule. See them cited in 2 Chitty Contr. (11th Am. ed.) 1238, note (*p*), 1240, note (*u*).] And the amount of the debt may be supplied. Cornforth *v.* Smithard, 29 L. J. Ex. 228; Sidwell *v.* Mason, 2 H. & N. 306. But a mere proposal, Francis *v.* Hawkesley, 28 L. J. Q. B. 370; [1 El. & El. 1052], or qualified acknowledgment and promise will not be sufficient. A'Court *v.* Cross, 3 Bing. 328; Tanner *v.* Smart, 6 B. & C. 603; Collinson *v.* Margesson, 27 L. J. Ex. 305; Everett *v.* Robertson, 1 El. & El. 16; Goate *v.* Goate, 1 H. & N. 29; [2 Chitty Contr. (11th Am. ed.) 1242–1244.] So, a conditional acknowledgment is not sufficient unless there is proof that the condition has been performed. Hart *v.* Prendergast, 14 M. & W. 741–745; see Collis *v.* Stack, 1 H. & N. 605; [2 Chitty Contr. (11th Am. ed.) 1246; Betton *v.* Cutts, 11 N. H. 170; M'Lellan *v.* Albee, 17 Maine, 184; Angell Limit. §§ 235–239, 280; Humphrey *v.* Jones, 14 M. & W. 1.] And see, generally, Goode *v.* Job, 1 El. & El. 6; Holmes *v.* Mackrell, 3 C. B. N. S. 789; Godwin *v.* Culley, 4 H. & N. 373; Moodie *v.* Bannister, 28 L. J. Ch. 881; Amos *v.* Smith, [1 H. & C. 238;] 31 L. J. Ex. 423; Hartland *v.* Jukes, 32 L. J. Ex. 162; [1 H. & C. 667;] Bush *v.* Martin, [2 H. & C. 311;] 33 L. J. Ex. 17. When an unstamped note was inclosed in a letter as follows: "I have sent you a note for the money due to you," it was held no acknowledgment, because the note could not be looked at. Parmeter *v.* Parmeter, 30 L. J. Ch. 508. The acknowledgment must be made by the party to be charged or his authorized agent.

Obs. 19 & 20 Vict. c. 97, s. 13; 9 Geo. 4, c. 14, s. 1, *supra*. As to acknowledgments by co-contractors, see *supra*. [2 Chitty Contr. (11th Am. ed.) 1248, note (l^2).

An infant may effectually sign an acknowledgment, provided the debt be for necessaries. Williams *v.* Smith, 4 El. & Bl. 180.

An executrix of a surety in a bond may acknowledge the debt. Moodie *v.* Bannister, 28 L. J. Ch. 881. But to a plea under 3 & 4 W. 4, c. 42, s. 5, that the cause of action on a deed did not accrue within twenty years, a replication alleging a written acknowledgment need not set out the writing in its terms. Kempe *v.* Gibbon, 9 Q. B. 609.

Since 9 Geo. 4. c. 14, it has been a matter of doubt whether an acknowledgment to a third person is sufficient, but the better opinion appears to be that it will not; Grenfell *v.* Girddlestone, 2 Y. & C. 662; per Alderson B. Goodwin *v.* Culley, 4 H. & N. 380, per Bramwell B. [Generally, in the American states, it is not necessary that the new promise should be made to the creditor, but it may be effectual, though made to a third person in the creditor's absence. Oliver *v.* Gray, 1 H. & Gill, 204; Whitney *v.* Bigelow, 4 Pick. 110; Soulden *v.* Van Rensselaer, 9 Wend. 293; Philips *v.* Peters, 21 Barb. 351; Bloodgood *v.* Bruen, 11 Barb. 427; St. John *v.* Garow, 4 Porter, 223; Betton *v.* Cutts, 11 N. H. 170; Frye *v.* Barker, 4 Pick. 582; Kisler *v.* Sanders, 40 Ind. 78, 83, and cases cited. In Pennsylvania the new promise must have been made to the creditor or his agent. Christy *v.* Flemington, 10 Penn. St. 129; Farmers' & Mechanics' Bank *v.* Wilson, 10 Watts, 261.]

Part payment takes a case out of the statute, because it is evidence of a fresh promise. Gowan *v.* Forster, 3 B. & Ad. 511; [2 Chitty Contr. (11th Am. ed.) 1252, and cases in note (f).] So, if it is made to an agent. Megginson *v.* Harper, 2 Cr. & M. 322; [Hill *v.* Kendall, 25 Vt. 528; Kisler *v.* Sanders, 40 Ind. 78, 83, and cases cited.] But the part payment must be made under circumstances which warrant a jury in inferring a promise to pay the residue. Wainman *v.* Kynman, 1 Ex. 118; [Lee *v.* Wilmot, L. R. 1 Ex. 364; Foster *v.* Dawber, 6 Ex. 839, 853; Jones *v.* Jones, 21 N. H. 219; Whipple *v.* Stevens, 22 N. H. 226; Sigourney *v.* Drury, 14 Pick. 387; Arnold *v.* Downing, 11 Barb. 554; White *v.* Jordan, 27 Maine, 370; Steel *v.* Matthews, 7 Yerger, 313; Allen J. in Shoemaker *v.* Benedict, 1 Kernan, 176; Kisler *v.* Sanders, 40 Ind. 78, 80, and cases cited; Atwood *v.* Coburn, 4 N. H. 315; Smith *v.* Eastman, 3 Cush. 355; Exeter Bank *v.* Sullivan, 6 N. H. 124.] A payment of interest, *qua* interest, is a good part payment. Sims *v.* Brutton, 5 Ex. 809; per Parke B. 20 L. J. Ex. 41; Scholey *v.* Walton, 12 M. & W. 510; see Harding *v.* Edgecombe, 28 L. J. Ex. 313; [Welton *v.* Robinson, 5 Ired. 341; Fryburg *v.* Osgood, 21 Maine, 176; Sanford *v.* Hayes, 19 Conn. 591; Jones *v.* Hughes, 5 Ex. 104; Bradfield *v.* Tupper, 7 Ex. 27; Maber *v.* Maber, L. R. 2 Ex. 153; Amos *v.* Smith, 1 H. & C. 238. Part payment in goods, see Cottam *v.* Partridge, 4 M. & G. 271; Hooper *v.* Stephens, 4 Ad. & E. 71; Blair *v.* Ormond, 17 Q. B. 423, 435; Badger *v.* Arch, 12 Ex. 333; Randon *v.* Tobey, 11 How. (U. S.) 443; Sibley *v.* Lumbert, 30 Maine. 253.] See as to what is a payment, [2 Chitty Contr. (11th Am. ed.) 1252 *et seq.*]

As to payment by co-contractor, &c. 19 & 20 Vict. c. 97, s. 14, *supra*; Cockrill *v.* Sparke, 32 L. J. Ex. 118; Jackson *v.* Woolley, 8 El. & Bl. 778; [2 Chitty Contr. (11th Am. ed.) 1256, note (f^1), 1257.]

As to renewing the writ to save the statute, 15 & 16 Vict. c. 76, s. 11. Anonymous, 32 L. J. Ex. 88.

As to bringing an action against an executor or administrator where the action being before the C. L. P. Act, 1852, s. 135, had abated. Waters *v.* Earl Thanet, 2 Q. B. 757; Curlewis *v.* Mornington, 7 El. & Bl. 283; [(Am. ed.) note, *ad finem*;] 26 L. J. Q. B. 181; 27 Ib. 439; Sturgis *v.* Darell, 4 H. & N. 622; 6 Ib. 120.

1. *Plea of the Statute of Limitations.* (*q*)

That the alleged cause of action did not accrue within [six] years (*r*) before this suit.

[1*a*. *Answer of the Statute of Limitations.*

And the defendant comes and answers that the cause of action mentioned in the plaintiff's writ did not accrue within six years before the suing out of the plaintiff's writ.]

2. *Replication that the Defendant was abroad when the Cause accrued.* (*s*)

That at the time when the alleged cause of action accrued to the plaintiff the defendant was in parts beyond the seas, that is to say, ——; and the plaintiff commenced this suit within six years next after the defendant's first return from parts beyond the seas after the accruing of the said cause of action.

3. *Replication to a Plea of the Statute of Limitations (to a Declaration by an Executor), that the Testator issued a Writ within Six Years, and that the Executor sued within a Reasonable Time after the Death.* (*t*)

Waters *v.* Lord Thanet, 2 Q. B. 757.

4. *Plaintiff's Infancy.*

Gery *v.* Coke, Lutw. 242, 243; Chandler *v.* Villetti, 2 Saund. 118.

5. *That Plaintiff obtained a Judgment, which was arrested or reversed, and that he now comes within a Year after such Reversal.*

2 Saund. 63 *h*.

6. *Replication in Action against Husband and Wife.*

Pittam *v.* Foster, 1 B. & C. 248.

7. *That the Plaintiff was imprisoned when the Cause of Action accrued.*

Pigot *v.* Rush, 4 Ad. & E. 912.

(*q*) The limitation in cases of simple contract is six years. 21 Jac. 1, s. 16, s. 3. In actions and suits relating to real property it is twenty years (3 & 4 W. 4, c. 42, s. 42), except that by s. 3 no more than six years' arrears of charges thereon can be recovered. Hunter *v.* Nockold, 19 L. J. Ch. 177. In actions on a deed, such as for arrears of rent due on a lease, Paget *v.* Foley, 2 Bing. N. C. 679; or a rent-charge, Strachan *v.* Thomas, 12 Ad. & E. 558; recognizance or award, or on a statute by party grieved, it is twenty years. Ib. For a penalty under a by-law of a corporation it is six years. Tobacco Pipe Makers *v.* Loden, 20 L. J. Q. B. 415. Form of a plea on a money bond, Blair *v.* Ormond, 20 L. J. Q. B. 445; Tuckey *v.* Hawkins, 4 C. B. 655; 16 L. J. C. P. 201; on an indenture, Kempe *v.* Gibbon, 12 Q. B. 662; 17 L. J. Q. B. 298.

(*r*) The statement of when the writ was issued in the commencement of the record, or writ of trial is conclusive evidence of this. Whipple *v.* Manley, 1 M. & W. 432.

(*s*) 4 Ann. c. 16, s. 19, as to joint debtors, see Obs.; 19 & 20 Vict. c. 97, s. 11. The effect of the absence of a plaintiff, Obs. *ante*, 431, 19 & 20 Vict. c. 97. s. 10. Forms, Fannin *v.* Anderson, 7 Q. B. 811; 14 L. J. Q. B. 282; Lane *v.* Bennett, 1 M. & W. 70.

(*t*) Bul. N. P. 15; Chit. on Contr.; 2 Saund. 64 *n*. See other forms. Curlewis *v.* Mornington, 7 El. & Bl. 283; 26 L. J. Q. B. 181; 27 Ib. 439; Sturgis *v.* Darrell, 4 H. & N. 622; 6 Ib. 120; 28 L. J. Ex. 366; 29 Ib. 472.

8. *Plaintiff's Insanity.*

Tarbuck *v.* Bispham, 2 M. & W. 2; 6 L. J. Ex. 49.

9. *Replication in an Action on a Specialty, an Acknowledgment within Twenty Years.* (*u*)

Forsyth *v.* Bristowe, 3 Ex. 348.

[10. *Replication of an Acknowledgment in Writing within Six Years.*

And the plaintiff replies as follows, viz. he says that within six years before the suing out of this writ the defendant executed a writing, a copy whereof is hereto annexed, by which he acknowledged said debt, and agreed to pay the same.]

LUNACY.

Obs. — The lunacy of the defendant, and that the plaintiff had notice of it (Dane *v.* Kirkwall, 8 C. & P. 679), at the time of making the contract, would seem proper to be pleaded specially, as being a matter "showing the transaction either void or voidable in point of law, on the ground of fraud *or otherwise.*" Ib. r. 8, T. T. 1853. See form of plea, Harrison *v.* Richardson, 1 M. & Rob. 504; and see Alcock *v.* Alcock, 3 M. & G. 268; Sentance *v.* Poole, 3 C. & P. 1. As to this defence in general, see [1 Chitty Contr. (11th Am. ed.) 187–191, and notes; Kendall *v.* May, 10 Allen, 52; Sceva *v.* True, 53 N. H. 627, 630;] Baxter *v.* Lord Portsmouth, 5 B. & C. 170. But where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fairly and *bonâ fide* executed and completed, and the subject matter of the contract cannot be restored, so as to put the parties in *statu quo*, such contract cannot be afterwards set aside either by the alleged lunatic or by those who represent him. Molton *v.* Camroux, 2 Ex. 487; 4 Ex. 17. A lunatic is, in law, incapable of stating an account. Tarbuck *v.* Bispham, 2 M. & W. 2. The lunacy of the defendant, *subsequent* to his entering into the contract sued on, is no defence. Jones *v.* Evans, 8 Dowl. 425. [Liability of lunatic on contracts for necessaries, see Sawyer *v.* Lupkin, 56 Maine, 308; 1 Chitty Contr. (11th Am. ed.) 188, and cases in note (*l*); Kendall *v.* May, 10 Allen, 59; Sceva *v.* True, 53 N. H. 627, 630.]

If the *plaintiff* be a lunatic, any one may sue for him in his name. Com. Dig. Ideot, B. 7; Rock *v.* Slade, 7 Dowl. 22.

Plea that at the Time of making the Contract, Defendant was a Lunatic. (*x*)

That at the time when the defendant contracted the said debt [*according to the fact*] he was lunatic and of unsound mind, and thereby incapable of contracting or understanding the meaning of the said contract, as the plaintiff well knew.

MAINTENANCE. (*y*)

(*u*) 3 & 4 W. 4, c. 42, s. 5.

(*x*) Form, Read *v.* Legard, 6 Ex. 637; 20 L. J. Ex. 309. See a form of replication that plaintiff was lunatic, and rejoinder that the defendant did not know it, Beavan *v.* McDonnel, 9 Ex. 509; 10 Ex. 184; 23 L. J. Ex. 94–326; replication that the goods supplied were necessaries. Read *v.* Legard, *supra.*

(*y*) *Ante*, 307, note (*t*). See forms of plea, Sprye *v.* Porter, 7 El. & Bl. 58; Findon *v.* Parker, 11 M. & W. 675.

MARRIAGE, BREACH OF PROMISE OF. (z)

1. *General Issue.*

Non assumpsit, *ante*, 284.

2. *Plea to an Action for Breach of Promise of Marriage, that the Plaintiff misconducted herself after the Promise.*

That the defendant made the said promise on the faith and under the supposition that the plaintiff had been and was a chaste and modest woman, and a person of correct habits and demeanor, but that after (*a*) the making of the said promise, and before any breach thereof, the defendant discovered that the plaintiff had not been and was not a chaste and modest woman, and a person of correct habits and demeanor, for which reason the defendant refused to marry the plaintiff.

3. *Plea that Plaintiff had had Carnal Intercourse with a Third Person before the Promise, which Defendant did not discover until afterwards; and similar Plea that she had had a Child.*

Young *v.* Murphy, 3 Bing. N. C. 58.

(z) See Declarations, *ante*, 205, and notes. Pleas of misconduct should not be pleaded without the strongest ground to expect success on them, as the pleading them would doubtless much enhance the damages. See other forms, Bench *v.* Merrick, 1 C. & K. 463. Non assumpsit would put the contract between the parties in issue, and it would therefore seem to be the proper plea where the contract was not binding on the defendant by reason of its not being mutual on the part of the plaintiff. See Harrison *v.* Cage, Ld. Ray. 386; Holt *v.* Ward, Stra. 850, 937; Daniel *v.* Bowles, 3 C. & P. 553; *ante*, 212. Evidence of the promise. Stark. Ev. Marriage; Chit. jr. Contr. Where the promise was to marry on request, or conditionally, a plea denying the request or performance of the condition would be good; Short *v.* Stone, 8 Q. B. 58; but if the defendant has put it out of his power to perform his promise of marrying the plaintiff by marrying another woman, then, if that be averred in the declaration, a plea stating that plaintiff never requested defendant to marry her would be bad. Short *v.* Stone, 8 Q. B. 58; Caines *v.* Smith, 15 L. J. Ex. 106; [15 M. & W. 189;] and see Lovelock *v.* Franklin, 15 L. J. Q. B. 146; *ante*, 206, note (*c*). [See Clements *v.* Moore, 11 Ala. 35; Greenup *v.* Stoker, 5 Gil. 202; Blattmacher *v.* Saal, 29 Barb. 22.] Plea of fraud. Wharton *v.* Lewis, 1 C. & P. 529; Foote *v.* Hayne, Ib. 546; form, *ante*, 393, "Fraud." Plea that plaintiff contracted a disease and became in bad health. Atchinson *v.* Baker, Peake Add. Cas. 103, 124, S. C. This was held to be a bad plea. Hall *v.* Wright, El., Bl. & El. 746; 27 L. J. Q. B. 345; 29 Ib. 43. Plea that plaintiff "absolved, exonerated and discharged" defendant from his promise. King *v.* Gillett, 7 M. & W. 55. Under such a plea, the defendant must prove the proposition to rescind on the part of the plaintiff, and that that proposition was acceded to by the defendant; Ib.; so that in fact it comes to the same thing as the plea of rescinded contract. *Post*, 438. No plea, that plaintiff was a person of gross manners and little feeling, wherefore defendant declined the marriage. Leeds *v.* Cook, 4 Esp. R. 257. If the plaintiff since the contract has engaged herself to another person, then traverse the averment in the declaration of her *readiness* to marry the defendant. A plea of plaintiff's pre-contract with another is bad; Beechy *v.* Brown, El., Bl. & El. 796; and so also is a plea that the defendant had afterwards discovered that the plaintiff had been lunatic. Baker *v.* Cartwright, 30 L. J. C. P. 364. The marriage of a woman, plaintiff or defendant, will not abate the action. C. L. P. Act, 1852, s. 141; *ante*, 272, notes. If she is taken in execution, she would be released if she have no separate property. Thorpe *v.* Angles, 1 D. & L. 831; Edwards *v.* Martin, 21 L. J. Q. B. 86. In such cases, therefore, it would be better to proceed against the husband also by suggestion or writ of revivor under C. L. P. Act, 1852, ss. 129, 130; and see 2 Saund. 72 *k*. As to proceedings in error, see s. 167.

(*a*) Or *prior* misconduct may be set up, averring that defendant had no knowledge or means of knowledge thereof. See Irving *v.* Greenwood, 1 C. & P. 350; [2 Chitty Contr. (11th Am. ed.) 793, 794;] Bench *v.* Merrick, 1 Car. & K. 463. Form of pleas, that the plaintiff was of intemperate habits. Harbert *v.* Edgington, 1 C. & K. 464. [As to bad character, see 2 Chitty Contr. (11th Am. ed.) 793, 794; Van Storch, 71 Penn. St. 245.]

4. *Plea that the Time for the Marriage had not elapsed.*

That the day agreed on [*or* "a reasonable time"] for the marriage had not elapsed before this suit.

5. *Plea of Mutual Rescission of Contract.* (*b*)

That before breach the agreement was mutually rescinded by the plaintiff and the defendant.

MASTER AND SERVANT.

OBS. — See *ante*, 207, Declarations, and notes thereto.

1. *General Issue.*

Non assumpsit, *ante*, 284.

2. *Plea to an Action for discharging, that the Plaintiff was incompetent.* (*c*)

That at the time of the making of the said agreement the plaintiff represented to the defendant that he was reasonably competent and had sufficient skill and ability to perform the said service, and that he the defendant entered into the said agreement upon the faith of such representations; whereas the plaintiff was not reasonably competent or able to perform the said service, wherefore the defendant discharged the plaintiff from his said service, which is the alleged breach.

3. *Plea that the Plaintiff misconducted himself, and was dismissed on that Account.* (*d*)

That after the making of the said contract, and before the alleged dismissal,

(*b*) Forms, Hall *v.* Wright, 27 L. J. Q. B. 345; Short *v.* Stone, 8 Q. B. 358; Davis *v.* Bomford, 30 L. J. Ex. 139; [6 H. & N. 245.] See King *v.* Gillett, 7 M. & W. 55; 10 L. J. Ex. 164. An exoneration by the plaintiff from the promise may be implied from the conduct and demeanor of the parties, and the total cessation of intercourse and correspondence is evidence of such exoneration. Davis *v.* Bomford, *supra*.

(*c*) See Harmer *v.* Cornelius, 5 C. B. N. S. 236.

(*d*) See [2 Chitty Contr. (11th Am. ed.) 843, and note (*d*);] Cooper *v.* Whitehouse, 6 C. & P. 545. See other forms of similar pleas, Baillie *v.* Kell, 4 Bing. N. C. 638; and a form of plea justifying the dismissal of a surgeon's assistant, Wise *v.* Wilson, 1 C. & K. 662; and see Phillips *v.* Clift, 28 L. J. Ex. 153; [5 H. & N. 168.] It is sufficient to prove part only of the plea, if the part proved be enough to justify the dismissal. Ib. And the *motives* of the master in dismissing the servant cannot be inquired into, provided a cause of justifiable dismissal existed, Ridgway *v.* Hungerford Co. 3 Ad. & E. 171, although not known to the master at the time. Cussons *v.* Skinner, 11 M. & W. 161; Spotswood *v.* Barrow, 5 Ex. 110. [See Durgin *v.* Baker, 32 Maine, 273; Morrell *v.* Burns, 4 Denio, 121.] Unless this defence be pleaded it cannot be given in evidence, even in mitigation of damages. Speck *v.* Phillips, 5 M. & W. 279. See plea that a clerk set up a claim to partnership with his master, wherefore the master dismissed him, Amor *v.* Fearon, 9 Ad. & E. 548; and see form of plea justifying the dismissal of an articled clerk, Mercer *v.* Whall, 5 Q. B. 447, and other pleas in the forms referred to, *ante*, 211 *et seq.*; Spotswood *v.* Barrow, 5 Ex. 110; 19 L. J. Ex. 226. That plaintiff absented herself from her service all night. Turner *v.* Mason, 14 M. & W. 112. See Burgess *v.* Beaumont, 7 M. & G. 962. That the plaintiff got drunk contrary to his undertaking. Monkman *v.* Shepherdson, 11 Ad. & E. 411; Clarke *v.* Allatt, 4 C. B. 335. Discharged for seducing defendant's female servant, Atkins *v.* Acton, 4 C. & P. 208. As to the form and particularity of the plea, see Horton *v.* M'Murtry, 5 H. & N. 667; 29 L. J. Ex. 260.

the plaintiff wilfully misconducted himself by [*according to the fact*], wherefore the defendant dismissed the plaintiff, which is the alleged breach.

4. *Plea of Misappropriation of Money.*

Smith *v.* Thompson, 8 C. B. 44.

5. *Plea denying the Dismissal.* (*e*)

That the defendant did not dismiss the plaintiff, as alleged.

6. *Plea to a Declaration for discharging a Servant, that he was dismissed by due Notice.* (*f*)

That one calendar month before the defendant put an end to the said service he gave to the plaintiff one calendar month's notice of his intention to put an end to the said service, and to discharge the plaintiff therefrom.

7. *Plea that the Plaintiff a Seaman suing for Wages had Deserted.* (*g*)

Robins *v.* Power, 27 L. J. C. P. 257; [4 C. B. N. S. 778.]

MONEY HAD AND RECEIVED. *Ante*, 29.

MONEY LENT. *Ante*, 28.

MONEY PAID. *Ante*, 28.

MORTGAGE. *Ante*, 214.

General Issue.

Non est factum, ante, 285.

NEW ASSIGNMENT.

Obs. — A new assignment is in general necessary, where the plaintiff has, or has had, *two* causes of action against the defendant, either of which the declaration will fit, and the defendant having a supposed answer to *one* such cause of action, pleads that answer. See Steph. and 1 Chit. Pl. 7th ed. p. 653, &c.; Taylor *v.* Cole, 1 Sm. L. C. 5th ed. 111, and Wms. Saund. 299, 300 *i*. In such case the plaintiff must reply, by *repeating*, as it were, the declaration,

(*e*) See Powell *v.* Bradbury, 7 C. B. 201; Lush *v.* Russell, 5 Ex. 203; 19 L. J. Ex. 56, 244.

(*f*) See another form, &c. Nowlan *v.* Ablett, 2 Cr., M. & R. 55; Parker *v.* Ibbetson, 4 C. B. N. S. 346; 27 L. J. C. P. 236. See the declaration, *ante*, 210. If the declaration do not state that it was part of the contract that it should be determined by a month's notice, then plead the general issue, as it would seem to be bad to add that term by special plea. See Williams *v.* Byrne, 7 Ad. & E. 177; *ante*, p. 213. If any wages are due, plead payment into court to that part of the declaration.

(*g*) When the action for seaman's wages is under £50, see Rossi *v.* Grant, 5 C. B. N. S. 699. [Must be specially pleaded. Johnson *v.* Hilberry, 3 H. & C. 328.]

Obs. stating either that he is not proceeding for the causes of action professedly answered in the plea, or else that he is proceeding, *not only* for those causes of action, but for the others also. To this *new assignment* the defendant pleads again; if in denial, — then the issue to be tried will be whether or not there were in reality *two* debts, or two causes of action. Hall *v.* Middleton, 4 Ad. & E. 107. If in confession and avoidance, it is admitted on the record that there *were* two such causes of action, and the plea to the new assignment must be answered, by traverse or otherwise, as if it were pleaded to an entirely new declaration; in such case, therefore, issue cannot be taken on the fact, whether the cause of action in the new assignment (and professedly answered in the plea thereto) be *identical* with that mentioned in the declaration. Heydon *v.* Thompson, 1 Ad. & E. 210; Oliver *v.* Dixon, 9 Ex. 159. So if a plea to a bill count (unnecessarily) assert that the defence contained in it is applicable to *that* bill and no other, the plaintiff should not take issue upon that assertion; but should, if the facts warrant it, new assign *another* bill. Wheeler *v.* Senior, 7 M. & W. 563.

Where the declaration is *general* in its statements, and the plea is as general in its answer (as would be the case where to counts for goods sold, &c. an ordinary plea of payment is pleaded, see James *v.* Lingham, 5 Bing. N. C. 553), there it is not necessary to new assign, though the defendant's evidence really answer a cause of action included in the declaration; such a plea, pleaded under those circumstances, will be taken to mean, that *whatever* claim the plaintiff can establish, the defendant undertakes to answer, and all ambiguity is in reality removed by the particulars of demand. Freeman *v.* Crafts, 4 M. & W. 4; Burgess *v.* De Lane, 27 L. J. Ex. 154. Thus, where to a declaration on a continuing guaranty for £78, the defendant pleaded that the principal paid £78, it was held that, under a denial of that payment, the plaintiff might prove an unpaid *balance* beyond the £78. Moses *v.* Levy, 4 Q. B. 218. And to a plea in abatement new assignment is not necessary. Hill *v.* White, 6 Bing. N. C. 26; 8 Dowl. 13.

But where the plea itself narrows the generality of the declaration, and the plaintiff wishes to go beyond the plea, he must new assign; as where to a count for work, &c. the defendant pleaded that it was done under a *specific* agreement, which was set out in the plea, and that the latter work was paid for, it was held that by denying the payment, the plaintiff accepted the restricted issue offered, and that consequently he could not, without new assigning, recover for work *extra* that agreement. Rogers *v.* Custance, 1 Q. B. 83. So where to debt for wages as a servant, an agreement was pleaded that the plaintiff should forfeit wages actually due if he got drunk, and averring that he did do so, the court said that if the plaintiff were suing for wages due *after* such drunkenness, a new assignment was the proper course for him to adopt. Monkman *v.* Shepherdson, 11 Ad. & E. 417.

The plaintiff by the form of his own replication may be the means of thus restricting the issue, as where to a declaration for goods, &c. the defendant pleaded a release, and the plaintiff, instead of denying that he released the causes of action in the declaration, replied *non est factum*, it was held that he ought to have newly assigned causes of action which had accrued *after* the release, and that he could not recover for such under the issue he had taken. Jubb *v.* Ellis, 15 L. J. Q. B. 94; 3 D. & L. 364.

As a new assignment is a repetition of, or explanation of the declaration, the cause of action stated in it must already have been included in and be consistent with the declaration. Cheasley *v.* Barnes, 10 East, 73, and see Price *v.* Great Western Railway Company, 31 L. J. Q. B. 101. And so, where there are several successive new assignments, each must be contained within the declaration and within one another. Pugh *v.* Griffith, 7 Ad. & E. 827.

By s. 87 of the C. L. P. Act, 1852, "One new assignment only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with and confined by the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what the defences set up in such pleas justify, or both."

By s. 88, "No plea which has already been pleaded to the declaration shall be pleaded to such new assignment, except a plea in denial, unless by leave of

Obs. the court or a judge, and such leave shall only be granted upon satisfactory proof — that the repetition of such plea is essential to trial on the merits."

Subject to this provision, the pleas to a new assignment are similar to those to a declaration. The pleas originally pleaded to the declaration (except, of course, the plea which gives rise to the new assignment) may be considered as applicable also to the new assignment. See 1 Wms. Saund. 300 *a*. A replication and new assignment may be pleaded together without leave. See *post*, Torts, "New Assignment," "Trespass."

1. *New Assignment to a Plea to Money Counts.* (*h*)

That he sues not [*or* "not only," *as the case requires*] for the debts [*or* "causes of action"] in the said plea mentioned, but [*or* "but also"] for other debts [*or* "causes of action"].

2. *New Assignment of Breaches of Another Agreement.*

That he sues not for breaches of the agreement [*or* "contract," *or* "promise"] in the said plea mentioned, but for breaches of another agreement [*or* "contract," *or* "promise"]. (*i*)

3. *New Assignment of other Breaches.*

That he sues not [*or* "not only," *as the case may require*] for the breaches of the said agreement [*or* "contract," *or* "promise"] in the said plea admitted, but [*or* "but also"] for other breaches of the same. (*k*)

NOLLE PROSEQUI.

Obs. — As to a *nol. pros.* in general, see 2 Chit. Arch. 11th ed. 1499; Chitty's Forms, 9th ed. 840; 1 Saund. 207. If entered before trial, its effect is to withdraw that part of the claim from the consideration of the jury in that cause; but it does not prevent a second action being brought for that part of the claim. Amor *v.* Cuthbert, 3 M. & G. 1; S. C. 2 Dowl. N. S. 160. If entered after judgment it operates as a retraxit and bars any future action for the same cause.

A *nol pros.* may be entered at any time even after the trial. Fallows *v.* Bird, 2 Cr., M. & R. 457. And where no issue has been joined as to a particular count, the proper course is to enter a *nol. pros.* on it after trial of the other issues. Luckie *v.* Gompertz, 1 Car. & M. 55; Allsop *v.* Smith, 7 C. & P. 708. A *nol. pros.* cannot be entered after verdict or judgment against the plaintiff.

Where the defendant has demurred to the whole (Drummond *v.* Dorant, 4 T. R. 36) or to part (Butler *v.* Mapp, 10 Bing. 391), of a declaration, the plaintiff cannot in general rectify his error by entering a *nol. pros.* to the part objected to. In Quarrington *v.* Arthur, 11 M. & W. 491; S. C. 2 Dowl. N. S. 1036; [1 Chitty Pl. 228, and cases in note (*n*);] he was allowed to do so as to issues in fact, the defendant having succeeded on other issues in law, and having then moved for judgment, as in case of a nonsuit. By 3 & 4 W. 4, c.

(*h*) See forms given in schedule B of the C. L. P. Act, 1852, *post*, Torts, "New Assignment," "Trespass."

(*i*) As the count in a case of this kind would include *one* agreement only, the plaintiff could not new assign that he was suing not only on the agreement pleaded to but also on another. The proper course in such a case is to have separate counts in the declaration on each agreement; and see 1 Wms. Saund. 299 *a*.

(*k*) It will be advisable in this and the last case to distinguish by date or otherwise, the agreement or breaches, new assigned from those pleaded to. See forms new assigning to a plea of bankruptcy breaches of covenant after the bankruptcy, Elder *v.* Beaumont, 8 El. & Bl. 353; 27 L. J. Q. B. 25; and to a plea of eviction breaches before the eviction, Davies *v.* Underwood, 2 H. & N. 570; 27 L. J. Ex. 113.

Obs. 42, s. 32, "when several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for and recover his reasonable costs;" and by s. 33, "where any *nolle prosequi* shall have been entered upon any count, or as to any part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf." This applies where the *nol. pros.* is entered as to *part* of the sum claimed. Williams *v.* Sharwood, 3 Bing. N. C. 331; 5 Dowl. 371, S. C. When entered in consequence of a demurrer, the costs of the demurrer must be paid; Goddard *v.* Smith, 2 Salk. 456; but such costs need not be paid or deducted until the final taxation. Bertram *v.* Gordon, 6 Taunt. 441. Where the plaintiff in effect abandons his cause of action as to the other issues as well as to the one on which the *nol. pros.* is entered, the defendant will be entitled to the costs of those other issues also. Godee *v.* Goldsmith, 2 M. & W. 102; 5 Dowl. 288, S. C.; Coates *v.* Stephens, 2 Cr., M. & R. 118; 3 Dowl. 784, S. C.; Topham *v.* Kidmore, 5 Dowl. 676.

In actions *ex contractu* the plaintiff cannot enter a *nol. pros.* as to one defendant without releasing the others, [1 Chitty Pl. 594,] except when the one defendant pleads some plea which goes to his *personal discharge*, such as bankruptcy discharge under the insolvent act, or the like. 1 Wms. Saund. 207 *c.* But a plea of infancy is not within this rule. Boyle *v.* Webster, 21 L. J. Q. B. 202. [A different rule prevails in some states. *Ante*, 407, note (*n*); 1 Chitty Pl. 50, note (*y*).]

1. *Nolle Prosequi to the Whole or Part of a Plea.*

Replication to the other pleas, as usual.] And the plaintiff says that he will not further prosecute his suit in respect of the causes of action in the [*second*] plea pleaded to [*or, if the whole plea be not admitted, say* "so far as the said plea relates to," *stating the portion*]; therefore as to those causes of action let the defendant be acquitted, and go thereof without day [*&c.*].

2. *The like, as to One of Several Defendants.*

And as to the plea of the defendant, A. B., by him above pleaded, the plaintiff says that he will not further prosecute his suit against the said A. B.; therefore let the said A. B. be acquitted of the premises in the declaration mentioned, and go thereof without day [*&c.*]. (*l*)

NON-JOINDER.

See "Abatement," *ante*, 268, Obs., and Forms 1, 3, 5, 6, 7, 8, and notes thereto.

PARTNERSHIP OF THE PLAINTIFF AND DEFENDANT.

Obs — See *ante*, 215 *et seq.* The defence that the plaintiff and defendant are partners, and that the claim forms part of their unsettled partnership account is available under never indebted. Worrall *v.* Grayson, 1 M. & W. 166; Gregory *v.* Hartnoll, 1 M. & W. 183; Pearson *v.* Skelton, 1 M. & W. 505: Bosanquet *v.* Wray, 6 Taunt. 597. "If the plaintiff was one of the purchasers of goods sold, he cannot say that the defendant was indebted to him." Payne *v.* Hales, 5 M. & W. 599. See the cases and law on the point that one partner cannot sue another at law, in reference to the unsettled partnership accounts, [1 Chitty Contr. (11th Am. ed.) 339 *et seq.*; *ante*, 215.] It is a defence when one firm is suing another that either of the parties is a member of both firms. [1 Chitty Contr. 343, and note (*f*), 344.] Form of

(*l*) As to the effect of this and costs, see Obs. *supra*.

Obs. plea, Mainwaring *v.* Newman, 2 B. & P. 124; 2 Chit. R. 539; Harvey *v.* Kay, 9 B. & C. 536, Bedford *v.* Brutton, 1 Bing. N. C. 399. One partner may sue the other when there is a balance struck although it do not extend to every partnership account, provided it relate to every part of a particular transaction between the partners as such of an insulated and separate nature, and there need not be any express promise to pay the balance struck. Wray *v.* Milestone, 5 M. & W. 24; Green *v.* Beesley, 2 Bing. N. C. 112; [*ante*, 215, 216.] As to the rights of partners in the county courts, see the county court acts.

Plea to an Action against a Retired Member of a Firm, that when he retired another Partner came in, and that by the Consent of all Parties the Debts of the Old Firm were transferred to the New. (*m*)

Hart *v.* Alexander, 7 C. & P. 746; S. C. 2 M. & W. 484.

PATENT.

Obs. — See Form of Declaration, *ante*, 218. The plea of the general issue will vary according to the forms of declaration. In actions for money due for a license to use a patent, the defendant cannot dispute the validity of the patent. Lawis *v.* Purser, 6 El. & Bl. 930; Smith *v.* Scott, 28 L. J. C. P. 325. So, also, for the assignment of patents, Smith *v.* Veale, 2 C. B. N. S. 67; Hall *v.* Conder, 2 C. B. N. S. 22. See Hills *v.* Laming, 9 Ex. 256.

PAYMENT.

Obs. — By Rule of T. T. 1853, s. 14, "Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar."

S. 13, "In any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

"But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover *a certain balance*, without giving credit for any particular sum or sums." See, as to how the particulars are affected by this rule, *ante*, 36.

Unless pleaded, payment cannot be given in evidence even for the purpose of showing that no interest was due on an admitted debt; Adams *v.* Palk, 3 Q. B. 2; nor can it be shown in mitigation of damages, though a set-off on an account stated be pleaded; Cooper *v.* Morecroft, 3 M. & W. 500; and the defendant prove entries of payments in the handwriting of the plaintiff; Linley *v.* Polden, 2 Dowl. 780; indeed, the reason for making the rule, was to prevent a defendant who had a case of false payment, pleading only the general issue and losing the costs of that issue, but reducing the plaintiff's claim to nominal damages by the surprise thus effected. Per Alderson B. Speck *v.* Phillips, 5 M. & W. 282; and see Lord *v.* Ferrand, 1 D. & L. 630.

Payment must be pleaded in all cases where payments, *as such*, are not credited in the particulars. Mercy *v.* Galot, 3 Ex. 851; 18 L. J. Ex. 347; Smethurst *v.* Taylor, 12 M. & W. 545. See *ante*, 35. The plea will be taken to apply to the plaintiff's demand, whatever it may be proved to be, and therefore it is not in general necessary for the plaintiff to new assign. Freeman

(*m*) As to pleading to a bill the partnership of plaintiff and defendant, see Fox *v.* Frith, 10 M. & W. 131; and see a form of plea, in an action by two partners, of an agreement between the defendant and one of them, sufficient to defeat the action. Gordon *v.* Ellis, 7 M. & G. 607; S. C. 2 D. & L. 308. Subsequent partnership no defence to an action for a loan. Garrard *v.* Harding, 5 M. & G. 477.

Obs. *v.* Crafts, 4 M. & W. 4; James *v.* Lingham, 5 Bing. N. C. 553. See *ante*, "New Assignment," and Obs. 440. The defendant therefore cannot by *truly* pleading payment of a sum which the plaintiff does not claim in the present action, gain any advantage. Dyte *v.* Hawker, 1 D. & L. 189; Kenningham *v.* Alison, 2 Dowl. N. S. 658.

Pleas of payment to bills, *ante*, 336, 337.

A defendant will not be compelled to give particulars under a plea of payment. Phipps *v.* Southern, 8 Dowl. 208. See, also, Ireland *v.* Thompson, 4 Bing. N. C. 716.

By the C. L. P. Act, 1852, s. 75, "Pleas of payment shall be construed distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff for so much of the causes of action as shall not be so answered. The above section in fact extends the doctrine of Cousins *v.* Paddon, 2 Cr., M. & R. 547, to all descriptions of pleadings.

The common plea of payment will suffice when the payment has been made either by check, Pearce *v.* Davis, 1 M. & R. 366, per Patteson J.; see Hough *v.* May, 4 Ad. & E. 954; or by bills of exchange which have since become due and have been paid; Smart *v.* Nokes, 6 M. & G. 911; or by the delivery of goods *as money;* Cannan *v.* Wood, 2 M. & W. 467; [Borah *v.* Curry, 12 Ill. 66; Hooper, *v.* Stevens, 4 Ad. & E. 71;] or by the transfer of money in account; Eyles *v.* Ellis, 4 Bing. 112; Stewart *v.* Aberdein, 4 M. & W. 218; see Bodenham *v.* Purchas, 2 B. & Ald. 39; or by money which the defendant has paid to a third person, and which has been afterwards allowed by the plaintiff in a written account with the defendant; Walker *v.* Andrews, 3 M. & W. 312; and see Lawes *v.* Eastmore, 8 C. & P. 205; Bramston *v.* Robins, 4 Bing. 14; or on an agreed set-off; Foster *v.* Dawber, 6 Ex. 839; 20 L. J. Ex. 385; or by proof that a creditor received the proceeds of a check drawn in his favor. Mountford *v.* Harper, 16 M. & W. 825; 16 L. J. Ex. 184. But a written receipt is not conclusive even though the parties agree that it shall be so. Foster *v.* Dawber, *ubi sup.;* [1 Chitty Contr. (11th Am. ed.) 8, and cases in note (e^1); 2 Ib. 1118, 1119, and notes (*u*) and (*y*) and cases cited.] The plea will also suffice where it has been *agreed* between the parties that the debt of one shall be deducted from that of the other. Per Parke B. Pinnock *v.* Harrison, 3 M. & W. 537; and if two parties state an account, and it is allowed and settled between them, that amounts to payment, and not to set-off. Per Alderson B. Sinclair *v.* Baggeley, 4 M. W. 314. And if money is sent as ordered by the creditor, or in the usual course of business it will be a good payment. Walter *v.* Haynes, R. & M. 149; Warwick *v.* Noakes, 1 Peake, 67. See Kington *v.* Kington, 11 M. & W. 233–235; 12 L. J. Ex. 248; see, also, Gordon *v.* Strange, 1 Ex. 477, and Caine *v.* Coulson, 32 L. J. Ex. 97; [Crane *v.* Pratt, 12 Gray, 348; Gurney *v.* Howe, 9 Gray, 408; Williams *v.* Carpenter, 36 Ala. 9; Wakefield *v.* Lithgow, 3 Mass. 249.] And if a creditor order his debtor to pay third party he must do so according to order, otherwise it is no payment. Smith *v.* Ferrand, 7 B. & C. 19–24. Where, however, it is doubtful whether the facts amount to payment or set-off, it will be better to plead both pleas. See Fidgett *v.* Penny, 1 Cr., M. & R. 108; Palmer *v.* Costerton, 4 Q. B. 525; see Lucas *v.* Wilkinson, 1 H. & N. 420; The Lichfield Union *v.* Green, 1 H. & N. 884.

The payment may be made by any one as agent for and on account of the debtor; Simpson *v.* Eggington, 10 Ex. 845; 24 L. J. Ex. 312; who may ratify at the trial a payment. Ib. [And when payment is so made, the creditor and the person making the payment may rescind the transaction at any time before the debtor has affirmed the payment. See Martin B. in Walter *v.* James, L. R. 6 Ex. 124, 128.] The payment must be made to the creditor or his agent for the purpose. And if a general agent receive money in the ordinary course of business, it will be a good payment; Capel *v.* Thornton, 3 C. & P. 352; but not otherwise. Kaye *v.* Brett, 5 Ex. 269. [See Patten *v.* Fullerton, 27 Maine, 58; Catterall *v.* Hindle, L. R. 2 C. P. 368. So it will be a good payment for goods sold, if made to the person to whom it was agreed payment should be made, at the time of sale, the authority of that

Obs. person not being in the mean time revoked. Marsh *v.* Laforest, 7 La. Ann. 7.] So payment may be made to one of two partners. Porter *v.* Taylor, 6 M. & S. 156; King *v.* Smith 4 C. & P. 108; Farrer *v.* Hutchinson, 9 Ad. & E. 641; [2 Chitty Contr. (11th Am. ed.) 1098, 1099.] So to one executor or trustee. Husband *v.* Davis, 10 C. B. 645; [Lord Hardwicke, in Carr *v.* Read, 3 Atk. 695; Pemberton *v.* Chapman, 7 El. & Bl. 210; S. C. El., Bl. & El. 1056.] So payment under process of court is good. Place *v.* Potts, 8 Ex. 705; 10 Ex. 370. The authority to pay must have come from all the defendants expressly or impliedly; McIntyre *v.* Miller, 13 M. & W. 725, but if a payment be made by one of two defendants, Walters *v.* Smith, 2 B. & Ad. 889, or by one of two makers of a note, Beaumont *v.* Greathead, 2 C. B. 494, the authority of the other will be implied, Thorne *v.* Smith, 20 L. J. C. P. 71, [10 C. B. 659,] and it should be pleaded as a payment by both.

If separate actions be brought against two for a joint debt, and one pay it, the court will stay the action against the other without costs. Bailey *v.* Haines; Bailey *v.* Bracebridge, 13 Q. B. 815–832.

Payment will sometimes be presumed without a plea of the statute of limitations, see [2 Chitty Contr. (11th Am. ed.) 1103, 1104.]

In regard to the appropriation of payments, the party paying has a right to apply the payment as he sees fit, and if he owes several debts he can designate to which the payment shall be applied. But if he do not at the time of payment specifically appropriate it, the person to whom it is paid may apply it as he pleases. Waller *v.* Lacy, 1 M. & G. 54; 9 L. J. C. P. 217; see Simson *v.* Ingham, 2 B. & C. 65; [2 Chitty Contr. (11th Am. ed.) 1111–1118, and notes; Haynes *v.* Nice, 100 Mass. 327, 329 and cases cited; Ramsay *v.* Warner, 97 Mass. 8, 13. "The general rule of law, in case of payments by a debtor to one who is his creditor upon distinct transactions, or for distinct amounts, when neither party makes an appropriation at the time, is, that the payments are applied by law to the liabilities of earliest date." Crompton *v.* Pratt, 105 Mass. 255, 257; Worthley *v.* Emerson, 116 Mass. 374; 2 Chitty Contr. (11th Am. ed.) 1110, and note (n^1), 1111, and note (*o*), and cases cited.]

Payment of a smaller sum cannnot be pleaded in satisfaction of a greater; Down *v.* Hatcher, 10 Ad. & E. 121; [2 Chitty Contr. (11th Am. ed.) 1101, and note (*y*); *ante*, 288; and Seymour *v.* Minturn, 17 John. 169, and the following cases there cited; Walen *v.* Kirby, 99 Mass. 1, 3; Twichell *v.* Shaw, 10 Cush. 48;] unless some agreement, founded on good consideration, be shown for giving up the residue, such as the payment of part *before* the day, or by a stranger out of his own moneys; Lewis *v.* Jones, 4 B. & C. 506; [Brooks *v.* White, 2 Met. 283; Lee *v.* Oppenheimer, 32 Maine, 253; Goodnow *v.* Smith, 18 Pick. 414; Reid *v.* Bartlett, 19 Pick. 273; Rose *v.* Hall, 26 Conn. 392; Smith *v.* Brown, 3 Hawks, 580; Kellogg *v.* Richards, 14 Wend. 116; Sanders *v.* Branch Bank, 13 Ala. 353; Boyd *v.* Hitchcock, 20 John. 76;] or under a creditor's composition; *ante*, 364, note (*o*); [Huston J. in Milliken *v.* Brown, 1 Rawle, 397, 398; Hinckley *v.* Arey, 27 Maine, 362; Cutter *v.* Reynolds, 8 B. Mon. 596; Shaw C. J. in Langdon *v.* Langdon, 4 Gray, 189;] or there be a release under seal of the residue. But the damages and costs *ultra* the debt, are not to be estimated as a part of the debt given up in this sense, and therefore payment of the amount of *the debt* may be well taken in satisfaction of both debt and damages, and even too it seems of costs incurred. Corbett *v.* Swinburne, 8 Ad. & E. 673.

"If a claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may be under certain circumstances evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a satisfaction of any sum due on a simple contract." Per Parke B. Sibree *v.* Tripp, 15 M. & W. 33; 15 L. J. Ex. 318. See Cooper *v.* Parker, 15 C. B. 822; 24 L. J. Ch. 68; [M'Kean C. J. in Musgrove *v.* Gibbs, 1 Dallas, 217; Brooks *v.* White, 2 Met. 285, 286; Perkins *v.* Lockwood, 100 Mass. 249; Bowker *v.* Harris, 30 Vt. 424; Eaton *v.* Lincoln, 13 Mass. 424; Watkinson *v.* Ingleby, 5 John. 386; Blinn *v.* Chester, 5 Day, 359; Jones *v.* Bullitt, 2 Litt. 49.]

1. *General Plea of Payment to the whole of a Count, or to the whole Declaration.* (*n*)

That before action he satisfied and discharged the plaintiff's claim by payment. (*o*)

[1*a*. *Answer of Payment.*

And the defendant comes and answers that he has paid the plaintiff the sum of —— dollars, which was the full amount of the amount stated in the plaintiff's bill of particulars.]

2. *Plea of Payment after Action.* (*p*)

That after action he satisfied and discharged the plaintiff's claim [and all damages and costs in respect thereof] by payment.

(*n*) C. L. P. Act, 1852, sch. B, 40. As to what is payment, see *ante*, Obs. Where no time for payment of a debt is provided by the parties, it impliedly accrues due immediately the consideration for it has attached, without demand; and if payment is made before action the creditor is not entitled to nominal damages; Beaumont *v.* Greathead, 2 C. B. 494; 15 L. J. C. P. 130; unless pleaded it cannot be given in evidence, *vide* Obs. R. 14, T. T. 1853; Speck *v.* Phillips, 5 M. & W. 282. As to part payment, *ante*, 20. Where there is no doubt about the sum which the defendant can prove he has paid, it is advisable to plead to part only, because if the defendant prove payment of the part he *pleads* as having paid, he will get the costs of that issue, though he lose the cause. If he prove *less* than he *pleads* as having paid, he will be allowed for as much as he does prove in the estimate of the *extent* to which his defence reaches. Cousins *v.* Paddon, 2 Cr., M. & R. 547; S. C. 4 Dowl. 438; Lord *v.* Ferrand, 1 D. & L. 630; and if, with the help of his other pleas, the aggregate of his defence is enough to equal the plaintiff's claim, the defendant will get the costs of the plea of payment with the others; but if the aggregate of his defence is not enough to equal the plaintiff's claim, the defendant will not in such case get *any* costs on his plea of payment, even though he has been put to expense in proving that portion of it which he does prove, and which nevertheless counts for him in reduction of the damages. Tuck *v.* Tuck, 5 M. & W. 109; Moore *v.* Butlin, 7 Ad. & E. 597; Kilner *v.* Bayley, 5 M. & W. 384. Where the plea is to part only of the cause of action, it is necessary to allege with certainty in the commencement the sum to which it is intended to be pleaded. Dunn *v.* De Nuovo, 3 M. & G. 107. Take care that it is not pleaded to more than is answered in the body, otherwise the defendant may demur; Wright *v.* Acres, 6 Ad. & E. 726; and the plea would be bad after verdict; Down *v.* Hatcher, 10 Ad. & E. 121; but the plaintiff could not sign judgment; Wood *v.* Farr, 5 Bing. N. C. 247; *aliter*, if there be not pleas on the record applied in their commencement to *every* part of the plaintiff's demand, so that some part is left unanswered, in that case judgment may be signed for the unanswered part. Chitty *v.* Dendy, 3 Ad. & E. 319; Henry *v.* Earl, 8 M. & W. 228; Chit. Arch. Pr. 8th ed. p. 265. The defendant need not prove payment of the whole sum stated in the plea; if he prove payment of sufficient to cover plaintiff's real demand that will suffice; Falcon *v.* Benn, 2 Q. B. 314; and if he prove less than the sum stated in the plea, he will be allowed so much in reduction of damages. Lord *v.* Ferrand, 1 D. & L. 630.

(*o*) If there be two joint plaintiffs, a payment *to* one would in general be a payment to both, and may be pleaded as such. Beaumont *v.* Greathead, 2 C. B. 494; Porter *v.* Taylor, 6 M. & S. 156; Farrer *v.* Hutchinson, 9 Ad. & E. 641. If the payment has been made to a person whose receipt of it makes it a good payment against the plaintiff, it should be pleaded as though made to plaintiff himself. A plea of payment to plaintiff's wife was held bad for not averring that she was his agent to receive it. Offley *v.* Clay, 2 M. & G. 172; [Thrasher *v.* Tuttle, 22 Maine, 335.]

(*p*) If the debt be paid and accepted after action, the plaintiff cannot further maintain his action to recover nominal damages. Beaumont *v.* Greathead, 2 C. B. 494; 15 L. J. C. P. 130; Thorne *v.* Boast, 12 Q. B. 808; 17 L. J. Q. B. 340; Hills *v.* Maynard, 10 Q. B. 273; 16 L. J. Q. B. 306; and that though nothing be said when such payment was made of a satisfaction for costs incurred; Horner *v.* Denham, 12 Q. B. 813; see Cooke *v.* Hopewell, 11 Ex. 555; but such payment must be pleaded or plaintiff will be entitled to a verdict for the whole debt due when action brought. Nosotti *v.* Page, 20 L. J. C. P. 81; [Ash *v.* Pouppeville, L. R. 3 Q. B. 86.] See Goodwin *v.* Cremer, 22 L. J. Q. B. 31. Indorsee may go against acceptor to recover costs though pending action amount of bill be paid by third party. Ib.

3. *Plea of Payment on a Judgment.* (*q*)

That after the said judgment was recovered, and before action, he satisfied and discharged the said judgment by payment.

[4. *Plea of Payment by a Set-off of Cross Demands in an Account stated and Payment of the Balance.*

Sutton *v.* Page, 3 C. B. 204; Callander *v.* Howard, 10 C. B. 290. See Smith *v.* Page, 15 M. & W. 683; Livingstone *v.* Whiting, 15 Q. B. 722.

5. *Plea to an Action for Goods sold, of Payment of Part of the Price to the Plaintiff, and of the Residue to Trustees by Agreement with the Plaintiff to abide the Adjustment of a Dispute as to the Goods being equal to the Contract.*

Page *v.* Meek, 3 B. & S. 259.]

PAYMENT INTO COURT.

Obs. — By the C. L. P. Act, 1852, s. 70, "It shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), and, by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends (*b*): provided that nothing herein contained shall be taken to affect the provisions of a certain act of parliament passed in the session of parliament holden in the sixth and seventh years of the reign of her present majesty, intituled 'An act to amend the law respecting defamatory words and libel.'"

By s. 72, "No rule or judge's order to pay money into court shall be necessary, except in the case of one or more of several defendants; but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff or to his attorney, upon a written authority from the plaintiff, on demand."

The effect of these sections is, that no rule or order is necessary, except where one or more of several defendants pay into court.

Section 71 gives the form of plea to be followed as near as may be, *mutatis mutandis*.

By s. 73, "The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit."

By R. H. T. 1853, 11, "No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of court, unless specially required by the master."

R. 12, "When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, *when the costs of the cause are taxed* (*a*), shall be entitled

(*q*) This plea is given by 4 Anne, c. 16, s. 12. See *ante*, "Bonds," 351.

Obs. to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action, and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at instructions for plea, but not before."

R. 13. "Where money is paid into court in several actions, which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court."

And by C. L. P. Act, 1860, s. 25, "In any action brought upon a bond which has a condition in defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of a court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case to the value of the goods alleged to be detained, and such payment into court shall be made and pleaded in like manner, and according to the provisions of the common law procedure act, 1852; and the like proceedings may be had and taken thereupon, as to costs and otherwise." See Bishop of London *v.* McNeill, 9 Ex. 490.

Care must be taken to pay into court a sum sufficient to satisfy the full claim to damages to *the time the plea is pleaded*. If interest be claimable, it must be calculated to the time of payment, and not merely to the time the writ was issued. Kidd *v.* Walker, 2 B. & Ad. 705; 1 Dowl. 331, S. C. [If the payment is of too small an amount by only a few cents, though by mistake, the object and effect of it are defeated. Boyden *v.* Moore, 5 Mass. 365; Patnote *v.* Sanders, 41 Vt. 66.] If money be paid into court, but the defendant omit to plead the payment, the defendant is not entitled to costs. Adelaide *v.* Booth, 1 Bing. N. C. 693; and if less be paid in than is admitted to be due by the plea, such payment would be bad. Tattersall *v.* Parkinson, 16 M. & W. 752; Grimsley *v.* Parker, 3 Ex. 610; An amendment by adding a plea of payment into court, or by increasing the sum before paid in on a plea of payment into court, would in general be allowed on terms. If money be offered by the defendant and refused by the plaintiff, on a summons before declaration (Cumming *v.* Columbino, 6 Dowl. 373; Parsons *v.* Pitcher, Ib. 432), the defendant will not be entitled to the subsequent costs unless such money be afterwards paid into court on a plea. Gover *v.* Elkins, 3 M. & W. 216; S. C. 6 Dowl. 335; 4 Bing. N. C. 306, S. C. But if plaintiff refuse to accept the money on summons, and afterwards take it out of court, it is considered *primâ facie* as vexatious conduct on his part, and therefore disentitling him to the costs after the offer, unless explained; see Willis *v.* Darke, Tyr. & Gr. 503; Jones *v.* Owen, 1 Dowl. 565; 2 Cr. & J. 479, S. C.; Hale *v.* Baker, 2 Dowl. 125; Kelly *v.* Flint, 5 Dowl. 293; as by showing on affidavit that he could not sooner ascertain the amount of damages; Ackroyd *v.* Reed, 5 M. & W. 542; but the court will not interfere to give defendant his costs unless he have made a previous application to the master. Roe *v.* Cobham, 6 Dowl. 628. On the other hand, an abandoned summons of the defendant offering more than he afterwards pays into court, may be used as evidence against him at the trial. Dommett *v.* Young, 1 Car. & M. 465.

Where money is paid into court, and the plaintiff accepts it in satisfaction of his claim, he "recovers" the amount within the meaning of 13 & 14 Vict. c. 61, s. 11, which deprives a plaintiff of costs where he "shall recover a sum not exceeding £20." Parr *v.* Lillicrap, 32 L. J. Ex. 150; [1 H. & C. 615;] overruling Chambers *v.* Wiles, 24 L. J. Q. B. 267.

Where there are several counts for several causes of action, or several breaches are assigned in an action on a covenant, the defendant may plead payment into court of one entire sum, in satisfaction of all the counts or breaches. Marshall *v.* Whiteside, 1 M. & W. 188; Mitchell *v.* Towneley, 7 Ad. & E. 164.

Effect of, as an admission. — 1. *When pleaded to an indebitatus count.*] It admits that defendant was indebted on the causes of action as described in those counts to the extent of the money paid in on them; Kingham *v.* Robins, 5 M.

Obs. & W. 94 ; [Jones *v.* Hoar, 5 Pick. 285 ;] but no further, though the plaintiff prove a single contract exceeding in value the amount paid into court ; Steavenson *v.* Corporation of Berwick, 1 Q. B. 154 ; Goff *v.* Harris, 5 M. & G. 573 ; it admits, also, the validity of every *species* of claim mentioned in the particulars accompanying the counts on which it is paid in, and that *some* damages are due on *each ;* Edgar *v.* Watson, 1 Cr. & M. 494; [but see Hubbard *v.* Knous, 7 Cush. 556; Bacon *v.* Charlton, 7 Cush. 582, 583;] and it admits the plaintiff's character in which he sues; Lipscombe *v.* Holmes, 2 Camp. 441 ; and his sole right to the money sued for ; Walker *v.* Rawson, 1 Mood. & Rob. 250 ; S. C. 5 C. & P. 486 ; and that the defendants are properly sued jointly ; Ravenscroft *v.* Wise, 1 Cr., M. & R. 203 ; if the plea be pleaded by all the defendants ; Stapleton *v.* Noel, 6 M. & W. 9 ; S. C. 8 Dowl. 196 ; *aliter,* if pleaded by only one defendant; Elliot *v.* Morgan, 7 C. & P. 334; it also admits that the action is not brought too soon ; Harrison *v.* Douglas, 3 Ad. & E. 396 ; but all these admissions only operate to the extent of the amount paid into court. Archer *v.* English, 1 M. & G. 873 ; [Hubbard *v.* Knous, 7 Cush. 556.]

2. *When pleaded to a special count.*] — It admits the contract as laid ; McCance *v.* London & North Western Railway Co. 31 L. J. Ex. 65 ; [3 H. & C. 343 ;] Israel *v.* Benjamin, 3 Camp. 46 ; [Huntington *v.* American Bank, 6 Pick. 340 ; Hubbard *v.* Knous, 7 Cush. 557, 558 ;] and that nominal damages are due on it ; Archer *v.* English, 1 M. & G. 873 ; and this the defendant cannot give evidence to controvert ; Lloyd *v.* Walkey, 9 C. & P. 771 ; still less will he be allowed to give evidence of facts under this plea even in mitigation of damages, which, if pleaded before, would have been a bar to the action ; Speck *v.* Phillips, 5 M. & W. 279 ; S. C. 7 Dowl. 470 ; and it admits all the material, but not the immaterial, averments in the declaration, as sums of money laid under a *videlicet.* Cooper *v.* Blick, 2 Q. B. 915. In use and occupation it admits plaintiff's title and his sole title. Dolby *v.* Iles, 11 Ad. & E. 335 ; and see Attwood *v.* Taylor, 1 M. & G. 280. If paid in on a promissory note payable by instalments, it only admits the amount of instalments as due which the money paid in will cover, and does not preclude the statute of limitations being pleaded to the others. Reid *v.* Dickons, 5 B. & Ad. 499 ; Jourdain *v.* Johnson, 2 Cr., M. & R. 566.

Where some money is due on the indebitatus counts, and the declaration contains also special counts, as to which the defendant wishes to make no admissions, he may secure that object by expressly restricting the plea of payment into court to the former counts. Charles *v.* Branker, 12 M. & W. 743 ; S. C. 1 D. & L. 989; Bonne *v.* Thompson, 4 Q. B. 543. Where the plaintiff has two counts in his declaration, upon either of which he can recover his demand, as a count for goods sold, and upon an account stated as to the price, it suffices to pay money into court upon one only of such counts. Early *v.* Bowman, 1 B. & Ad. 89 ; Stafford *v.* Clarke, 2 Bing. 377 ; 1 C. & P. 703, S. C. ; Evereth *v.* Bell, 7 Taunt. 450.

By payment into court the defendant loses any right he might have had to move in arrest of judgment. Wright *v.* Goddard, 8 Ad. & E. 144.

When the declaration comprises several causes of action, and money is paid into court generally, the court will not in general order particulars stating to what items of the plaintiff's claim the money is paid into court. The Thames Iron Works & Ship Building Co. *v.* The Royal Mail Steam Packet Co. 30 L. J. C. P. 265; [10 C. B. N. S. 375 ;] Baxendale *v.* Great Western Railway Co. 30 L. J. Ex. 63; [6 H. & N. 94.]

As to payment into court in actions on tort, see *post,* "Torts." For the practice and mode of proceeding, see Chit. Circt. Pr.

1. *Plea of Payment into Court.* (*r*)

The defendant, by —— his attorney [*or* "in person," *&c.*], [*if pleaded to*

(*r*) This form is given by the C. L. P. Act, 1852, s. 71, and no order is necessary except in the case of one or more of several defendants, s. 72. It admits the cause of action as if judgment had gone by default. As also the damages to the extent of the money paid in ; Robinson *v.* Harman, 1 Ex. 850 ; Story *v.* Finnis, 6 Ex. 123 ; and it has the same effect in actions of tort. Schreger *v.* Carden, 11 C. B. 851 ; Perren *v.* Mon-

part, say "as to £——, parcel of the money claimed"] brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

2. *Replication taking the Money out of Court in Satisfaction.* (*s*)

That he accepts the money paid into court in full satisfaction and discharge of the causes of action, in respect of which it has been paid in.

3. *Replication claiming a further Sum.* (*t*)

That the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded.

mouthshire Ry. Co. 11 C. B. 855; [Bacon *v.* Charlton, 7 Cush. 581; Hosmer *v.* Warner, 7 Gray, 186.] If pleaded to the whole or part of an indebitatus count, the sum paid in should equal that to which it is pleaded; Grimley *v.* Parker, 3 Ex. 610; and all interest due at the time of paying it in. Kidd *v.* Walker, 2 B. & Ad. 705. If pleaded to a count on a bill or note, and part only of the sum mentioned in the bill be paid in, the plea must give some answer to the residue. Armfield *v.* Burgin, 6 M. & W. 281; Tattersall *v.* Parkinson, 16 M. & W. 752. See form 4, *post*. If the pleas of payment into court be pleaded to part only of the claim, the remainder being met by other defences, such as payment, &c. since by originally claiming too much, the plaintiff has rendered the pleading such other pleas necessary on the part of the defendant, he cannot by taking the money out of court, in discharge of the whole cause of action, avoid paying the costs of those other pleas to the defendant; Topham *v.* Kidmore, 5 Dowl. 676; Emmett *v.* Standen, 3 M. & W. 497; Goodee *v.* Goldsmith, 2 M. & W. 202; S. C. 5 Dowl. 288; Rumbelow *v.* Whalley, 16 Q. B. 397; and see Harrison *v.* Watt, 16 M. & W. 316; M'Lean *v.* Phillips, 7 C. B. 817; but if money be paid into court on *the whole* declaration, the rule, it seems, would be otherwise. Coates *v.* Stevens, 2 Cr., M. & R. 118; S. C. 3 Dowl. 784. Pleas in denial will not be allowed to any part of the cause of action covered by the plea of payment into court. Thompson *v.* Jackson, 1 M. & G. 242; 8 Dowl. 591. See Pl. R. T. T. 1853, 22. As to the effect of so pleading, Fischer *v.* Aidé, 3 M. & W. 486; and see Twemlow *v.* Askey, 3 M. & W. 495. It is not necessary to specify how much of the sum paid into court is meant to be applied to each particular count. Jourdain *v.* Johnson, 2 Cr., M. & R. 564; Marshall *v.* Whiteside, 1 M. & W. 192. Exception in the case of a bill, *post*. Take care to pay enough in to cover interest, &c. or any other damages that may have accrued in respect of the causes of action confessed by this plea, up to the time when the money is paid in. Kidd *v.* Walker, 2 B. & Ad. 705; *supra*, Obs.; [Boyden *v.* Moore, 5 Mass. 365.]

(*s*) C. L. P. Act, 1852, s. 53. Where the money is paid into court on part of an *indebitatus* count, this replication is generally proper, and the plaintiff may then proceed for his further claim on the other issues; he may take the money out of court at once, but cannot tax the costs of the issue until the cause is ended. Canty *v.* Gyll, 5 Scott N. R. 819; S. C. 4 M. & G. 907. Where, however, the defendant has not paid into court sufficient to cover interest, &c. (see *supra*, 352, Obs.), or where more is claimed on *the contract* on which the money is paid in, the next form is proper. The prudent course is to take the money out of court in full satisfaction, and stay proceedings, in cases where there is a reasonable doubt of establishing a claim beyond the amount paid in. Where the defendant pleads payment of money into court to part, and other pleas to the residue of the plaintiff's demand which are true, and the necessity for which has arisen in consequence of the plaintiff's claiming in the declaration more than was due to him, the plaintiff cannot pass over those other pleas unnoticed; and if he do, the court will give leave to the defendant to sign judgment of *nol. pros.* unless the plaintiff amends his replication on payment of costs, or consents to taxation of costs as upon a *nol. pros.* in respect of the unanswered pleas. Topham *v.* Kidmore, 5 Dowl. 676. If the plaintiff enter a *nol. pros.* to those pleas, the defendant will be entitled to the costs in respect of the issues on them. Goodee *v.* Goldsmith, 2 M. & W. 202; 5 Dowl. 288, S. C.; and Emmett *v.* Standen, 3 M. & W. 497. It is no discontinuance if the plaintiff do not reply to the plea of payment of money into court before going to trial on the other issues, as he may enter a *nol. pros.* on the former even after verdict. Fallows *v.* Bird, 2 Cr., M. & R. 457; *ante*, "*Nol. Pros.*" When money is taken out under a mistake, see Emery *v.* Webster, 9 Ex. 242; 10 Ex. 901.

(*t*) See preceding note, and C. L. P. Act, 1852, s. 73.

PERFORMANCE. See *ante*, "Bonds," 353, Form 10, note (*k*).

PHYSICIAN. (*u*)

PROMISSORY NOTES.

Obs.— See the Declarations, *ante*, 220. *Non assumpsit* cannot be pleaded to a count on a note. *Ante*, "Bills," Obs. 330. Pleas to notes may easily be framed from those on bills; *ante*, 332–348; bearing in mind that the *maker of a note* stands in the position of the *acceptor of a bill*; and the *payee* of a note *when he indorses it* in that of the *drawee* of a bill; but though the *indorsee* of a *bill* is in the nature of a new *drawer*, the *indorser of a note* is not in the situation of a new *maker*. [Gwinnell *v.* Herbert, 5 Ad. & E. 436. Plea to an action for money lent, that a promissory note was given to third persons as trustees for the plaintiffs, and that they were still the holders, and replication, that plaintiffs alone were interested in it, and that it was due and unpaid. The National Savings Bank *v.* Tranah, L. R. 2 C. P. 556.]

1. *Drawer or Indorser against Maker; Denial of making.*

That he did not make the said promissory note, as alleged.

2. *Indorsee against Maker; Denial of Indorsement.*

As *ante*, 333, Form 2, substituting the words "promissory note" for "bill."

3. *Plea on Equitable Grounds, that the Defendant made the Note as Surety for a Joint Maker, and that the Plaintiff gave Time to such Joint Maker.* (*x*)

That he made the said note jointly with A. B. for his accommodation and as his surety only, to secure a debt due from him solely to the plaintiff, and save as aforesaid, there never was any value or consideration for making the said note by the defendant; and the note was delivered to the plaintiff, and was accepted by him with notice of the premises; and that afterwards, and whilst the plaintiff was holder of the said note, and without the knowledge or consent of the defendant, and for a good and valid consideration in that behalf, the plaintiff gave time to A. B. for the payment of the said note after the same became due.

PUBLIC COMPANY.

Obs. — See Declarations, *ante*, 225–230; Lindley on Partnership.

The plea of "never indebted," in an action for calls, puts the plaintiffs on proof of all that the statutes require them to prove, in order to maintain the action, and under it the defendant may show that there was no notice, or no *due* notice, of the calls, or that the directors did not appoint a time or place for receiving the payments. Edinburgh, Leith & Newhaven Ry. Co. *v.* Hebblewhite, 6 M. & W. 707. Accordingly, pleas denying those facts will not be

(*u*) *Ante*, 220. A physician who is registered has a legal right to recover. Gibson *v.* Budd, 32 L. J. Ex. 182.

(*x*) See other forms, Pooley *v.* Harradine, 7 El. & Bl. 431; 26 L. J. Q. B. 156; Greenough *v.* M'Clelland, 30 L. J. Q. B. 15; Mutual Loan Association *v.* Sudlow, 5 C. B. N. S. 449; 28 L. J. C. P. 108; Lawrence *v.* Walmsley, 31 L. J. C. P. 143. See the law, Chit. on Bills, 10th ed. 288; and see *ante*, 376.

Obs. allowed; neither will the defendant be allowed to plead pleas which would tend to litigate matters for the determination of which other provisions are made; thus the *application* of the calls depending upon the directors, who may be called to account at a general meeting, a plea by an individual subscriber will not be allowed to raise the question whether or not the calls were made for other purposes than those warranted in the act. London & Brighton Ry. Co. *v.* Wilson; Same *v.* Fairclough, 6 Bing. N. C. 135, 270; and see South Eastern Ry. Co. *v.* Hebblewhite, 12 Ad. & E. 497. So a plea that the calls were made after deviations in the line will not be allowed. Ib. Nor pleas that the calls were not made upon *all* the subscribers or proprietors; Ib.; and Thames Dock Haven Co. *v.* Rose, 4 M. & G. 552; or by competent persons, and for the sole purpose of the undertaking; or that there were not present, when the calls were made, the required number of directors who had paid their calls; or that there were fewer shares allotted than the act of parliament required, the act being only *directory* as to the number. Thames Haven Dock Co. *v.* Rose, 4 M. & G. 552, S. C. A plea that the shares had been forfeited *since* the call was made, would also be repugnant to the spirit of the statutes. London & Brighton Ry. Co. *v.* Fairclough, 6 Bing. N. C. 270. And even a plea that the shares had been forfeited *before* the making the calls in question, would, it seems, be bad, as amounting to an argumentative traverse of the defendant's being a shareholder; Ib.; such forfeiture is not complete until confirmed at a general meeting of the company, held according to the act of parliament; see 8 & 9 Vict. c. 16, s. 31; Birmingham, Bristol & Thames Junction Ry. Co. *v.* Locke, 1 Q. B. 256, 271, 282; therefore, until confirmed, it is no defence to an action for calls. It is no defence that between the day when the call was made and that upon which it was payable, the defendant transferred his shares, although such transfer was duly entered and indorsed according to the provisions of the act of parliament; as in all cases the person holding the share at the time when the call is made is liable. Aylesbury Ry. Co. *v.* Mount, 7 M. & G. 898. And under the general issue it may be shown that the defendant is not a shareholder. Shropshire Union Ry. Co. *v.* Anderson, 3 Ex. 401; 18 L. J. Ex. 232. As to who are shareholders, see *ante* 226, note (*r*). In an action against a shareholder for calls, in the general form given by s. 26 of 8 & 9 Vict. c. 16, twenty years is the period of limitation within which the action may be brought. Cork & Bandon Ry. Co. *v.* Goode, 13 C. B. 826; 22 L. J. C. P. 198. But see Welland Ry. Co. *v.* Blake, 30 L. J. Ex. 161, as to calls under foreign or colonial statutes. [As to personal liability of promoters of non-existing company, Kelner *v.* Baxter, L. R. 2 C. P. 174. Plea that claim is not *bonâ fide* will not be allowed. Hooper *v.* Bristol &c. Co. 35 L. J. C. P. 299. Plea that land had not been injuriously affected. Beckett *v.* The Midland Ry. Co. L. R. 1 C. P. 241; L. R. 3 C. P. 82. Misrepresentation in prospectus of public company. Kennedy *v.* The Panama &c. Co. L. R. 2 Q. B. 580.]

1. *General Issue to an Action for Calls.*

Never indebted, *ante*, 284.

2. *Denial that the Defendant is the Holder of the Shares.*

That he was not at the time of the making of the said call the holder (*y*) of the said shares in the said company, or of any of them, as alleged.

3. *Denial that the Company is registered.*

Agricultural Cattle Insurance Co. *v.* Fitzgerald, 16 Q. B. 432; 20 L. J. Q. B. 244. (*z*)

(*y*) Or "proprietor," according to the term used in the declaration. See The Belfast & County Down Ry. Co. *v.* Strange, 1 Ex. 738. As to the evidence, see The Cheltenham & Great Western Union Ry. Co. *v.* Daniel, 2 Q. B. 281.

(*z*) See other like forms, London Monetary Advance Co. *v.* Smith, 3 H. & N. 543; 27 L. J. Ex. 479. Traverse that the company is incorporated. Liverpool Borough Bank *v.* Mellor, 3 H. & N. 551; 28 L. J. Ex. 78. Pleas relating to the appointment of liquidators. Anglo-Californian Gold Mining Co. *v.* Lewis, 30 L. J. Ex. 50; [6 H. & N. 174.]

4. *Plea that the Calls made were in Excess of the Company's Powers.*

The Welland Ry. Co. *v.* Berrie, 6 H. & N. 416; 30 L. J. Ex. 163.

5. *Plea that the Contract was not under Seal.*

London Dock Co. *v.* Sinnott, 8 El. & Bl. 347. (*a*)

[5*a*. *Plea that Defendant was induced to become Holder of Shares through the Fraud of the Plaintiffs, never had any Benefit, &c. and repudiated and disclaimed the Shares, and gave Notice thereof.*

Bwlch y Plwm, &c. Co. *v.* Baynes, L. R. 2 Ex. 324.]

6. *Plea that Plaintiff was a Director and interested in the Contract.*

Stears *v.* South Essex Gas Co. 9 C. B. N. S. 180; 30 L. J. C. P. 49. (*b*)

PUIS DARREIN CONTINUANCE.

Obs. — See *ante*, 318, form 2, note (*b*).

By C. L. P. Act, 1852, s. 68, "Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action."

By s. 69, "In cases in which a plea *puis darrien continuance* has heretofore been pleadable in banc or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading; and such plea may, when necessary, be pleaded at nisi prius, between the tenth of August and twenty-fourth of October; but no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order."

And by R. T. T. 1853, 22 & 23, "A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading such first mentioned plea. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants."

Any defence which arises after plea and before verdict, and within eight days after such defence arises (unless further time be allowed by the court or a judge), may be pleaded as arising *puis darrien continuance*. Todd *v.* Emly,

(*a*) Other like pleas, and that the contracts were *ultra vires*, South Wales Ry. Co. *v.* Redmond, 10 C. B. N. S. 675; Royal British Bank *v.* Turquand, 6 El. & Bl. 327; 24 L. J. Q. B. 327; 25 L. J. Q. B. 317; Balfour *v.* Ernest, 28 L. J. C. P. 170; [5 C. B. N. S. 601;] Ernest *v.* Nicholls, 6 H. L. Cas. 408; South Yorkshire Ry. Co. *v.* Great Northern Ry. Co. 9 Ex. 55; Bell *v.* Darenth Ry. Co. 1 H. & N. 305; Bateman *v.* Mayor &c. of Ashton, 3 H. & N. 323; 27 L. J. Ex. 458; Hambro *v.* Hull Fire Insurance Co. 28 L. J. Ex. 62; [3 H. & N. 789;] Payne *v.* Mayor &c. of Brecon, 3 H. & N. 572; 27 L. J. Ex. 495. Where all the capital has not been subscribed, see London & Continental Assurance Co. *v.* Redgrave, 4 C. B. N. S. 524. [Company cannot plead that the contract was not under seal. Nicholson *v.* The Guardian of Bradfield Union, L. R. 1 Q. B. 620. When a contract not under seal binding. The South of Ireland Collier Co. *v.* Waddle, L. R. 3 C. P. 463.]

(*b*) 7 & 8 Vict. c. 110, s. 29. See, also, Job *v.* Lamb, 11 Ex. 539.

Obs. 9 M. & W. 606. And unless it be pleaded, advantage cannot be taken of it. Rundle *v.* Little, 6 Q. B. 174; Cooke *v.* Hopewell, 11 Ex. 555; Goodwin *v.* Cremer, 18 Q. B. 757. When pleaded it is a waiver of the pleas before pleaded; Dunn *v.* Hill, 11 M. & W. 470; Wagner *v.* Imbrie, 6 Ex. 38; [1 Chitty Pl. 690;] so when pleaded after demurrer and joinder, it operates as a retraxit of the demurrer. Solomon *v.* Graham, 24 L. J. Q. B. 332. When pleaded the plaintiff may confess the plea, and is entitled to his costs. R. 23, T. T. 1853 (*supra*); Barnett *v.* London & North Western Ry. Co. 5 H. & N. 604; 29 L. J. Ex. 334. The judge is bound to accept it at nisi prius when tendered to him; Page *v.* Shenstone, 4 D. & L. 396; or before the cause be reached, if the eight days would otherwise expire. Townsend *v.* Smith, 1 C. & K. 160. Formerly the plea would not be allowed with other pleas in bar. Suckling *v.* Wilson, 4 D. & L. 167; Gabardi *v.* Harmer, 6 D. & L. 481.

Plea Puis Darrien Continuance.

That after the last pleading in this action [*here state the defence*]. (*c*)

RECOGNIZANCE OF BAIL.

1. *Plea Nul Tiel Record.* (*d*)

That there is not any record of the supposed recognizance in the said court here [*or* "the said court of ——"].

2. *Plea that there was no Capias ad Satisfaciendum against the Principal.* (*e*)

That no writ of *capias ad satisfaciendum* was sued out of the said court here against the said E. F. upon the said judgment, after the recovery of the same and before this suit.

3. *Replication that there was a Ca. Sa. against the Principal.* (*f*)

That after the recovery of the said judgment, and before this suit, on the —— day of ——, A. D. 18—, the plaintiff sued out of the said court a writ of *capias ad satisfaciendum* upon the said judgment against the said E. F., directed to the sheriff of ——; by which said writ our lady the queen commanded the said sheriff [*set out writ in past tense*], which said writ afterwards, and before the said return thereof, was delivered by the plaintiff to the sheriff aforesaid to be executed in due form of law, and afterwards, according to the course and practice of the said court, the said sheriff returned to the said court on the said writ that the said E. F. was not found in his bailiwick, as by the said writ of *capias ad satisfaciendum*, and the return thereof duly affiled and remaining of record in the said court more fully appears; and the plaintiff

(*c*) Annex affidavit of truth, as *ante*, 270, adding, "that the matter of the said plea arose within eight days next before this day, being the day on which the said plea is pleaded."

(*d*) See *ante*, 418. A recognizance is not a record until enrolled. Glynne *v.* Thorpe, 1 B. & Ald. 153. Plea of the death of the principal before the bail were fixed. Wilson *v.* Hodges, 2 East, 312. The defendant cannot plead a mere *irregularity* in practice. Cherry *v.* Powell, 1 D. & R. 50; Sandon *v.* Proctor, 7 B. & C. 800; Hinton *v.* Acraman, 2 C. B. 367.

(*e*) See Chit. Arch. Pr.; Dudlow *v.* Watchorn, 16 East, 39; Cherry *v.* Powell, 1 D. & R. 50; Sandon *v.* Proctor, 7 B. & C. 800; Beck *v.* Young, 3 Dowl. 284, 286, 291; *ante*, 310, note (*e*).

(*f*) See Sandon *v.* Proctor, 7 B. & C. 800.

prays that the said record may be seen and inspected by the court here; but because the court here are not yet advised what judgment to give on the premises, a day is therefore given to the said parties aforesaid here, until ——, to hear judgment thereon. (*g*)

RELEASE.

Obs. — Release must be specially pleaded. T. T. 1853, r. 8. A release may be made by express agreement, or may take effect by operation of law. [See 2 Chitty Contr. (11th Am. ed.) 1145 *et seq.*] A parol contract may before breach be released by parol. Goss *v.* Lord Nugent, 5 B. & Ad. 58–66 ; Com. Dig. Assumpsit, G. See Foster *v.* Dawber, 6 Ex. 839 ; as to release *after* breach, Dobson *v.* Espie, 26 L. J. Ex. 240. But a contract under seal can be released only by an instrument under seal. Brooks *v.* Stuart, 9 Ad. & E. 854 ; Littler *v.* Holland, 3 T. R. 590. A release otherwise than by instrument under seal must be founded upon a sufficient consideration. Lodge *v.* Dicas, 5 B. & Ald. 611.

No particular form of words is necessary to constitute a release if a manifest intention is indicated by the debtor to release the creditor. Bac. Abr. Release, A.; Com. Dig. Release, A. 1. A release on part payment under a composition agreement with defendant's creditors generally is good, though the agreement be not under seal. See *ante*, 364; Barker *v.* Richardson, 1 Y. & J. 362. A release to one of two joint and several debtors is a release to all ; Cocks *v.* Nash, 9 Bing. 431 ; Nicholson *v.* Revill, 4 Ad. & E. 675; Brooks *v.* Stuart, 9 Ad. & E. 854 ; Wilkinson *v.* Lindo, 7 M. & W. 87 ; [Lunt *v.* Stevens, 24 Maine, 584 ; Colyer Partn. § 606, and notes and cases cited; Walker *v.* McCulloch, 4 Greenl. 421 ; Shaw *v.* Pratt, 22 Pick. 308 ; Pond *v.* Williams, 1 Gray, 630, 636 ; Wiggin *v.* Tudor, 23 Pick. 444 ; Harrison *v.* Close, 2 John. 449; Rowley *v.* Stoddard, 7 John. 209 ; Putnam *v.* Lewis, 8 John. 304 ; Johnson *v.* Weed, 9 John. 310 ; Frink *v.* Green, 5 Barb. 450 ; Mason *v.* Jewett, 2 Dana, 107;] unless it appear by the deed that it was not intended so to operate; North *v.* Wakefield, 13 Q. B. 536 ; but the court will set such a release aside if the giver was only a trustee, and had no real interest to release. Rawstorne *v.* Gandell, 15 M. & W. 305. [A release of one joint debtor, which discharges all, must be a technical release under seal. Shaw *v.* Pratt, 22 Pick. 308 ; Harrison *v.* Close, 2 John. 449 ; 1 Chitty Contr. (11th Am. ed.) 346, note (*s*). But a mere discharge by operation of law, of one of several debtors, without the consent of the creditor, will not take away his remedy against the others. Ward *v.* Johnson, 13 Mass. 152 ; Robertson *v.* Smith, 18 John. 459 ; Hosack *v.* Rogers, 8 Paige, 229 ; Townsend *v.* Riddle, 2 N. H. 449.] A pauper may release to the prejudice of his attorney. Jones *v.* Bonner, 2 Ex. 230.

As to the distinction between a release to, and a covenant not to sue one of several debtors, see Price *v.* Barker, 7 El. & Bl. 760–777 ; Dean *v.* Newall, 8 T. R. 168; Twopenny *v.* Young, 3 B. & C. 212 ; Willis *v.* De Castro, 4 C. B. N. S. 216. The court will only set such a release aside when there is fraud between the releasor and defendant ; fraud *upon* releasor should be replied; Wild *v.* Williams, 6 M. & W. 490 ; and see Crook *v.* Stephen, 5 Bing. N. C. 688 ; Phillips *v.* Claggett, 11 M. & W. 84 ; and they will not interfere where a party releasing has any interest at all to release, though the effect of his release may be to bar innocent co-plaintiffs. Rawstorne *v.* Gandell, *ubi sup.* Release defeating attorney's lien on a judgment. Barker *v.* St. Quintin, 12 M. & W. 441 ; Perry *v.* Allen, Ex. M. T. 1845. A release from any plaintiff on the record is a bar, even though the action is brought for the benefit of others, who have no mode of enforcing their claim except by suing in plaintiff's name. Per Parke B. Wilkinson *v.* Lindo, 7 M. & W. 87; and see, also, Gibson *v.* Winter, 5 B. & Ad. 96. See Chit. Contr. *in voc.*

A covenant not to sue may amount to a release ; 2 Wms. Saund. 4799 ; Ford *v.* Beech, 11 Q. B. 852 ; [2 Chitty Contr. (11th Am. ed.) 1146, note (e^1) and cases cited ;] but it cannot be pleaded in bar if it is only not *to sue for* a lim-

(*g*) See *ante*, 418, note (*d*).

Obs. ited time ; Thimbleby *v.* Barron, 3 M. & W. 210 ; 2 Wms. Saund. 150 *a*; [2 Chitty Contr. (11th Am. ed.) 1147, and note (*g*) and cases cited;] unless there is a condition that it may be so pleaded in case, an action be brought within the time. Gibbons *v.* Vouillon, 8 C. B. 483 ; Belshaw *v.* Bush, 11 C. B. 191; Keyes *v.* Elkins, [5 B. & S. 240;] 34 L. J. Q. B. 25 ; Walker *v.* Nevill, [3 H. & C. 403;] 34 L. J. Ex. 73 ; [2 Chitty Contr. (11th Am. ed.) 1147, and note (*f*) and cases cited ; Winans *v.* Huston, 6 Wend. 471 ; Pearl *v.* Wells, 6 Wend. 291 ; White *v.* Dingley, 4 Mass. 433.]

1. *Plea of Release.* (*h*)

That after the alleged claim accrued, and before this suit, the plaintiff, by deed, released the defendant therefrom.

[1*a*. *Plea of Release to the further Maintenance of the Action.*

Tetley *v.* Wanless, L. R. 2 Ex. 275.]

2. *Replication to Plea of Release.* (*i*)

That the alleged release is not the plaintiff's deed.

3. *Replication that the Release was obtained by Fraud.* (*k*)

That the said release was procured by the fraud of the defendant.

4. *Plea that the Manager of a Banking Company released the Debt, which the Company (the Plaintiffs) afterwards ratified.*

Bell *v.* Tuckett, 3 M. & G. 783.

5. *Plea of the Release of a Co-contractor.* (*l*)

[Thompson *v.* Lack, 3 C. B. 540; North *v.* Wakefield, 13 Q. B. 536; Price

(*h*) C. L. P. Act, 1852, sch. B, 42. The plea should be pleaded to part only of the demand if the whole claim be not admitted, and of course the plea must then be confined to the part confessed. If this plea be pleaded to a count on a bill, add, "and after the acceptance" [*or* "indorsement," *as the case may be*] of the said bill. See Ashton *v.* Freeston, 2 M. & G. 1. A release by deed must be expressly pleaded as a release, or so much of the deed as operates as a release must be set out. Wilson *v.* Braddyll, 9 Ex. 718.

(*i*) C. L. P. Act, 1852, sch. B. 50. This replication in general merely puts the execution of the deed in issue. If the release be by one of several plaintiffs, the proper replication would be to deny that he released in manner and form alleged; per Parke B. Wilkinson *v.* Lindo, 7 M. & W. 86; North *v.* Wakefield, 13 Q. B. 536; a covenant not to sue would be no defence in such case. Walmsley *v.* Cooper, 11 Ad. & E. 216. When to new assign to a release, Jubb *v.* Ellis, 15 L. J. Q. B. 94.

(*k*) C. L. P. Act, 1852, sch. B, 51.

(*l*) A *release* to one of several *joint* and several debtors is a discharge of all; Co. Litt. 232; Cocks *v.* Nash, 9 Bing. 431; Nicholson *v.* Revill, 4 Ad. & E. 675; Brooks *v.* Stuart, 9 Ad. & E. 854; [*ante*, 455;] but a covenant *not to sue* is not so in general. Dean *v.* Newhall, and Twopenny *v.* Young, *supra*, Obs.; [*ante*, 455.] Release by giving time on a guaranty. Howell *v.* Jones, 1 Cr., M. & R. 97; and see Combe *v.* Wolf, 8 Bing. 156. By releasing the principal. Barr *v.* Cooper, 8 M. & W. 751; *ante*, "Guaranty." Release by appointing a joint debtor executor. Chetham *v.* Ward, 1 B. & P. 630, and see there form of plea to a bond; [2 Chitty Contr. (11th Am. ed.) 1156, note (*m*); 1 Chitty Pl. 60, and cases in note (*c*).] Release of a note by giving time to one for whose accommodation defendant had made it. Smith *v.* Winter, 4 M. & W. 454. Release by withdrawing an execution which plaintiff had against the principal debtor. Mayhew *v.* Crickett, 2 Swanst. 185. Parol consent on the part of the defendant, that the release of the other joint debtor should not operate to release him, cannot be pleaded to a release under seal; Cocks *v.* Nash, 9 Bing. 431; but such a consent under seal may; Cowper *v.* Smith, 4 M. & W. 519. Release of one joint debtor by proceeding to judgment against the other. King *v.* Hoare, 13 M. & W. 494; [Maule J. in Bell *v.* Bankes, 3 M. & G. 267; Bayley J. in Lechmere *v.* Fletcher, 1 Cr. & M. 634; Story J. in United States *v.* Cushman, 2 Sumner, 437–441; Trafton *v.* United States, 3 Story, 646; Pierce *v.* Kearney, 5 Hill, 86; Ward *v.* Johnson, 13 Mass. 151, 152; Robertson *v.* Smith, 18 John. 459; Moale *v.*

v. Barker, 4 El. & Bl. 760;] Willis *v.* De Castro, 4 C. B. N. S. 216; 27 L. J. C. P. 243; [reserving remedies, *ante*, 399, note (*s*[1]).]

6. *Replication to a Plea of Release, setting out the Releasing Deed in Hæc Verba, by which it appeared that the Release was to be void in Certain Circumstances, and averring those Circumstances.*

Hyde *v.* Watts, 12 M. & W. 254. (*m*)

REPLEVIN BOND. (*n*)

1. *General Issue.* (*o*)

Non est factum.

2. *Plea to a Declaration on a Replevin Bond, that it was taken by a Person not duly deputed by the Sheriff for the Purpose.* (*p*)

That the said supposed bond was taken from the defendants in the name of the sheriff of the county of ——, by one M. G., under pretence that the said M. G. was then the deputy of the said sheriff of the said county, but that at the time of the taking thereof the said sheriff had not deputed or appointed the said M. G. as his deputy, nor had the said M. G. any authority in the sheriff's name to make replevies and deliverance of distresses.

3. *Plea that the Suit abated by the Death of the Plaintiff in Replevin.*

Morris *v.* Matthews, 2 Q. B. 295.

RESCINDED CONTRACT.

Obs. — At common law, an agreement (whether reduced to writing or not is immaterial) not under seal may *before breach* be wholly waived or rescinded by the mutual consent of the parties, even by parol, and without any accord or satisfaction. Goss *v.* Lord Nugent, 5 B. & Ad. 58; Rippinghall *v.* Lloyd, 5 B. & Ad. 742; Taylor *v.* Hilary, 1 Cr., M. & R. 741; Franklin *v.* Miller, 4 Ad. & E. 599–606; Fitt *v.* Cassanet, 4 M. & G. 898. See Lewis *v.* Clifton, 14 C. B. 245; 23 L. J. C. P. 68; [1 Chitty Contr. (11th Am. ed.) 154, 155, and cases cited in note (*d*); 2 Ib. 1147.] But not *after breach*. Edwards *v.* Chapman, 1 M. & W. 231; and see Cooper *v.* Phillips, 1 Cr., M. & R. 649.

Hollins, 11 Gill & J. 11; Ward *v.* Motter, 2 Rob. (Va.) 559, 560; 2 Chitty Contr. (11th Am. ed.) 1173, and note (*e*); Holman *v.* Langtree, 40 Ind. 349, 389.]

(*m*) Neville *v.* Boyle, 11 M. & W. 26. Replication, that the release was altered. Fazakerly *v.* Knight, 6 El. & Bl. 795; 26 L. J. Q. B. 30. See form of replications on equitable grounds, De Pothonier *v.* De Mattos, 27 L. J. Q. B. 260; [El., Bl. & El. 461;] Lyall *v.* Edwards, 30 L. J. Ex. 193; [6 H. & N. 337;] The Thames Iron Works & Ship Building Co. *v.* The Royal Mail Steam Packet Co. 31 L. J. C. P. 169; [13 C. B. N. S. 358;] *ante*, "Equitable Pleas."

(*n*) See form, &c. Faulkner *v.* Johnson, 11 M. & W. 581.

(*o*) The bail may also plead *nul tiel record*, if the declaration show a judgment in the replevin suit. If the bond be conditioned to prosecute without delay, and no judgment against the principal is shown, they may plead a prosecution of the replevin suit without delay. See form, &c. Harrison *v.* Wardle, 5 B. & Ad. 148. As to plea of appearance at the county court, see Rider *v.* Edwards, 3 M. & G. 202.

(*p*) See 1 Ph. & M. c. 12, s. 3; Griffiths *v.* Stevens, 1 Chit. R. 196.

Obs. *Then* the agreement to rescind must be executed in accord and satisfaction. Ib.; and Sard *v.* Rhodes, 1 M. & W. 153; Bayley *v.* Honan, 3 Bing. N. C. 915; Wray *v.* Milestone, 5 M. & W. 21; [*per cur.* Foster *v.* Dawber, 6 Ex. 839, 851; Adams *v.* Nichols, 19 Pick. 275; 2 Chitty Contr. (11th Am. ed.) 1148, and note (*q*).] A mere agreement for an accord, not executed, will not extinguish a vested right of action. Lynn *v.* Bruce, 2 H. Bl. 317; Reeves *v.* Hearne, 1 M. & W. 323; [*ante*, 288.]

A partial failure of consideration does not entitle the other party to rescind a contract *in toto;* Franklin *v.* Miller, 4 Ad. & E. 599; Jonassohn *v.* Young, 4 B. & S. 296; [see Keenan *v.* Brown, 21 Vt. 86;] but an unqualified refusal by one contractor to perform his part does; *aliter*, when the refusal is qualified. Lines *v.* Rees, 1 Jur. 593.

As to the right of a defendant to rescind a contract for the delivery of goods, on the ground of the plaintiff refusing to pay for the first *part* delivery of them, Ivey *v.* Young, 1 M. & R. 545. See Bartholomew *v.* Markwick, 33 L. J. C. P. 145; [15 C. B. N. S. 711.] And as to rescinding contract founded on a mistake, Scott *v.* Littledale, 27 L. J. Q. B. 201; [8 El. & Bl. 815; 2 Chitty Contr. (11th Am. ed.) 1034.] If one party refuses absolutely to perform his contract, the other may rescind the contract. Hochster *v.* De la Tour, 2 El. & Bl. 678; Avery *v.* Bowden, 6 El. & Bl. 953; [Barwick *v.* Buba, 2 C. B. N. S. 563;] Reid *v.* Hoskins, 6 El. & Bl. 961; Xenos *v.* Danube Co. 31 L. J. C. P. 84, 284; [11 C. B. N. S. 152;] and notes to Cutter *v.* Powell, 1 Sm. L. C. 1; [Sargent J. in Clark *v.* Manchester, 51 N. H. 594, 596; Bell J. in Webb *v.* Stone, 24 N. H. 288; Allen *v.* Webb, 24 N. H. 278; Weeks *v.* Robie, 42 N. H. 316, and cases cited; Danforth *v.* Dewey, 3 N. H. 79. If the act of one party be such as necessarily to prevent the other party from completing his part of the contract according to the terms of it, the latter may treat the contract as rescinded. Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285; Hall *v.* Rupley, 10 Barr, 231; Moulton *v.* Trask, 9 Met. 577; Derby *v.* Johnson, 21 Vt. 17; Hoagland *v.* Moore, 2 Blackf. 167; Webster *v.* Enfield, 5 Gilman, 298; Planché *v.* Colburn, 8 Bing. 14; Burton *v.* Pinkerton, L. R. 2 Ex. 340; Reybold *v.* Voorhees, 30 Penn. St. 116; 2 Chitty Contr. (11th Am. ed.) 828–830, and note (*l*); Bassett *v.* Sanborn, 9 Cush. 58, 65. When a contract may be rescinded for fraud, see 1089, and note (*m*); or because there is a complete difference in substance between the thing bargained for and that obtained under the contract; see Kennedy *v.* Panama &c. Mail Co. L. R. 2 Q. B. 580; Azemar *v.* Casella, L. R. 2 C. P. 431, 677; Pooley *v.* Brown, 11 C. B. N. S. 566; Gardner *v.* Lane, 12 Allen, 39; 9 Allen, 492; Gurney *v.* Wormersley, 4 El. & Bl. 133; Benj. Sales (1st Am. ed.), § 600 *et seq.;* or for breach of warranty, see 1 Chitty Contr. (11th Am. ed.) 648, and note (q^1); Day *v.* Pool, 52 N. Y. 416, 419; Rogers *v.* Hanson, 35 Iowa, 284, 286, 287; Scranton *v.* Tilly, 16 Texas, 173; Kuntzman *v.* Weaver, 20 Penn. St. 422; Matteson *v.* Holt, 45 Vt. 336; Carpenter *v.* Minturn, 65 Barb. 293; Benj. Sales (1st Am. ed.), § 888, and note (*a*); Dorr *v.* Fisher, 1 Cush. 271, 274; Foster J. in Morse *v.* Brackett, 98 Mass. 209; and in Boardman *v.* Spooner, 13 Allen, 361; or for non-performance of condition precedent, see 2 Chitty Contr. (11th Am. ed.) 1090, and note (*p*); Frost *v.* Jackson, 7 Cowen, 24.]

In the case of an agreement required to be in writing under the statute of frauds, a parol agreement, even before breach that it shall be abandoned *in part*, is void. Goss *v.* Lord Nugent, *supra;* Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89; Harvey *v.* Grabham, 5 Ad. & E. 61. [See Noble *v.* Ward, 4 H. & C. 149; S. C. L. R. 1 Ex. 117; S. C. 2 Ib. 135; Moore *v.* Campbell, 10 Ex. 323, 332; Swain *v.* Seamens, 9 Wallace, 254; Stead *v.* Dawber, 10 Ad. & E. 57; Dana *v.* Hancock, 30 Vt. 616; Ogle *v.* Vane, 7 B. & S. 855; L. R. 2 Q. B. 275; 9 B. & S. 182; L. R. 3 Q. B. 272; Emmet *v.* Dewhurst, 3 Mac. & G. 587; Browne Stat. Frauds, §§ 179, 411 *et seq.* The law is settled otherwise in Massachusetts, where it is held that parol evidence may be admitted to prove a subsequent oral agreement, enlarging the time of performance of a simple contract, or varying its terms, or to show a waiver or discharge, although the original contract was required by the statute of frauds to be in writing. Stearns *v.* Hall, 9 Cush. 31; Cummings *v.* Arnold, 3 Met. 486. The decisions in Maine and Maryland have a bearing in the same direction. Richardson

Obs. *v.* Cooper, 25 Maine, 450; Blood *v.* Hardy, 15 Maine, 61; Franklin *v.* Long, 7 Gill & J. 407; Watkins *v.* Hodges, 6 Harr. & J. 38.]

Where a contract has been rescinded *ab initio*, that is, under a power to rescind contained in the *original* contract, that fact, when set up as a defence to an *indebitatus count*, may be given in evidence under *non assumpsit*. But such is not the effect of a subsequent agreement to rescind; in such case there is a substitution of one agreement for another, and a special plea in confession and avoidance would be proper. Stevens *v.* Ufford, 7 C. & P. 97.

1. *Plea that before Breach the Contract was rescinded by Mutual Agreement.*

That after the said contract, and before any breach thereof, it was agreed by and between the plaintiff and defendant that the contract should be, and thereupon it was, rescinded. [See Burgess *v.* De Lane, 27 L. J. Ex. 154.]

2. *Plea that before Breach the Plaintiff absolved, exonerated, and discharged the Defendant.* (*q*)

Davis *v.* Bomford, 30 L. J. Ex. 139; 6 H. & N. 245.

RESTRAINT OF TRADE.

Obs. — *Ante*, 134–136.

Plea that a Covenant not to carry on a Business within Certain Limits was void, as being contrary to Public Policy.

Mellan *v.* May, 11 M. & W. 653.

REWARDS. (*r*)

SALE OF GOODS.

Obs. — See *ante*, Obs. 234. In an action upon the *indebitatus* counts for the price of goods sold, the defence that they were of so bad a quality as to be *entirely* worthless, contrary to an express or implied contract; [see Benj. Sales (1st Am. ed.), § 899, and notes (*p*) and (*q*);] or that they are not worth more upon a *quantum meruit* than a certain sum (paid into court or paid before action), by reason of their not being conformable to a warranty given or sample shown, or equal in quality to what they ought to have been by implication of law, may be set up under *never indebted*, although a fixed price were agreed upon. Cousins *v.* Paddon, 2 Cr., M. & R. 547. A plea that the goods consisted of a machine, for which nothing was to be paid unless it worked well, was held bad on special demurrer; Groundsell *v.* Lamb, 1 M. & W. 352; and so was a plea which stated that a boat, warranted sound by the plaintiff, had turned out unsound, and was only worth a certain sum which had been paid. Dicken *v.* Neale, 1 M. & W. 556. See other instances, Hayselden *v.* Staff, 5 Ad. & E. 161; Gardener *v.* Alexander, 1 Bing. N. S. 671.

So, under the general issue, the defendant may prove that the goods delivered

(*q*) Like pleas, King *v.* Gillett, 7 M. & W. 55; Goldham *v.* Edwards, 17 C. B. 141; Hobson *v.* Cowley, 27 L. J. Ex. 205; Xenos *v.* Danube Co. 31 L. J. C. P. 84; [11 C. B. N. S. 152; Davis *v.* Bomford, 6 H. & N. 245.]

(*r*) See *ante*, 233. See, also, Neville *v.* Kelly, 32 L. J. C. P. 118.

Obs. formed part of several parcels ordered under an *entire* contract for the whole of the goods; that the part delivered were returned in due time, and that no more were delivered before action, for under such circumstances no promise to pay for those delivered can be implied; *ante*, 279; and the defence that the goods were sold upon a *credit* unexpired when the action was commenced, may and must be relied upon on the general issue. *Never indebted* means that there never was any contract of sale *on credit;* it may be shown therefore under it that payment was made for the goods at the time they were brought and delivered; Bussey *v.* Barnett, 9 M. & W. 313; but see Littlechild *v.* Banks, 14 L. J. Q. B. 356; or that they were supplied in part payment of defendant's wages. Wilson *v.* Storey, 4 Jur. 463. In an action against a man for goods ordered by a third person in his name, the authority of the third person to order the goods, whether such authority arises from implication of law or from other circumstances, may be disputed under *never indebted;* it follows, therefore, that in an action against a husband for goods ordered by his wife, her adultery, or such other facts as show that she had no authority, express or implied, to bind her husband, may be shown under *never indebted.* Symes *v.* Goodfellow, 2 Bing. N. C. 532; Spreadbury *v.* Chapman, 8 C. & P. 371; Sinclair *v.* Hervey, 2 Chit. Rep. 642.

1. *General Issue.*

Never indebted, *ante*, 284; non assumpsit, *ante*, 284.

2. *Plea to a Special Declaration for not accepting; that the Defendant did accept.*

That he did accept the said goods according to his contract.

3. *Plea to a Similar Declaration, that Plaintiff was not ready and willing to deliver the Goods.* (*s*)

That the plaintiff was not ready and willing to deliver the said goods according to his contract.

4. *Plea that the Plaintiff did not send the Goods within the Time, and was not ready and willing to do so.* (*t*)

Attwood *v.* Emery, 1 C. B. N. S. 111.

5. *Plea to a Special Declaration for not paying for the Goods; that the Defendant did pay for them.*

That he did pay to the plaintiff the price for the said goods according to his contract.

(*s*) This form of traverse involves the plaintiff's *ability* to perform his contract. See Lawrence *v.* Knowles, 5 Bing. N. C. 399; De Medina *v.* Norman, 9 M. & W. 820; Boyd *v.* Letts, 1 C. B. 222; S. C. 2 D. & L. 847. It would be bad to traverse a *tender* of the goods, even though the plaintiff should improperly introduce that allegation into his declaration. Jackson *v.* Alloway, 6 M. & G. 942. The lunacy of the plaintiff may be given in evidence under this plea. Kirtley *v.* Copeland, 1 Car. & K. 319. Plea to a declaration for wrongfully discharging the defendant from going on with the *manufacture* of goods ordered from him by the plaintiff, denying such discharge. Pontifex *v.* Wilkinson, 1 C. B. 76. A plea to a declaration for not accepting a cargo of oil, stating that the *casks* were not merchantable, was held bad. Gower *v.* Dedalzen, 3 Bing. N. C. 717. Pleas, &c. in this form of action, held bad for duplicity. Smith *v.* Dixon, 6 Dowl. 47; S. C. 7 Ad. & E. 4.

(*t*) See other forms excusing acceptance; that they were not according to sample. Sieveking *v.* Dutton, 3 C. B. 331; 15 L. J. C. P. 276; not equal to contract, Jones *v.* Clarke, 2 H. & N. 725; not in a merchantable condition, Bull *v.* Robison, 10 Ex. 342; 24 L. J. Ex. 165.

6. *Vendee against Vendor, for not delivering Goods.* (*u*)

7. *Plea to Goods sold and delivered, that the Goods were returned, and the Contract rescinded.*

That after the sale and delivery of the said goods, and before this suit, it was agreed between the plaintiff and defendant, that the defendant should return and redeliver to the plaintiff the said goods, and that the plaintiff should accept and receive back the same, in satisfaction and discharge of the causes of action; and the defendant afterwards, and before this suit, returned and redelivered the said goods to the plaintiff, and he then accepted and received back the same upon the terms aforesaid.

8. *Plea to a Declaration for Goods sold and delivered, that the Goods were sold by the Plaintiff under the False Pretence that he was the Executor of A. B., and Payment to the Rightful Executor.*

Allen *v.* Hopkins, 13 M. & W. 94. (*x*)

9. *Plea that Goods were sold upon a Sunday.* (*y*)

That at the time of the said sale and delivery of the said goods by the plaintiff to the defendant, the plaintiff carried on the trade and business of ["a corn merchant"], and the said goods ["being corn,"] were sold and delivered by the plaintiff to the defendant, and the said contract to pay the price and value thereof was made by the defendant to the plaintiff in the way of the plaintiff's said trade and business, being his ordinary calling, and in the course and exercise thereof, on Sunday the —— day of ——, A. D. ——, the same not being a work of necessity or charity.

SALE OF LAND. See *post*, "Vendors and Purchasers."

(*u*) See the declaration, *ante*, 240, form 11. The defendant may traverse any conditions precedent therein alleged, such as "*that a reasonable time for the delivery of the said goods had not elapsed before, &c.;*" or "*that the plaintiff was not ready and willing to accept the goods;*" or "*to pay for them;*" or "*that the defendant had not notice, &c.;*" or "*that he did deliver the goods, &c.*" Whether all or any of these are material allegations of conditions precedent, and therefore traversable, will depend upon the precise terms of the contract itself as set out in the declaration. See Kingdon *v.* Cox, 15 L. J. C. P. 95.

(*x*) See Lee *v.* Shore, 1 B. & C. 94; Keeble *v.* Payne, 8 Ad. & E. 551.

(*y*) See 29 Car. 2, c. 7, s. 1, and cases thereon; [Benj. Sales (1st Am. ed.), §§ 553–558, and notes; 1 Chitty Contr. (11th Am. ed.) 588, and note (f^2), 590, and note (*i*), 591, and note (l^1), 592, and note (*o*); 2 Ib. 1017 *et seq.* and notes;] Rawlins *v.* Overseers of Derby, 15 L. J. C. P. 70. A sale on Sunday, not in the course of the vendor's ordinary calling, is good. Ib.; Scarfe *v.* Morgan, 4 M. & W. 270; and see Norton *v.* Powell, 4 M. & G. 42. Work by attorney on Sunday valid. Plea need not conclude "against the statute." Peate *v.* Dicken, 1 Cr., M. & R. 422. A replication to this plea, that the defendant kept the goods without offering to return them, was held bad for not showing a new promise to pay. Simpson *v.* Nicholls, 3 M. & W. 240. [See 1 Chitty Contr. (11th Am. ed.) 588, note (f^2), 591, note (l^1).] As a new implied promise to pay for the goods would arise in such case, the plaintiff should new assign. Ib. [But the mere fact of the vendee keeping the goods, will not render him liable in such a case. Simpson *v.* Nicholls, 3 M. & W. 240; Smith *v.* Bean, 15 N. H. 577; Myers *v.* Meinrath, 101 Mass. 368; Hall *v.* Corcoran, 107 Mass. 259; Cranson *v.* Goss, 107 Mass. 441; Horton *v.* Buffington, 105 Mass. 399; King *v.* Green, 6 Allen, 139; Bradley *v.* Rea, 14 Allen, 20; Stebbins *v.* Peck, 8 Gray, 553; Boutelle *v.* Melendy, 19 N. H. 196; Sumner *v.* Jones, 24 Vt. 217.]

SEAMAN.

OBS. — See *ante*, 243, Obs.

1. *Plea to an Action by a Seaman for refusing to allow him to serve, that the Agreement was entered into under* 5 *&* 6 *W.* 4, *c.* 19, *and that Plaintiff was guilty of Mutiny.*

Renno *v.* Bennett, 3 Q. B. 768.

2. *Plea to a Special Count for Wages, that they were forfeited by Plaintiff's Desertion of the Ship.*

M'Donald *v.* Jopling, 4 M. & W. 285.

SET-OFF.

OBS. — By 2 Geo. 2, c. 22, s. 13, "where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." [But a set-off is not a defence. Curran *v.* Curran, 40 Ind. 473.]

By 8 Geo. 2, c. 24, s. 5, "mutual debts may be set off, notwithstanding that such debts are of a *different nature*, unless in cases where either of the said debts shall accrue by reason of a *penalty* contained in any bond or specialty, where the debt intended to be set off shall be *pleaded* in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other as aforesaid."

By the bankrupt law consolidation act, 1849 (12 & 13 Vict. c. 106), s. 171, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off, had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

By the C. L. P. Act, 1860 (23 & 24 Vict. c. 126), s. 19, the joinder of too many plaintiffs shall not be fatal; and by s. 20, "upon the trial of such cause a defendant who has therein pleaded, a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him."

By R. 8, T. T. 1853, set-off must be specially pleaded; Graham *v.* Partridge, 1 M. & W. 395; and such plea shall be taken distributively. C. L. P. Act, 1852, s. 75. Particulars of the set-off must be delivered with the plea. R. 19, Hil. T. 1853. These particulars should specify items, dates, and amounts, and should also mention what the balance is; though such particulars need not mention the items on the credit side. Chit. Arch. Pr. They should be such as not to mislead a reasonable man as by confusing a claim of salary with one for commission. Law *v.* Thompson, 15 M. & W. 545. See Prichard *v.* Nelson, 16 M. & W. 772. A set-off can only be pleaded in respect of *mutual debts;* Isberg *v.* Bowden, 22 L. J. Ex. 322; [8 Ex. 852; 2 Chitty Contr. (11th Am. ed.) 1268, and note (g^1),] and does not apply to a claim

Obs. founded in damages. Morley *v.* Inglis, 4 Bing. N. C. 58; Bell *v.* Carey, 8 C. B. 887; Castelli *v.* Boddington, 22 L. J. Q. B. 5; [1 El. & Bl. 66.] Thus a liability on a guaranty, Morley *v.* Inglis, *supra*, even though it be under seal, Williams *v.* Flight, 2 Dowl. N. S. 11, cannot be set off. So, it cannot be pleaded to an action on a bond conditioned to indemnify generally; Attwool *v.* Attwool, 2 El. & Bl. 23; 22 L. J. Q. B. 287; nor to an action for detention of a ship; Seeger *v.* Duthie, 29 L. J. C. P. 253; 30 L. J. C. P. 65; nor to an action for unliquidated losses on a policy of insurance; Thompson *v.* Redman, 11 M. & W. 487; Castelli *v.* Boddington, *supra;* nor to a special count for not indemnifying an accommodation acceptor; Hardcastle *v.* Netherwood, 5 B. & Ald. 93; except as to so much of the claim as is in respect of the payment of the amount of the bill. Crampton *v.* Walker, 30 L. J. Q. B. 19.

But if money is actually paid under a guaranty, it may be set off. Hutchinson *v.* Sidney, 10 Ex. 438. When the set-off accrues on a judgment; Turner *v.* Pell, 2 Ex. 793; Amor *v.* Cuthbert, 3 M. & G. 1; see Simpson *v.* Lamb, 26 L. J. Q. B. 121; [17 C. B. 603; 2 Chitty Contr. (11th Am. ed.) 1273, and note (g^1);] or bond; Dobson *v.* Lockhart, 5 T. R. 133; Lee *v.* Lister, 7 C. B. 1008; the sum really due on the penalty or otherwise must be shown. Symons *v.* Knox, 3 T. R. 65; Grimwood *v.* Barritt, 6 T. R. 460. A joint-stock company may set off calls; Moore *v.* Metropolitan Sewage Company, 3 Ex. 333; 18 L. J. Ex. 164; Milvain *v.* Mather, 5 Ex. 55; 19 L. J. Ex. 227; and under the 17th section of 21 & 22 Vict. c. 60, a debt due from the company may be set off in an action for calls against a contributory. The Garnett &c. Company *v.* Sutton, 32 L. J. Q. B. 47. When a debtor has advanced moneys for necessaries to the deserted wife of the creditor in equity, he can set off such moneys against the creditor's legal demand. Jenner *v.* Morris, 30 L. J. Ch. 361. A judgment recovered in the name of a trustee, which, if recovered in the name of the *cestui que trust*, would have been a good set-off in law against the plaintiff's demand, may be pleaded by way of equitable set-off. Cochrane *v.* Green, 30 L. J. Q. B. 97; [9 C. B. N. S. 448.] So, also, may money due under an equitable assignment. Elkin *v.* Baker, 31 L. J. C. P. 177; and see *ante*, "Equitable Pleas." An attorney may set off his costs before bill delivered. Brown *v.* Tibbits, 31 L. J. C. P. 206; [11 C. B. N. S. 855.] The debt must be due at the time of action brought. Richard *v.* James, 2 Ex. 471; [Carpenter *v.* Butterfield, 3 John. Cas. 145; Jefferson County Bank *v.* Chapin, 19 John. 322; Stewart *v.* United States Insurance Co. 9 Watts, 126; Edwards *v.* Temple, 2 Harring. 322; Carprew *v.* Carravan, 4 How. (Miss.) 370; Hardy *v.* Corliss, 21 N. H. 356; Kelly *v.* Garrett, 1 Gilman, 649. Money paid by the defendant as a surety for the plaintiff, *after action brought*, but on an obligation entered into before, cannot be set-off. Cox *v.* Cooper, 3 Ala. 256; but see Clark *v.* Magruder, 2 Harr. & J. 77.] The debt must continue due down to the time of trial. Eyton *v.* Littledale, 4 Ex. 159; [2 Chitty Contr. (11th Am. ed.) 1276, 1277.]

The debts must be mutual, and in the same right. Thus, a joint debt due from the plaintiff and another cannot be set off against a debt due to the plaintiff solely. Arnold *v.* Bainbridge, 9 Ex. 153. [So, in an action by two or more partners, the defendant cannot set off a debt due to him from one of the firm, even although the defendant, at the time the debt was contracted, did not know that that one was not dealing with him on his own account merely. Gordon *v.* Ellis, 2 C. B. 821. See Fuller *v.* Wright, 18 Pick. 403; Banks *v.* Pike, 15 Maine, 268; Ross *v.* Knight, 4 N. H. 236; Watson *v.* Hensell, 7 Watts, 344; Jones *v.* Gilreath, 6 Ired. 338; Vose *v.* Philbrook, 3 Story, 335. One of several defendants cannot set off a debt due to him alone from the plaintiff. 2 Chitty Contr. (11th Am. ed.) 1278, and note (*r*).] But the plaintiff's joint and several note payable to the defendant may be set off. Owen *v.* Wilkinson, 5 C. B. N. S. 526. When defendant is entitled to set-off when plaintiffs improperly joined, see *supra*.

To a declaration for money had and received by the defendant to the use of the plaintiff, as administrator, and on accounts stated between them, the defendant cannot plead a set-off of money lent by him to the intestate. Rees *v.* Watts, 11 Ex. 410; Schofield *v.* Corbett, 11 Q. B. 779. And an executor sued as such for a debt due from the testator in his lifetime, cannot set off a

Obs. debt for money had and received to defendant's use as executor, and money due on an account stated with him as executor since the death of the testator. Mardall *v.* Thellusson, 6 El. & Bl. 976.

In case of bankruptcy, *supra*. Mutual credits to be within the bankruptcy laws must be such as by their nature terminate in debts. Rose *v.* Hart, 8 Taunt. 506. And see the notes thereto, 2 Sm. L. C. 5th ed. 251. Mutual credit cannot be pleaded to a claim for unliquidated damages. Bell *v.* Carey, 8 C. B. 88. See Chitty Contr. *in voc.* But a claim on a policy of insurance is a credit. Beckwith *v.* Bullen, 8 El. & Bl. 682; Lee *v.* Bullen, 8 El. & Bl. 692.

1. *Plea of Set-off.* (*z*)

That the plaintiff at the commencement (*a*) of this suit was and still is (*b*) indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the cause of set-off, as in a declaration,* (*c*) *see forms, ante*], which amount the defendant is willing to set off against the plaintiff's claim.

2. *Plea that the Debts sued for accrued jointly from Defendant and a Third Person, and Set-off against the Plaintiff of a Debt due from him to the Defendant and that Third Person jointly.* (*c*)

Stackwood *v.* Dunn, 3 Q. B. 822.

(*z*) C. L. P. Act, 1852, sch. B, 41, particulars must be delivered with this plea. *Ante*, Obs. If there are special counts in the declaration for unliquidated damages, take care that the plea of set-off be restricted in its commencement, so as not to apply to those counts. The plea need not be pleaded to any particular count or sum. Noel *v.* Davis, 4 M. & W. 138. But where there is no doubt as to the amount which the defendant will be able to prove, it is better to plead the set-off to that sum only, as in that case the defendant will be entitled to a verdict on that issue, and therefore to the costs of that plea (Barnes *v.* Butcher, 9 C. & P. 725), whatever be the event of the cause; whereas, if it be pleaded to the whole declaration, the defendant (though he prove *part* of the set-off) will only be entitled to the costs of that issue when he is entitled to the general costs of the cause; for the material part of the plea of set-off, admitting, as it does, *something* to be due on *each* count to which it is pleaded, is whether the defendant's *whole* claim on the record, taking into account all the other pleas, equals or not the whole claim of the plaintiff. Moore *v.* Butlin, 7 Ad. & E. 595; Tuck *v.* Tuck, 5 M. & W. 109; Kilner *v.* Bailey, Ib. 384; Roche *v.* Champagne, 1 Ex. 10; 16 L. J. Ex. 249. Where, however, the plea is pleaded to the whole declaration, and the defendant proves part, that part will in any case be allowed him in reduction of damages. Cousins *v.* Paddon, 2 Cr., M. & R. 547; Barnes *v.* Butcher, 9 C. & P. 725. It should also be borne in mind that where there are several pleas, each to a *different part* of the declaration, the plaintiff will obtain a verdict for the difference, if the proof under *each* plea do not come up to that to which it is pleaded, even though there be such an *excess* of proof on some of the pleas as to show that the plaintiff's claim is in reality discharged, for such excess cannot be taken to help the deficiency of the others. Green *v.* Marsh, 5 Dowl. 675; Newhall *v.* Holt, 6 M. & W. 662. Where, therefore, there are several such pleas not *overlapping* each other, it will generally be safer to plead also the general issue to the whole declaration, as in Cousins *v.* Paddon, *ubi supra;* and see Harrington *v.* McMorris, 5 Taunt. 282.

(*a*) "At the time of the declaration," or "plea pleaded," would be bad. Evans *v.* Prosser, 3 T. R. 186; Eland *v.* Carr, 1 East, 376; Braithwaite *v.* Coleman, 4 Nev. & M. 654; [*ante*, 463.]

(*b*) The plea would be bad if these words were omitted. Dendy *v.* Powell, 3 M. & W. 442; [*ante*, 463.]

(*c*) Of course any other ground of set-off may be here stated; such as that defendant is indebted to plaintiff on a judgment, in which case set it out as in the form of declaration in debt on judgment, *post;* and see form in Amor *v.* Cuthbert, 3 M. & G. 1; and see Jaques *v.* Withey, 1 T. R. 557; or on a bond, Dobson *v.* Lockhart, 5 T. R. 133; 1 Wils. 155, in which case the sum due by virtue of the *penalty* must be shown; Symmons *v.* Knox, 3 T. R. 65; Grimwood *v.* Barritt, 6 T. R. 460; or on a bill or note, or for use and occupation, &c. In these the causes of set-off must be set out in the plea, as though the *defendant* were *declaring* upon them against the *plaintiff*. Other forms may therefore be taken from the various forms of declarations, taking care to write "plaintiff" for "defendant," and *vice versâ*. See, also, many of these forms in 3 Chit. Pl. 7th ed. 119–122.

3. *Plea that the Debts sued for formed the Subject of a Plea of Set-off in a Former Action by the Defendant against the Plaintiff, in which a Verdict passed against the Present Plaintiff.*

Eastmure *v.* Lawes, 5 Bing. N. C. 445; S. C. 7 Dowl. 431. See, also, Mondel *v.* Steel, 8 M. & W. 858; S. C. 1 Dowl. N. S. 1; and another form, Bronkenshir *v.* Monger, 1 Dowl. N. S. 378.

4. *Plea of Set-off on a Bill accepted by Plaintiff.*

Upon a bill of exchange bearing date the —— day of ——, A. D. ——, now overdue, (*d*) drawn by the defendant upon, and accepted by, the plaintiff, requiring the plaintiff to pay to the defendant £—— —— months after date.

5. *Plea of Set-off on a Bill indorsed by Plaintiff to Defendant.*

Upon a bill of exchange bearing date the —— day of ——, A. D. 18—, drawn by the plaintiff upon E. F., whereby the plaintiff requested E. F. —— months after the date thereof, to pay to the plaintiff or order £——, which said bill was indorsed by the plaintiff to the defendant [*if intermediate indorsees state them*], and was duly presented for payment, and was dishonored, of which the defendant had due notice.

6. *Plea of Set-off upon a Judgment.*

Stanton *v.* Styles, 5 Ex. 578; 19 L. J. Ex. 336.

7. *Replication to a Plea of Set-off denying the Debt.*

That he was not nor is indebted as alleged.

8. *Replication of the Statute of Limitations to a Plea of Set-off.* (*e*)

That the alleged set-off did not accrue within six years before this suit.

9. *Plea to an Action for Goods sold, that the Defendant bought them of Plaintiff's Factor, as the Apparent Principal, and a Set-off against him.* (*f*)

That the plaintiff sold and delivered the said goods to the defendant by and

(*d*) See *ante*, 73, note (*i*).

(*e*) C. L. P. Act, 1852, sch. B, 52. The statute must be replied specially, or it cannot be relied upon at the trial. Chapple *v.* Durston, 1 Cr. & J. 1; Gale *v.* Capern, 1 Ad. & E. 103. This replication admits a debt as stated, but denies that it accrued within six years, and therefore under it the plaintiff cannot show a payment of any part of the set-off. Moore *v.* Wood, 2 M. & Rob. 407. The plaintiff might reply the statute as to part of the debt set off and deny the remainder thereof, adding an averment that the part denied does not exceed the plaintiff's claim; Blakesley *v.* Smallwood, Q. B. Hil. T. 1846; but see Briscoe *v.* Hill, 10 M. & W. 735; the form in the text would seem sufficient in such a case, because on that issue the defendant would have to show a debt due within six years equal to plaintiff's claim; Fairthorne *v.* Donald, 13 M. & W. 424; S. C. 2 D. & L. 675; or a written memorandum taking an older debt out of the statute 9 Geo. 4, c. 14, s. 4.

(*f*) [As to this form and the requisites of it, Semenza *v.* Brinsley, 34 L. C. P. 161.] See forms, &c. Carr *v.* Hinchliff, 4 B. & C. 547; Purchell *v.* Salter, 9 Dowl. 511; S. C. 1 Q. B. 197; Warren *v.* M'Kay, 1 M. & W. 591; Schofield *v.* Corbett, 11 Q. B. 779; Addington *v.* Magan, 10 C. B. 576; 20 L. J. C. P. 82. The proper mode of replying would be "that the said goods were not, with the consent," &c. of the plaintiff, sold and delivered by the said J. S., then being the factor of the plaintiff, in J. S.'s name, as owner

through the medium of one J. S., who at the time of such sale and delivery was the factor and agent of the plaintiff in that behalf, and intrusted (*g*) by him with the said goods, and the said J. S., with the consent of the plaintiff, sold the said goods to the defendant in his the said J. S.'s own name, as the true and sole owner of the said goods, and the said J. S. then appeared to be such true and sole owner, by the plaintiff's consent, and the plaintiff did not appear, nor was he known by the defendant at or before the time of the said sale, as the proprietor of or to be interested in the said goods, and the defendant then bought and received the said goods of and from the said J. S. as his proper goods, and did not know and had not the means of knowing that the plaintiff was the owner of the said goods or interested therein, or that the said J. S. was only an agent in that behalf; and the defendant saith that the said J. S., before the defendant had any knowledge or notice (*h*) that the plaintiff was the real owner of the said goods, before and at the time of the said sale, was and still is indebted to the defendant an amount equal to the plaintiff's claim [*&c. stating the debt as in* Form 1.]

BANKRUPTCY.

10. *Plea of Set-off to an Action by the Assignees of a Bankrupt.* (*i*)

That the said E. F. at the time of his bankruptcy was indebted to the defendant in an amount equal to the plaintiff's claim for [*here state set-off*], which amount was, at the commencement of this suit, and still is due to the defendant, who is willing to set off the said amount against the plaintiff's claim.

11. *Action by Assignees. Plea, Set-off on a Judgment against the Bankrupt; Replication, that it was on a Warrant of Attorney, not filed within Twenty-one Days.*

Everitt *v.* Wells, 2 M. & G. 269.

12. *Replication to a Set-off on a Bill accepted by the Bankrupt and indorsed by the Drawer to the Defendant, that the Causes of Set-off were only Legal, and not both Legal and Equitable Debts, inasmuch as the Indorsement was a Fraud between the Drawer and the Defendant to obtain a Set-off for the Former.* (*k*)

Lackington *v.* Coombs, 6 Bing. N. C. 71.

and as his own goods, *modo et forma*, &c. See form, Pigeon *v.* Osborn, 9 Dowl. 511; S. C. 12 Ad. & E. 715.

(*g*) See 5 & 6 Vict. c. 39; Learoyd *v.* Robinson, 12 M. & W. 745; Bonzi *v.* Stewart, 4 M. & G. 295.

(*h*) See the observations of Parke B. 1 Q. B. 197.

(*i*) Take care that this plea is pleaded only to those counts of the declaration to which a set-off is applicable. Where assignees sue for money had and received to their use *as assignees*, or on an account stated with them in that character, they may recover in that form of action money received by the defendant by way of fraudulent preference before the bankruptcy; in such case, therefore, a set-off of money due from the bankrupt cannot be pleaded; Groom *v.* Mealy, 2 Bing. N. C. 138; or they may recover money received *after* the bankruptcy, in which case a set-off for money due from the bankrupt would be equally bad. Wood *v.* Smith, 4 M. & W. 522. See, in general, Chit. on Contr. "Set-off." If the cause of set-off accrued after the act of bankruptcy, plead *mutual credit*, as in form 13; and see, further, as to the distinction between set-off and mutual credit, Forster *v.* Wilson, 12 M. & W. 203.

(*k*) See, as to right of setting-off notes of bankrupt bankers which came to defendant's hands before *fiat*, Forster *v.* Wilson, 12 M. & W. 191.

13. *Plea of Set-off and Mutual Credit, in an Action by the Assignees of a Bankrupt.* (*l*)

That before and at the time when the said E. F. became bankrupt, (*m*) the said E. F. was indebted to the defendant (*n*) [*here state the debts and credits, which may be as follows:* for goods bargained and sold, and goods sold and delivered by the defendant to the said E. F., and for work done, &c. [*The usual counts.*] And the defendant for and on account of the said E. F., and at his request, had in his own name contracted and agreed with divers persons to pay and become liable to pay to the said persons divers sums of money, which said sums the defendant afterwards and before this suit was called upon, and was obliged to pay to the said persons. And the defendant further says that the said E. F. had employed the defendants as the brokers and agents of him, the said E. F., to sell in their own names divers large quantities of goods, and to receive the proceeds of the sale thereof, and the defendant did thereupon sell the said goods, and after the said E. F. became bankrupt received the proceeds of the sale thereof, which is the money in the said —— count (*o*) mentioned, and in respect whereof the accounts in the said —— count (*p*) mentioned were stated. (*q*) And the defendant says that mutual credit had been and was given by the defendant, and the said E. F. in respect of the said proceeds, and the claims herein pleaded to, and of the debts so due to the defendant, and sums of money so contracted and agreed to be paid by the defendant as aforesaid], and that he had not at the time of giving such credit and contracting such debts as aforesaid, notice of any act of bankruptcy by the said E. F. committed. And the defendant says that the amount of the said debts and credits is equal to the claim of the plaintiff herein pleaded to, and at the commencement of this suit was, and still is, due and owing to the defendant, and the defendant is willing to set off the said amount against the claim of the plaintiffs herein pleaded to.

(*l*) This defence is given by 12 & 13 Vict. c. 106, s. 171. See form, &c. Gibson *v.* Bell, 1 Bing. N. C. 743; Groom *v.* West, 8 Ad. & E. 758; Bittleston *v.* Timmis, 1 C. B. 389; Lee *v.* Bullen, 27 L. J. Q. B. 161.

(*m*) It must be shown that the mutual credit existed before bankruptcy. Boyd *v.* Mangles, 16 M. & W. 337–344.

(*n*) The debt must be due to the defendant in his own right, and not as a trustee for another. Collins *v.* Jones, 10 B. & C. 777.

(*o*) Count for money received for the use of the assignees after the bankruptcy.

(*p*) Count on accounts stated with the assignees.

(*q*) It is necessary to state the mode in which the credit was given. Alsager *v.* Currie, 11 M. & W. 14; S. C. 12 M. & W. 751. If the plea is pleaded to a count for money received to the use of the assignees after the bankruptcy, it should be shown that it was so received, in consequence of credit given before adjudication or notice of an act of bankruptcy. See form of mutual credit on bills indorsed by the defendant before the bankruptcy for the bankrupt's accommodation, Hulme *v.* Muggleston, 3 M. & W. 30; Russell *v.* Bell, 8 M. & W. 277; S. C. 1 Dowl. N. S. 107; and a plea to an action for money had and received to the use of the assignees, that the defendant paid a bill which he had accepted for the bankrupt's accommodation, who gave defendant another bill to receive the proceeds of, which he did *after* the bankruptcy. Bittleston *v.* Timmis, 1 C. B. 389; S. C. 2 D. & L. 817. The proper way of replying, see Alsager *v.* Currie, 11 M. & W. 14. A replication would be bad which attempted to put in issue both the fact of mutual credit being given and also the existence of debts of such a nature as could by law be the subject of mutual credit. Hulme *v.* Muggleston, 3 M. & W. 30. The assignees cannot reply a fraudulent delivery of goods, for the price of which they sue. Russell *v.* Bell, 8 M. & W. 277.

EXECUTORS, ADMINISTRATORS, &c.

14. *Plea of Set-off in an Action by an Executor.* (r)

That the said E. F. at the time of his death was indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the debt as ante*, "Executors," 123, Form 7], which said amount was at the commencement of this suit and still is due from the plaintiff as executor as aforesaid to the defendant, and the defendant is willing to set off the same against the plaintiff's claim.

15. *Plea of Set-off by an Executor to an Action against him.* (s)

That the plaintiff at the time of the death of the said E. F. was indebted to the said E. F. in an amount equal to the plaintiff's claim for [*here state the claim, as ante*, "Executors," 121, Form 1], which said amount at the commencement of this suit was and still is due from the plaintiff to the defendant as executor as aforesaid, and the defendant as executor as aforesaid is willing to set off the same against the plaintiff's claim.

SHIP. See "Seaman," *ante*, 462; "Ship," *ante*, 244.

Plea to an Action against the Captain for excluding Plaintiff, a Passenger, from the Cuddy, that the Plaintiff conducted himself in an Unbecoming and Ungentlemanly Manner, and threatened the Captain with Personal Violence. (t)

Prendergast *v.* Compton, 8 C. & P. 454.

SOLICITOR. See *ante*, 55, 61, 304, 307.

SPIRITUOUS LIQUORS.

Plea to a Declaration for Goods sold, that they consisted of Spirits contrary to the Tippling Act. (u)

That the said debt is for and on account of spirituous liquors delivered by the plaintiff to the defendant at various times, not amounting at any one time to the value of 20*s*., and was not really and *bonâ fide* contracted at one time to

(r) See the statute, *ante*, 462, Obs. A debt due from the plaintiff's *testator* cannot be set off against a debt which accrued to the plaintiff *as executor* after the death. Hutchinson *v.* Sturges, Willes' Rep. 263, 264; Shipman *v.* Thompson, Ib. 103; Bull. N. P. 180; Underwood *v.* Robertson, 4 Camp. 342; Rogerson *v.* Ladbrooke, 1 Bing. 93; Henslow *v.* Robertson, 6 Taunt. 448, 451; Schofield *v.* Corbett, 6 N. & M. 527. Care must be taken, therefore, to restrict this plea to a count charging a debt to the deceased.

(s) As to when and to what claims this and the preceding plea can be pleaded, see *ante*, 463, Obs.

(t) And see plea to an action against a commander for false imprisonment, of reasonable and probable cause to suspect the plaintiff of felony. Broughton *v.* Jackson, 18 Q. B. 378.

(u) 24 Geo. 2, c. 40, s. 12; 25 & 26 Vict. c. 38; [30 & 31 Vict. c. 142, s. 4.] See a form under the former act, Hughes *v.* Done, 1 Q. B. 294; 10 L. J. Q. B. 65.

the amount of 20*s.* or upwards, and no part of such spirituous liquors was sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the defendant, the purchaser thereof, in quantities not less at any one time than a reputed quart.

STAMP.

Obs. — See *ante*, 330. It is doubtful whether the want of a stamp can in any case be pleaded, but at all events such a defence can only be pleaded in cases where the instrument cannot be made good before the trial. See Bradley *v.* Bardsley, 15 L. J. Ex. 115.

STATUTES (ACTIONS ON).

See "General Issue by Statute," *ante*, 286; "Statutes Penal," *ante*, 245.

STOCK-JOBBING. See "Gaming," *ante*, 395.

SUBSTITUTED CONTRACT. See *ante*, "Rescinded Contract."

SUNDAY. See *ante*, "Sale of Goods," Form 9, and notes.

SURETY. See *ante*, "Guaranty," 137 and 397.

SURGEON.

Obs. — See *ante*, "Apothecaries," 48 and 300; "Physician," 220 and 451. See, also, Gibbons *v.* Budd, 32 L. J. Ex. 182; Alvarez De la Rosa *v.* Prieto, 33 L. J. C. P. 262.

SURRENDER. (*x*)

TENDER.

Obs. — See, in general, Com. Dig.; Bac. Abr.; 2 Stark. Ev.; and [2 Chitty Contr. (11th Am. ed.) 1184 *et seq.* tit. "Tender."] "The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and on a particular occasion offered the money." Hesketh *v.* Fawcett, 11 M. & W. 356; S. C. 2 Dowl. N. S. 829; [2 Chitty Contr. (11th Am. ed.) 1185, note (*k*) and cases cited.] Accordingly, where a tender has been actually made, the effect of it may be defeated, by showing a prior or subsequent demand and refusal of the *identical* sum tendered; because thereby

(*x*) See *ante*, 426, forms 10 and 11, and notes thereto.

Obs. the plaintiff negatives that the defendant was *always* ready to pay. See 1 Saund. 336, note (2); Bull. N. P. 156; [2 Chitty Contr. (11th Am. ed.) 1197; see Besancon *v.* Shirley, 9 Sm. & M. 457; Lanier *v.* Trigg, 6 Sm. & M. 641.] A replication to a plea of tender, that a larger sum was due than that tendered, is good, if it appear or be alleged that it was due in respect of a single entire cause of action. Tyler *v.* Bland, 9 M. & W. 338; S. C. 1 Dowl. N. S. 608; Brandon *v.* Newington, 3 Q. B. 915; Cotton *v.* Godwin, 7 M. & W. 147; Dixon *v.* Clark, 5 C. B. 365; Searles *v.* Sadgrove, 5 El. & Bl. 639. The law is, that if A. be indebted to B. on several *distinct contracts*, he may tender any one of the sums due. Bac. Abr. Tender, 449; Jones *v.* Owen, 5 Ad. & E. 222; Hesketh *v.* Fawcett, *ubi sup.*: Smith *v.* Manning, 5 C. B. N. S. 632; Robinson *v.* Ward, 8 Q. B. 920. But where the sum demanded is due upon a single *entire contract*, a tender of part is bad, and a set-off cannot be deducted so as to make a tender of the balance sufficient. Searles *v.* Sadgrove, *ubi supra;* Philpotts *v.* Clifton, 10 W. R. 135. It must, however, appear upon the pleadings that the contract was indivisible. Hesketh *v.* Fawcett, *ubi supra*, Brandon *v.* Newington, *ubi supra*. And so it should seem that a plea of tender of part to a declaration on a bill of exchange or a promissory note would be bad. Cotton *v.* Goodwin, *ubi supra;* Hesketh *v.* Fawcett, *ubi supra;* Wain *v.* Baily, 2 P. & Dav. 307; S. C. 10 Ad. & E. 616. Nor can a tender be pleaded to a bill or note at all, or to a bond conditioned for payment on a day certain, *after* it becomes due; Poole *v.* Tunbridge, 2 M. & W. 225; Hume *v.* Peploe, 8 East, 168; Dixon *v.* Clark, *ubi supra;* Dobie *v.* Larkan, 10 Ex. 776; 2 Wms. Saund. 486 *i;* unless to a note payable on demand. Norton *v.* Ellam, 2 M. & W. 463. The debtor is bound to tender on the precise day, and cannot plead a tender made afterwards. But the drawer or indorser of a bill may tender the amount without interest upon notice of dishonor. Siggers *v.* Lewis, 1 Cr., M. & R. 370; Walker *v.* Barnes, 5 Taunt. 240. If the plaintiff intends to set up that the debt was payable on a day certain, and that the tender was not made on the day he should so reply, where it does not appear by the declaration that the debt was so payable. Smith *v.* Manners, 5 C. B. N. S. 632.

Tender of a *larger* sum will support a plea of tender of a smaller; Dean *v.* James, 4 B. & Ad. 548; but an actual tender and production of the money, unless especially dispensed with, must be proved. Finch *v.* Brook, 1 Scott, 70–76; 1 Bing. N. C. 253; Douglas *v.* Patrick, 3 T. R. 683; Read *v.* Golding, 2 M. & G. 86. [As to the money in which a tender is to be made, see 2 Chitty Contr. (11th Am. ed.) 1196, and note (*b*), 1197, and note (e^1). Effect of creditor not objecting to the quality of the tender, 2 Chitty Contr. 1196, 1197, and note (e^1).] Moreover, the tender must not be clogged with any condition; therefore, an offer to pay £10 as the balance of a disputed account, upon condition of receiving a receipt in full, is an insufficient tender. Foord *v.* Noll, 2 Dowl. N. S. 618; Jennings *v.* Major, 8 C. & P. 67; Bowen *v.* Owen, 11 Q. B. 13; [2 Chitty Contr. (11th Am. ed.) 1194 *et seq.;* Thayer *v.* Brackett, 12 Mass. 450; Richardson *v.* Boston Chemical Laboratory, 9 Met. 42; Gassett *v.* Andover, 21 Vt. 342.] But a mere declaration, such as "this is the amount of your bill," will not invalidate a tender. Henwood *v.* Oliver, 1 Q. B. 409. See, also, Bull *v.* Parker, 2 Dowl. N. S. 345. Whether the tender has been conditional or not is a question for the jury. Eckstein *v.* Reynolds, 7 Ad. & E. 80. Tender is not pleadable to a claim for unliquidated damages. Dearle *v.* Barrett, 2 Ad. & E. 82.

A plea of tender is an issuable plea, and may be pleaded after time obtained. See Moore *v.* Smith, 1 H. Bl. 369; Kilwick *v.* Maidman, 1 Burr. 59. Where there is any doubt as to the formality or proof of the tender, the proper course is to plead payment of money into court; Leatherdale *v.* Sweepstone, 3 C. & P. 342; because if defendant fail on his plea of tender, he will have to pay all costs, whereas on the plea of payment of money into court, defendant only pays costs up to the time of his plea, if plaintiff take it out and proceed no further; r. 12 H. T. 1853; and defendant obtains all his subsequent costs, if plaintiff unsuccessfully proceed further after the plea of payment of money into court. As to staying proceedings on payment before declaration, &c. of debt and costs, see 2 Chit. Arch. Ind. "Staying," &c. The tender, if pleaded to a special count, admits the contract therein stated; if pleaded to

OBS. the common count, it is an admission only to the extent of the sum tendered. Cox *v.* Brian, 3 Taunt. 95; Bulmer *v.* Horne, 1 N. & M. 117, [*ante*, 449.] No other plea to the same course of action will be allowed. Maclellan *v.* Howard, 4 T. R. 194; Orgill *v.* Kemshead, 4 Taunt. 459. The sum tendered must be paid into court, or plaintiff may sign judgment as for want of a plea as to the sum tendered, but not for the residue of the demand stated in the declaration. Chapman *v.* Hicks, 2 Dowl. 641. [See *post*, 471, note (*z*).] Money deposited in court in lieu of bail cannot be transferred to the account of a payment into court on a plea of tender. Stultz *v.* Heneage, 10 Bing. 561. The amount tendered is not to be considered as recovered in the action. James *v.* Vane, 29 L. J. Q. B. 169; and see Beard *v.* Perry, 31 L. J. Q. B. 30.

1. *The General Issue, except as to Part, and a Tender of that Part.*

The defendant, (*y*) except as to the sum of £—— [*the exact sum tendered*], parcel of the money claimed, says that he never was indebted as alleged. (*z*)

And as to the said sum of £——, parcel, [*&c.*], the defendant says that he always was, and still is, ready and willing to pay, and before action tendered, (*a*) and offered to pay to the plaintiff the said sum of £——, parcel [*&c.*], to receive which the plaintiff then wholly refused; and the defendant now brings the same into court ready to be paid to the plaintiff.

[1*a*. *Answer of Part Payment and Tender.*

And the defendant comes and says that he has paid the note mentioned in the plaintiff's writ, except the sum of fifty dollars; and before the plaintiff sued out his writ he tendered to the plaintiff said sum of fifty dollars, and now brings the same into court for the plaintiff.]

2. *Replication to the Preceding, Denial of the Tender.* (*b*)

That the defendant did not tender or offer to pay the said sum of £——, as in the said [*second*] plea alleged.

(*y*) Take care, if the declaration contain a count on a bill or note, to restrict this commencement, so that the general issue may not include that count.

(*z*) Plead never indebted as above, if the defendant deny that the remainder of the demand *ever* existed; or plead any special defence, with or without never indebted, according to the facts; but care must be taken not to plead *as to the sum tendered* any other plea than the plea of tender; see 1 Saund. 33 *e*, note; Dowgall *v.* Bowman, 3 Wils. 145; 2 Bl. R. 723, S. C.; Maclellan *v.* Howard, 4 T. R. 194; otherwise a demurrer will hold. [A plea of tender before suit brought must contain a *profert in curiam* of the money tendered, and must be pleaded in bar of the *damages ultra*, &c. and not in bar of the action. Ayres *v.* Pease, 12 Wend. 393; Carley *v.* Vance, 17 Mass. 389; Claflin *v.* Hawes, 8 Mass. 261; Crawford *v.* Harvey, 1 Blackf. 383; Jarboe *v.* McAtee, 7 B. Mon. 279; Sheriden *v.* Smith, 2 Hill, 538; Earle *v.* Earle, 1 Harr. 273.]

(*a*) An actual tender must be averred in general. *Semble*, however, where the plaintiff expressly dispensed with the actual production of the money, see Chitty on Contracts, Index, "Tender;" Finch *v.* Brook, 1 Bing. N. C. 253; the plea should specially allege such dispensation or discharge after alleging a readiness at all times, and that defendant was about to tender, &c. See, further, Douglas *v.* Patrick, 3 T. R. 684; Turner *v.* Crossley, 3 M. & W. 43. As to a tender of goods in performance of a contract, see Startup *v.* Macdonald, 6 M. & G. 593; Isherwood *v.* Whitmore, 10 M. & W. 757; S. C. 11 M. & W. 347; [2 Chitty Contr. (11th Am. ed.) 1201 *et seq.* and notes.] Tender on a bill, Wain *v.* Bailey, 2 P. & D. 307; S. C. 10 Ad. & E. 616.

(*b*) The plaintiff may, if he pleases, confess that he is satisfied as to the sum tendered. See form 1, *ante*, "*Nol. Pros.*" 442. The above replication puts the defendant on proof of a strictly legal tender of the sum. In any case the plaintiff may take the sum out of court at once. The prior issuing of the writ need not now ever be replied specially, the date of the writ as stated on the record being conclusive as to this fact. See Whipple *v.* Manley, 1 M. & W. 432. Issue may be joined on the plea except as to the payment into court, and thereby both the tender and the defendant's continued readiness and willingness put in issue.

3. *Replication, a Demand of the Debt before the Tender.* (*c*)

That the defendant was not always ready and willing to pay the said sum of £——, parcel [*&c.*], to the plaintiff, as in the said plea alleged, in this, to wit,* that after the accruing of the said causes of action as to the said sum of £——, parcel [*&c.*], and before the defendant tendered and offered to pay the same as aforesaid, and before the commencement of this suit, the plaintiff demanded the said sum of £——, parcel [*&c.*], of and from the defendant, and then requested him to pay the same; but the defendant did not nor would then pay the same or any part thereof to the plaintiff, but then wholly neglected and refused so to do, and therein made default.

4. *Replication, a Demand of the Sum tendered after Tender.* (*d*)

As in Form 3, *to the asterisk.*] That after the making of the said tender, and before the commencement of this suit, the plaintiff demanded of and requested the defendant to pay him the plaintiff the said sum of £——, parcel [*&c.*]; but the defendant then wholly refused to pay the same to the plaintiff.

5. *Replication, a Larger Sum due at the Time of Tender.* (*e*)

That at the time of the making of the said tender in the said [*second*] plea alleged, there was and still is a larger sum than the said sum of £——, due and owing from the defendant, as one entire sum and in respect of a single entire contract, the same being the money claimed in the declaration.

USE AND OCCUPATION. See "Landlord and Tenant," 184 and 464.

VENDORS AND PURCHASERS OF REALTY.

OBS. — See forms of declaration, *ante*, 249. *Non assumpsit* would deny that the defendant made the contract, as alleged, by himself or his agent; the objection also might be taken under it, that the contract was not in writing. "Frauds, Statute of," *ante*, 394. It would admit the plaintiff's performance of his part of the contract in furnishing an abstract, making a good title, tendering a conveyance, &c. and also the breach on the part of the defendant. See plea of rescinded contract, *ante*, p. 360. Fraud by the employment of puffers or otherwise should be specially pleaded. Law on this subject, Thornett *v.* Haines, 15 L. J. Ex. 230; [15 M. & W. 367; Green *v.* Baverstock, 14 C. B. N. S. 204; 1 Chitty Contr. (11th Am. ed.) 406, 407, and note (*m*), 409, and note (*n*); 1 Sugden V. & P. (8th Am. ed.) 9 *et seq.* and notes.]

To a declaration for an estate bargained and sold, it would be competent for the defendant, under the general issue, to show that there had been no conveyance or deed such as the law requires. Per Parke B. Johnson *v.* Dodgson, 2 M. & W. 657.

(*c*) See Obs. *supra*; 1 Wms. Saund. 33 *c.* A joinder of issue would be sufficient, as the defendant's refusal to pay on demand would negative his being always ready and willing to pay. Johnson *v.* Clay, 7 Taunt. 486; Poole *v.* Tunbridge, 2 M. & W. 223, 226.

(*d*) See Obs. *ante*, 469, and preceding note.

(*e*) See Obs. *ante*, 469. Like replication, Cotton *v.* Godwin, 7 M. & W. 147; Hesketh *v.* Fawcett, 11 M. & W. 356; Brandon *v.* Newington, 3 Q. B. 915; Dixon *v.* Clark, 5 C. B. 366; Searles *v.* Sadgrove, 5 El. & Bl. 639; 25 L. J. Q. B. 15; Holden *v.* Ballantyne, 29 L. J. Q. B. 148; Philpotts *v.* Clifton, 10 W. R. 135.

1. *Vendor against Vendee, for not completing; Plea that Plaintiff did not make a Good Title.*

That the plaintiff did not, on or before the said —— day of ——, A. D. ——, deduce and make a good title to the said premises [*add, if necessary,* "subject as in the said agreement," *or* "condition of sale in that behalf mentioned"], according to the terms of the said agreement [*or* "the conditions of sale"].

2. *Vendor against Vendee, for not completing; Plea that Plaintiff was not ready to convey.*

That the plaintiff was not ready and willing to complete the said conveyance and purchase [*or* "to assign over the said lease of the said messuage and tenement with the appurtenances," *according to the declaration*], as alleged. (*f*)

[3. *Plea by Vendor, that he rescinded the Contract under a Promise contained in the Conditions of Sale.*

Steer *v.* Crowley, 14 C. B. N. S. 337; Shoreditch *v.* Hughes, 33 L. J. C. P. 349.]

4. *Vendor against Vendee of a Leasehold Interest, for not completing; Plea that the Plaintiff was not possessed of the Term.*

That the plaintiff was not *at the time of the breach* of the said agreement possessed of the said [residue of the said] term of years in the said tenements, as alleged. (*g*)

5. *Vendee against Vendor, for not completing; that no Conveyance was tendered.* (*h*)

That the plaintiff did not tender to the defendant any deeds in that behalf for the conveying the said tenements to the plaintiff, as alleged. [See Vonhollen *v.* Knowles, 12 M. & W. 602.]

(*f*) See other forms, Simmons *v.* Heseltine, 28 L. J. C. P. 129; [5 C. B. N. S. 554; Marsden *v.* Moore, 4 H. & N. 500;] Jones *v.* Barkley, 2 Dougl. 684; Poole *v.* Hill, 6 M. & W. 835. This involves a denial of plaintiff's *ability*, that is, *his title*, to make the conveyance at the time when the defendant was called upon to accept it; De Medina *v.* Norman, 9 M. & W. 820; and Kirtley *v.* Copeland 1 Cr. & M. 379; and under it any act which disqualifies the plaintiff from performing the contract, such as his insanity, may be given in evidence. Ib. See Isherwood *v.* Whitmore, 10 M. & W. 757; S. C. 11 M. & W. 7. If the declaration do not aver specifically that the plaintiff had a title, or was ready to convey at the time of the breach of the agreement, it will be proper to introduce that restriction into the traverse. As it is sufficient if plaintiff can procure a title before he is called on to complete, a plea which traversed an averment in the declaration that he had a title at the time *he made the agreement*, was held bad on special demurrer. De Medina *v.* Norman, *supra*. In general the seller is to make a good title, then the purchaser is to prepare and tender the conveyance, and then the seller to execute it. Laird *v.* Pim, 7 M. & W. 482; and see Jones *v.* Barkley, 2 Doug. 684.

(*g*) Under this plea the defendant may show any objections which existed to the lease constituting the plaintiff's title to the term which he professes to sell. If the defect of title occurred from matter *posterior* to that lease, that should be specially pleaded. Wheeler *v.* Wright, 7 M. & W. 360.

(*h*) See Poole *v.* Hill, 6 M. & W. 840. In Vonhollen *v.* Knowles, 12 M. & W. 602, it was held that the defendant might show under this plea that the lease actually tendered contained untrue recitals which might afterwards have operated against the defendant, and therefore that he was not bound to execute it.

6. *Vendee against Vendor, for not delivering an Abstract, &c.; that the Defendant discharged him from so doing.* (*i*)

That he was always, after the making of the said agreement, and before and on the said —— day of ——, A. D. ——, and always afterwards, ready and willing and able to deliver to the plaintiff, or his solicitor, at his the defendant's own expense, an abstract of his title to the said tenements, and to deduce such good title thereto as aforesaid, and to complete the said purchase, according to the agreement on his part, and was about so to do, but the plaintiff, before and on the said —— day of ——, A. D. ——, and before this suit, discharged and prevented the defendant from offering to deliver or delivering such abstract and deducing such title, and completing the said purchase on his part, and the plaintiff has not since and before this suit offered to perform the said agreement on his part, or required the defendant to deliver such abstract to the plaintiff or his solicitor, or deduce such title, or complete the said purchase on his the defendant's part.

(*i*) The late case of Rippinghall *v.* Lloyd, 5 B. & Ad. 742, contains much information on the subject. The vendor covenanted *under seal* with the vendee that he would, on or before the 30th of November, deduce a good title to the premises sold, and would, on or before the 8th of January, execute a proper conveyance for conveying the fee-simple, and it was stipulated that the conveyance should be prepared by and at the expense of the vendee; and further, that if the vendor should not verify the title to the vendee or his agent by production of deeds, &c. at Norwich, Lynn, *or* London, before the 30th of November, the agreement should be void. In an action of *covenant* by the vendee two breaches were assigned; *first*, that the vendor did not, on or before the 30th of November, deduce a good title; *secondly*, that the defendant did not, on or before the 8th of January, execute a proper conveyance. Plea *first*, that the vendor did, before the 30th of November, produce and show divers deeds, in part deducing a good title, and that until and upon that day he was ready and willing to produce and show to the vendee other deeds completing such title, and would on or before that day have produced such deeds to the vendee or agent attending, whereof the vendee had notice, but that he would not by himself or agent attend. Held, on special demurrer, that the plea was bad, inasmuch as the vendor's covenant was general, and therefore the facts stated were no excuse; and that if the covenant could be read as qualified by the subsequent stipulation as to the place, the plea ought to have averred notice to the vendee at which of the three places the vendor would be ready to produce his deeds. Plea, *secondly*, to the first breach, that by a subsequent agreement, made before any breach committed, the time of deducing title had been enlarged, and that the vendor was ready to deduce title within such enlarged time. *Thirdly*, the defendant pleaded a similar agreement after breach, and that plaintiff accepted such agreement, as a substitution for the former, and as a satisfaction of the damages resulting from the breach, and that the defendant was ready to fulfil such agreement, but plaintiff refused, &c. Held, on special demurrer, that the *second* plea was bad in not stating the new agreement to have been *under seal*. Leave was given to amend the second plea by stating the new agreement to have been in writing; but *quære*, if it were so, whether the facts amounted to a good accord and satisfaction. Plea to the *second breach* of covenant that the vendor until and on the 8th of January was ready and willing to execute proper conveyances, and would have executed the same, if the plaintiff would have prepared and tendered them, but that he did not do so. *Replication*, that the vendor did not deduce a good title, wherefore the vendee did not prepare the conveyance. *Rejoinder*, that although the vendor within reasonable time before the 8th of January was ready and willing and offered to deduce a good title, so that the vendee might, before the 8th of January, have prepared and tendered conveyances, whereof the vendee had notice, yet the vendee refused to have such title deduced, and discharged the defendant from deducing such title. *Surrejoinder*, that the vendor was not ready and willing to deduce, &c. On general demurrer, held, that upon this breach the matter pleaded by the vendee was no answer to the pleas of the vendor, and that the latter was entitled to judgment.

[7. *Plea by Vendor, that he made a Good Title according to the Conditions of Sale.*

Simmons *v.* Hazeltine, 5 C. B. N. S. 554. See Smith *v.* Tanner, 1 M. & G. 803.]

WAGES. See *ante*, 395.

WAIVER OF PLEA.

Obs. — By R. 8, H. T. 1853, "The defendant shall not be at liberty to waive his plea, or enter a *relicta verificatione* after a demurrer, without leave of a court or a judge, unless by consent of the plaintiff or his attorney. Under the old practice, waiving a plea was a mode of evading paying costs on a demurrer. Cooper *v.* Paynter and Hutton *v.* Turk, cited in M'Intyre *v.* Miller, 13 M. & W. 725–734, note.

WARRANTY.

Obs.— See declarations, *ante*, 256. Non assumpsit does not deny the breach, but only the sale and warranty. R. 6, T. T. 1853; Smith *v.* Parsons, 8 C. & P. 199. Where only a denial of the unsoundness, and non assumpsit were pleaded, Tindal C. J. held that the defendant could not show that the plaintiff entered into reference of the question of unsoundness to two veterinary surgeons, and that they signed a paper containing their decision, by which the plaintiff was bound. Watson *v.* Denton, 7 C. & P. 85; and see Ellis *v.* Chinnock, Ib. 169.

1. *General Issue.*

Non assumpsit, *ante*, 284.

2. *Denial of the Warranty.*

That he did not warrant, as alleged.

3. *Plea to Declaration on the Warranty of a Horse; Denial that the Horse was unsound.*

That the said *horse* was at the time of the making the said warranty *sound.*

4. *Plea to a Declaration on the Warranty of a Horse, that the Defendant took it back, and delivered Another to the Plaintiff in Satisfaction.*

That after the accruing of the said causes of action, and before this suit, it was agreed between the plaintiff and the defendant that the defendant should take back from the plaintiff the said horse, and should deliver to the plaintiff a certain other horse of the defendant, in satisfaction and discharge of the said alleged causes of action; and the defendant afterwards, and before this suit, in pursuance of the said agreement, took back from the plaintiff the said horse, and delivered to the plaintiff, and the plaintiff received the said other horse, in satisfaction and discharge of the said alleged causes of action.

WITNESS. *Ante*, 263.

WORK AND MATERIALS.

Effect of non assumpsit and never indebted, *ante*, 284.

Plea to a Count for Work in composing a Farce for the Defendant, that it was an Indecent and Libellous Production. (*k*)

That the said work and labor of the plaintiff were performed and bestowed by the plaintiff for the defendant in writing and composing a farce for the defendant at his request; and that the said farce was designed to be by the plaintiff, and the defendant respectively, a farce of an indecent and immoral nature and tendency, and to contain and does contain libellous, scandalous, indecent, and immoral passages, sentiments, words, and matters, and was not nor is a farce fit, legal, or proper to be performed, read, or published.

(*a*) Illegality of consideration must be specially pleaded. *Ante*, 401. A contract as between two persons may be illegal and void, and yet an agent, innocently employed to bring it about, may be entitled to compensation for his trouble. Wells *v.* Porter, 2 Bing. N. C. 722.

PRECEDENTS, ETC.

PART II.

DECLARATIONS IN TORT.

ACCIDENT. See *post*, "Negligence."

AGENTS.

Obs. — An action of tort lies against an agent at the suit of his employer for neglect or unskilfulness in the execution of the business which he was retained to perform. Courtney *v.* Earle, 10 C. B. 73; 20 L. J. C. P. 7. See Samuel *v.* Judin, 6 East, 333; Elsee *v.* Gatward, 5 T. R. 143; see, also, Boorman *v.* Brown, 3 Q. B. 510; 10 L. J. Q. B. 273; 11 L. J. Ex. 437; 11 Cl. & Fin. ix.; [Washington *v.* Eames, 6 Allen, 419. But not for injuries caused by his mistake in a doubtful matter of law. Mechanics' Bank *v.* Merchants' Bank, 6 Met. 13; Hicks *v.* Minturn, 19 Wend. 550.] The forms of declaration in contract, part 1, 38–47, will assist in framing a declaration in tort against an agent. In tort a *promise or undertaking* to use due care, &c. should not be alleged. See Corbett *v.* Packington, 6 B. & C. 268; Smith *v.* White, 6 Bing. N. C. 218. Where a declaration, after stating certain facts, alleges that it thereupon became the duty of the defendant, &c. the allegation is to be understood as a mere exposition of the legal liability supposed to result from the previously stated facts, and as an assertion that the defendant became thereby bound by law to do the act, and not as a distinct substantive allegation. Brown *v.* Mallet, 5 C. B. 599; 17 L. J. C. P. 227; [1 Chitty Pl. 397, 398.] Unless the duty results in all cases from stated facts, the declaration so framed is bad. The allegation of duty is superfluous where the facts stated show a legal liability, and it is useless where they do not. Ib. See, also, Seymour *v.* Maddox, 16 Q. B. 326; 20 L. J. Q. B. 327; Roberts *v.* Great Western Ry. Co. 4 C. B. N. S. 506; 27 L. J. C. P. 266. Since the Com. L. Pr. Act, 1852, counts in contract and tort may be joined in the same declaration (s. 41), so that it is now comparatively of little consequence whether a count be framed in tort or contract. [May *v.* Western Union Telegraph Co. 112 Mass. 90.] See, generally, as to the liability of agents, [1 Chitty Contr. (11th Am. ed.) 274 *et seq.*; 2 Ib. 803;] Paley on Agency, by Lloyd; Story on Agency. See forms, "Attorneys," "Bailees," *post*, 483, 484.

1. *Against a Broker for selling on Credit.* (*a*)

For that the plaintiff employed the defendant for reward to sell goods for

(*a*) Boorman *v.* Brown, 3 Q. B. 510; 10 L. J. Q. B. 273; 11 L. J. Ex. 437; 11 Cl. & F. 1; [*ante*, 42, note (*z*).] An agent authorized to sell has an authority to sell on credit or cash, according to the usage of the trade. But the credit must not be beyond the usual

the plaintiff for ready money, and the defendant received the said goods for such purpose, and afterwards sold the said goods on credit, whereby the plaintiff has been deprived of the price of the said goods, and is liable to lose the same.

2. *Against a West India Agent for improperly drawing a Bill in Plaintiff's Name, on which the Plaintiff was sued to Judgment.*

Pickwood *v.* Neate, 10 M. & W. 206.

3. *Against an Accountant for so negligently making out his Accounts that Plaintiff paid Money which he was not liable to pay.* (*b*)

Story *v.* Richardson, 6 Bing. N. C. 123.

4. *Against an Insurance Broker for not effecting an Insurance pursuant to his Instructions.* (*c*)

Turpin *v.* Bilton, 5 M. & G. 455; 12 L. J. C. P. 167; Cahill *v.* Dawson, 3 C. B. N. S. 106; 26 L. J. C. P. 253.

5. *Against a Commission Agent for selling for less than Invoice Prices.*

Raleigh *v.* Atkinson, 6 M. & W. 670; 9 L. J. Ex. 206.

6. *Against an Agent for falsely and fraudulently representing that he had Authority to make a contract for a Third Person.*

Randell *v.* Trimen, 18 C. B. 786; 25 L. J. C. P. 307. (*d*)

7. *Against Defendant for misrepresenting the Character of an Agent.*

Foster *v.* Charles, 6 Bing. 396; 7 Ib. 105; Wilkin *v.* Reed, 15 C. B. 192; 23 L. J. C. P. 193.

[8. *Against a Surveyor and Valuer for Loss arising from Ignorance and want of Skill in his Profession.*

Jenkins *v.* Bentham, 15 C. B. 168.

AIR.

Obs. — The enjoyment of air is governed by the same principles as those which govern the enjoyment of light. See Gale on Easements, by Willes. The pre-

period, nor given to a notoriously insolvent person. Scott *v.* Surman, Willes, 407; Houghton *v.* Matthews, 3 B. & P. 489; Anon. 12 Mod. 514, per Holt C. J.; Paley on Agency, by Lloyd; [*ante*, 42, note (*z*).]

(*b*) An agent is bound to keep regular accounts. White *v.* Lady Lincoln, 8 Ves. 369; Morgan *v.* Lewes, 4 Dow's R. 52. See Lady Ormond *v.* Hutchinson, 13 Ves. 47–53; [Eaton *v.* Welton, 32 N. H. 352; Clarke *v.* Moody, 17 Mass. 145;] Paley on Agency, by Lloyd, 47, 48; [Story Agency, §§ 208, 204, 332, 333.]

(*c*) It is now decided that an agent may insure for himself and for his principal. Waters *v.* The Monarch Life Insurance Company, 5 El. & Bl. 870; 25 L. J. Q. B. 102. But it appears an agent is not positively bound to do so without orders, or unless authorized by the usages of trade, or the mode of dealing between him and his principal. See Paley on Agency, by Lloyd, 18–20.

(*d*) And see *ante*, 45, note (*c*); and Pow *v.* Davis, 1 B. & S. 220; 30 L. J. Q. B. 257 Hughes *v.* Graeme, 33 L. J. Q. B. 335

Obs. scription act does not apply to a right to the free passage of air. Webb *v.* Bird, 30 L. J. C. P. 384.

ANCIENT WINDOWS OR LIGHTS.

Obs. — An action is maintainable by the tenant in possession, or the owner of the immediate reversion (Com. Dig. Action on the Case for a Nuisance, B.) of a house or other building to recover damages from the erector (Rosewell *v.* Prior, 12 Mod. 636) or occupier (Payne *v.* Rogers, 2 H. Bl. 350) of any building which obstructs the light from his windows, if the plaintiff can prove a valid grant of the privilege, or can show twenty years' undisturbed enjoyment of the light by the occupiers of his house, and the defendant should fail to establish that such enjoyment was in consequence of some deed or written instrument. See Gale on Easements, 147, 148.

By s. 3 of 2 & 3 W. 4, c. 71, "When the *access and use* of light to and for any dwelling-house, workshop, or other building shall have been *actually* enjoyed therewith for the full period of *twenty years without interruption*, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; see Salter's Co. *v.* Jay, 3 Q. B. 109; Merchant Taylors' Co. *v.* Truscott, 11 Ex. 855; Frewen *v.* Phillips, [11 C. B. N. S. 449;] 30 L. J. C. P. 356; unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by *deed* or *writing*." See the decisions on s. 2, collected in Gale on Easements, by Willes, p. 145; and particularly Bright *v.* Walker, 1 Cr., M. & R. 211; Tickle *v.* Brown, 4 Ad. & E. 369; Flight *v.* Thomas, 11 Ad. & E. 690; 8 Cl. & Fin. 231. See per Lord Campbell, Eaton *v.* Swansea Waterworks Co. 17 Q. B. 272. It is observable that the 3d section does not require an enjoyment "as of right," or under a "claim of right thereto," and therefore a verbal permission to enjoy the lights ensuing for twenty years will confer a right. Mayor of London *v.* Pewterer's Co. 2 M. & R. 409.

By the 4th section, "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period *next before some suit or action* wherein the claim or matter, to which such period may relate, shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made." Under this section it is held that the acquiescence for a year, is not limited to obstructions preceded and followed by portions of the twenty years. Flight *v.* Thomas, *ubi sup.*; and see Gale on Easements, by Willes, pp. 149, 150, and notes.

By the 5th section, "in all actions upon the *case*, and other pleadings, wherein the party may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation." See Halford *v.* Hankinson, 5 Q. B. 584.

The 7th section enacts, that where the right is by the act deemed to be "absolute and indefeasible" (*vide sect.* 2, *and sup. sect.* 3, *as to light enjoyed for twenty years*), the proviso, or exception, as to infants, &c. and in the case of enjoyment against tenants for life only, &c. shall not be applicable. The words are, "provided, also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." Clayton *v.* Corby, 2 Q. B. 813; Pye *v.* Mumford, 11 Q. B. 666. [For cases showing the extent

Obs. to which the English law respecting ancient lights has been recognized or repudiated in the American states, see 3 Kent, 448; Parker *v.* Foote, 19 Wend. 309; Myers *v.* Jemmel, 10 Barb. 537; Banks *v.* American Tract Society, 4 Sandf. Ch. 438; Mahan *v.* Brown, 13 Wend. 261; Palmer *v.* Wetmore, 2 Sandf. 316; Mullen *v.* Stricker, 19 Ohio St. 135; Morrison *v.* Marquardt, 24 Iowa, 35; Janes *v.* Jenkins, 34 Md. 1; Hubbard *v.* Town, 33 Vt. 295; United States *v.* Appleton, 1 Sumner, 492, 502; Gerber *v.* Grabel, 16 Ill. 217; Story *v.* Odin, 12 Mass. 157; Grant *v.* Chase, 17 Mass. 443, 448; Atkins *v.* Chilson, 7 Met. 403; Fifty Associates *v.* Tudor, 6 Gray, 255; Collier *v.* Pierce, 7 Gray, 18; Rogers *v.* Sawin, 10 Gray, 376; Carrig *v.* Dee, 14 Gray, 583; Richardson *v.* Pond, 15 Gray, 387; Paine *v.* Boston, 4 Allen, 168; Brooks *v.* Reynolds, 106 Mass. 31; Pierre *v.* Fernald, 26 Maine, 436; Ingraham *v.* Hutchinson, 2 Conn. 584; Cherry *v.* Stein, 11 Md. 1; Napier *v.* Bulwinkle, 5 Rich. (S. Car.) 311; Maynard *v.* Esher, 17 Penn. St. 226; Haverstick *v.* Sipe, 33 Penn. St. 368, 371; Robeson *v.* Pittenger, 1 Green Ch. 57, 64; Ray *v.* Lynes, 10 Ala. 63; Ward *v.* Neal, 35 Ala. 602; Jackson *v.* Duke of Newcastle, 3 De G., J. & S. 275; Keats *v.* Hugo, 115 Mass. 204, and cases cited. Clawson *v.* Primrose, 15 Am. Law Reg. (N. S.) 6, 26. Mr. Washburn in his work on Easements &c. p. [498] 583, says, "It will be found, it is believed, that in New York, Massachusetts, South Carolina, Maine, Maryland, Pennsylvania, Alabama, and Connecticut, the doctrine of gaining a prescriptive right to light and air, by mere length of enjoyment, has been discarded; while the English rule in this respect has been retained in Illinois, New Jersey, and Louisiana," and the learned author examines the cases at length.]

A party entitled to the enjoyment of ancient lights will be deemed to have abandoned his privilege if he suffer the windows to be permanently blocked up for twenty years; Lawrence *v.* Obee, 3 Camp. 514; see Stokoe *v.* Singers, 8 El. & Bl. 31; or in lieu of windows, build a blank wall, and allow it to remain for many) seventeen years, when his neighbor erects a house. Moore *v.* Rawson, 3 B. & C. 332; [Washburn Easements &c. (2d ed.) 631 [542]; Perkins *v.* Dunham, 3 Strobh. 224; Dyer *v.* Sanford, 9 Met. 395; Taplin *v.* Jones, 11 H. L. Cas. 290. See Crossley *v.* Lightowler, L. R. 3 Eq. 279; S. C. 2 Ch. Ap. 482; Cook *v.* Bath, L. R. 6 Eq. 177.] And he may so alter the mode in which he has been allowed to enjoy the easement as to lose the right altogether; and, therefore, where a person entitled to light through certain apertures in a barn, converted the barn into a malt-house and cut windows where the apertures had been, it was decided that the judge, at the trial of an action for a subsequent obstruction, ought not to have rejected evidence offered to show that the mode of enjoying the light had been thus altered to the defendant's prejudice. Garritt *v.* Sharp, 3 Ad. & E. 325; Blanchard *v.* Bridges, 1 Ad. & E. 536. See Renshaw *v.* Bean, 18 L. J. Q. B. 112; [18 Q. B. 112;] Cawkwell *v.* Russell, 26 L. J. Ex. 34; Hutchinson *v.* Copestake, 31 L. J. C. P. 19; [9 C. B. N. S. 863;] Jones *v.* Tapling, [11 C. B. N. S. 283;] 31 L. J. C. P. 110; 34 L. J. C. P. 342; [11 C. B. N. S. 826; 11 H. L. Cas. 290;] overruling Renshaw *v.* Bean, and Hutchinson *v.* Copestake; Binckes *v.* Pash, 31 L. J. C. P. 121; [11 C. B. N. S. 324; Martin *v.* Gohle, 1 Camp. 310; Lanfranchi *v.* Mackenzie, L. R. 4 Eq. 411–429. The right is not lost merely by the owner of the dominant tenement slightly obscuring his own lights. Arcedeckne *v.* Kelk, 2 Giff. 983; Staight *v.* Burn, L. R. 5 Ch. Ap. 163. The owner of the servient tenement will be bound by acquiescence in the alteration of ancient lights. Cotching *v.* Basset, 32 Beav. 101; Johnson *v.* Wyatt, 2 De G., J. & S. 18.]

But where no injury is occasioned to a neighbor, a window may be enlarged without losing the right to its original quantity of light. Chandler *v.* Thompson, 3 Camp. 80. [An ancient window may be replaced by one of the same size which will have the same privilege as the old one; see Luttrel's case, 4 Rep. 86; Hutchinson *v.* Copestake, 9 C. B. N. S. 863; but the dominant owner must not exceed the old limits; Turner *v.* Spooner, 1 Dr. & Sm. 467; Currier's Co. *v.* Corbett, 2 Dr. & Sm. 35; and see Martin *v.* Headon, L. R. 2 Eq. 425; otherwise the occupier of the servient tenement may obstruct such parts of the new window or windows as are not privileged, but he must be careful in so doing not to obstruct the privileged portion. Taplin *v.* Jones, 11 H. L. Cas. 290; Weatherley *v.* Ross, 1 H. & M. 349; Wilson *v.* Townend,

Obs. 1 Dr. & Sm. 324; Binckes *v.* Pash, 11 C. B. N. S. 324; Cooper *v.* Hubback, 30 Beav. 160.] See, as to extinguishment of easements, Gale on Easements, by Willes, 469, 512; [Washburn Easements &c. (2d ed.) 605 *et seq.*]

An action lies for darkening ancient lights, although the building by which they were darkened was erected under the provisions of the building act, 14 Geo. 3, c. 78, s. 43, and the action was not commenced within the time prescribed by that act, and no notice of action given. Wells *v.* Ody, 1 M. & W. 452; 7 C. & P. 410; Cotterill *v.* Griffiths, 4 Esp. 69. See Arcedeckne *v.* Kelk, 2 Giff. 683. For however short a period light may have been enjoyed, a vendor, lessor, or one claiming under him, cannot obstruct the light of a building in the possession of his vendee, lessee, or one claiming under either of them, where the window through which such light has access existed at the time of the sale or demise, for this would be in derogation of his own grant; Palmer *v.* Fletcher, 1 Lev. 122; Compton *v.* Richards, 1 Price, 27; Swansborough *v.* Coventry, 9 Bing. 305; [Washburn Easements &c. (2d Am. ed.) 579 *et seq.*; Story *v.* Odin, 12 Mass. 157; 3 Kent, 448;] nor can a tenant obstruct the light of a house adjoining to the land he rents, and in the possession of his landlord, &c. enjoyed at the time of the execution of his lease. Riviere *v.* Brown, 1 R. & Mo. 24. As to *licenses* to open windows, see Bridges *v.* Blanchard, 3 N. & M. 691; 1 Ad. & E. 536; Blanchard *v.* Bridges, 4 Ad. & E. 176. As to effect of conduct amounting to acquiescence, 31 L. J. C. P. 61. If the obstruction be continued, a second action may be brought even by a reversioner; Shadwell *v.* Hutchinson, 2 B. & Ad. 97; Battishill *v.* Reed, 18 C. B. 696; 25 L. J. C. P. 290; though the first obstruction were before the plaintiff's possession of the property. Thompson *v.* Gibson, 7 M. & W. 456. See Todd *v.* Flight, 9 C. B. N. S. 377; 30 L. J. C. P. 21.

No diminution of light is a sufficient cause of action, unless it render the building less fit for the purposes for which it was before used. Parker *v.* Smith, 5 C. & P. 438; Back *v.* Stacey, 2 C. & P. 465; Martin *v.* Gabb, 1 Camp. 322; 4 Esp. R. 69. It is not sufficient that a ray or two of light should be obstructed. The question is, whether in consequence of the obstruction, the plaintiff has less light than before to such a degree as to injure his property in point of value or occupation. Pringle *v.* Wernham, 7 C. & P. 377; Wells *v.* Ody, 1 M. & W. 452; 7 C. & P. 410. [With regard to the important question, what amount of damage or injury must be sustained to give a right of action or suit, it was observed by Wood V. C. in Dent *v.* Auction Mart Co. L. R. 2 Eq. 245, that the doctrine established in Attorney General *v.* Nicholl, 16 Ves. 343, and recognized by Lord Westbury in Jackson *v.* Duke of Newcastle, 10 Jur. N. S. 688–690, was this, that "there are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained or an action upon the case, which however might be maintained in many cases which would not support an injunction." V. C. Wood further observed, adopting the ruling of Best C. J. in Back *v.* Stacey, 2 C. & P. 465, "that at law, in order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done." In Robson *v.* Whittingham, L. R. 1 Ch. Ap. 442, also, it was held, that there must be a *material* (see judgment of Bruce L. J.) amount of damage to support a bill for injunction in such cases. See, also, Martin *v.* Headon, L. R. 2 Eq. 425, 434; Lyon *v.* Dillimore, 14 W. R. 511; Webb *v.* Hunt, 15 W. R. 725; Stokes *v.* City Off. Co. 2 H. & M. 650; Durrell *v.* Pritchard, L. R. 1 Ch. Ap. 244; Johnson *v.* Wyatt, 2 De G., J. & S. 18, and cases in notes to Am. ed.; Jackson *v.* Duke of Newcastle, 3 De G., J. & S. 275. The owner of a building containing ancient lights is entitled to all the light he enjoyed previous to the interruption complained of, without any *material* diminution of it. Yates *v.* Jack, L. R. 1 Ch. Ap. 295. There is no distinction between the rights in town and in the country. Martin *v.* Headon, L. R. 2 Eq. 425; Dent *v.* Auction Mart Co. L. R. 2 Eq. 238; but see Clarke *v.* Clark, L. R. 1 Ch. Ap. 16.]

As to an injunction to restrain the obstruction of ancient lights, see *post*, "Injunction."

[1. *For obstructing the Plaintiff's Windows.* (*e*)

The venue is local.] For that the plaintiff was possessed (*f*) of a dwelling-house, (*g*) and was entitled to have the light and air enter therein through a certain window in the said dwelling-house; and the defendant prevented and obstructed the light and air from entering through the said window into the said dwelling-house by erecting (*h*) a wall [*or* by keeping and continuing a wall before them wrongfully erected] near to the said window, whereby the said dwelling-house has been rendered dark, unwholesome, and of less value, and the plaintiff has incurred expense in opening other windows to obtain light and air in the said dwelling-house.]

2. *By a Reversioner of a House against a Railway Company for erecting a Station, whereby his Ancient Lights were obstructed.* (*i*)

Turner *v.* Sheffield & Rotherham Company, 10 M. & W. 425; [Salters' Co. *v.* Jay, 8 Q. B. 109; Metropolitan Association &c. *v.* Patch, 5 C. B. N. S. 504; Stokoe *v.* Singers, 8 El. & Bl. 31.]

APPRENTICE.

See, as to enticing away and harboring plaintiff's apprentice, Cox *v.* Mundy, 6 C. B. N. S. 375; Lumley *v.* Gye, 22 L. J. Q. B. 463; 2 El. & Bl. 216; Evans *v.* Walton, L. R. 2 C. P. 615; 36 L. J. C. P.; *post*, "Master and Servant."

ARREST.

See *ante*, part 1, p. 52, and *post*, "Trespass to the Person;" "False Imprisonment."

ASSAULT. *Post*, "Trespass to the Person."

ASSIGNEES.

See *post*, "Trover," *ante*, part 1, p. 54, and tit. "Bankruptcy."

(*e*) See forms, Flight *v.* Thomas, 11 Ad. & E. 690; Wells *v.* Ody, 1 M. & W. 452; Davies *v.* Marshall, 31 L. J. C. P. 61; [10 C. B. N. S. 697; Glare *v.* Harding, 27 L. J. Ex. 286; Wale *v.* Westminster Palace Hotel Co. 8 C. B. N. S. 276;] Merchant Taylors *v.* Truscott, 25 L. J. Ex. 173; 11 Ex. 855; [White *v.* Bass, 7 H. & N. 722.]

(*f*) Possession, in fact, is sufficient to sustain the action, and no title need be stated. 2 Saund. 113 *a*, note (1); Com. Dig. Pl. C. 39.

(*g*) *Or* "workshop," *or* "malthouse," &c. *as the case may be.* Declaration stated a "messuage," proof of part only of a house, viz. certain rooms therein; variance immaterial. Fenn *v.* Grafton, 2 Bing. N. C. 617.

(*h*) See Shadwell *v.* Hutchinson, 2 B. & Ad. 97; Thompson *v.* Gibson, 7 M. & W. 456; Brent *v.* Haddon, Cro. Jac. 555; Penruddock's case, 5 Co. R. 100; Winsmore *v.* Greenbank, Willes R. 583; Salmon *v.* Bensley, R. & M. 186.

(*i*) Other forms, Metropolitan &c. *v.* Patch, 5 C. B. N. S. 504; 27 L. J. C. P. 330; Stokoe *v.* Singers, 8 El. & Bl. 31; 26 L. J. Q. B. 257.

ATTORNEYS.

Obs. — See Obs. *ante*, 55–59, and 304. An action of contract or tort may be brought against an attorney for carelessness or unskilfulness to his client's prejudice in violation of the implied promise or duty created by the retainer of the attorney in his professional capacity. Shilcock *v.* Pasman, 7 C. & P. 289; Lamphier *v.* Phipos, 8 C. & P. 479; [*ante*, 55–59; 2 Chitty Contr. (11th Am. ed.) 815–821, and cases in notes; Reilly *v.* Cavenaugh, 29 Ind. 435; Purves *v.* Landell, 12 Cl. & Fin. (Am. ed.) 91; Hart *v.* Frame, 6 Cl. & Fin. 193, and note (1); Jennings *v.* McConnel, 17 Ill. 148; Holmes *v.* Peck, 1 R. I. 242; Cox *v.* Sullivan, 7 Geo. 144; Derrickson *v.* Cady, 7 Barr, 27; Weimer *v.* Sloane, 6 McLean, 259; Evans *v.* Watrous, 2 Porter, 205; Pennington *v.* Yell, 11 Ark. 212; Wilson *v.* Russ, 19 Maine, 421; O'Barr *v.* Alexander, 37 Geo. 195; Bowman *v.* Tallman, 27 How. Pr. 212; Phillips *v.* Bridge, 11 Mass. 246; Oldham *v.* Sparks, 28 Texas, 425; Stevens *v.* Walker, 55 Ill. 151; Harter *v.* Morris, 18 Ohio St. 492.] When tort is adopted, the forms in contract (*ante*, 60 *et seq.*) may be readily applied, alleging a *duty* instead of a promise.

An attorney is liable for arresting a party on a capias, which is afterwards set aside for irregularity; Codrington *v.* Lloyd, 8 Ad. & E. 449; Jones *v.* Williams, 8 M. & W. 356; or for issuing execution against the wrong party. See Davies *v.* Jenkins, 11 M. & W. 745; Green *v.* Elgie, 5 Q. B. 99. As to evidence sufficient to fix him, see Bowles *v.* Senior, 15 L. J. Q. B. 231. The client is also liable in such case as the act done by the attorney would be within the scope of his authority. Jarmain *v.* Hooper, 1 D. & L. 769; 6 M. & G. 827; Collet *v.* Foster, 26 L. J. Ex. 412; 2 H. & N. 356; and see Wilson *v.* Tumman, 6 M. & G. 236. But an action will not lie against an attorney without proof of malice, for wrongfully suing a different person from the one indicated by his instructions. Davies *v.* Jenkins, 11 M. & W. 745. See Yearsley *v.* Heane, 14 M. & W. 322; Ewart *v.* Jones, Ib. 774.

If an attorney commences an action without plaintiff's authority, he is liable in a summary way or by action. See Hubbart *v.* Phillips, 2 D. & L. 707; 14 L. J. Ex. 103; Robson *v.* Eaton, 1 T. R. 62.

1. *Against an Attorney for letting Judgment go by Default after Instructions to Defend.* (*k*)

For that the plaintiff retained and employed the defendant, as an attorney of the court of ——, to defend an action in the said court, at the suit of A. B. against the now plaintiff, for reward to the defendant; (*l*) and the defendant accepted such retainer and employment; yet the defendant so negligently defended the said action, that thereby judgment by default was signed in the said action, by the said A. B. against the now plaintiff; and the said A. B. recovered in the said action, and the plaintiff otherwise incurred costs and expenses in relation thereto.

2. *Against an Attorney for compromising contrary to the Directions of his Client.* (*m*)

Fray *v.* Vowles, 28 L. J. Q. B. 232; [1 El. & Bl. 839; Butler *v.* Knight, L. R. 2 Ex. 109.]

(*k*) Godefroy *v.* Jay, 7 Bing. 413.

(*l*) [See Cavillaud *v.* Yale, 3 Cal. 108.]

(*m*) An attorney has authority to compromise an action under his ordinary retainer to bring or defend an action, unless he is expressly forbidden by the client to do so. Chown *v.* Parrott, 32 L. J. C. P. 197; [14 C. B. N. S. 74;] Prestwich *v.* Poley, 34 L. J. C. P. 189; [18 C. B. N. S. 806;] and see Slater *v.* Mayor &c. of Sunderland, 33 L. J. Q. B. 37; Butler *v.* Knight, 36 L. J. Ex. 66; [L. R. 2 Ex. 109.] As to the power and duty of counsel in compromising a suit, see Swinfen *v.* Swinfen, 25 L. J. C. P. 303; 18 C. B. 485; Ib. 1 C. B. N. S. 364; 26 L. J. C. P. 97; Chambers *v.* Mason, 5 C. B. N. S. 59; 28 L. J. C. P. 10; Strauss *v.* Francis, 35 L. J. Q. B. 133; [L. R. 1 Q. B. 379;

3. *Against an Attorney for negligently conducting a Suit in Chancery commenced before he was retained, whereby the Bill was dismissed, &c.*

Frankland *v.* Cole, 2 Cr. & J. 590.

4. *Against an Attorney for disclosing to a Third Person a Defect in his Client's Title.*

Taylor *v.* Blacklow, 3 Bing. N. C. 235.

5. *Against a Person who was Plaintiff in a Former Action and his Attorney for not releasing the Plaintiff (Defendant in the Former Action) out of Prison after satisfaction of Debt and Costs.*

Croyzer *v.* Silling & another, 4 B. & C. 26.

6. *By the Sheriff against an Attorney for misrepresenting the Address of a Debtor, whereby the Sheriff levied on the Wrong Person.*

Childers *v.* Wooler, 29 L. J. Q. B. 129.

BAILEES AND BAILMENTS.

Obs. — A bailee of goods may in general be sued either in contract or tort for violation of his implied promise or duty. See *ante*, part 1, p. 67 *et seq.* and p. 144, where forms will be found which may easily be altered. See, also, *ante*, part 2, tit. "Agents" and "Attorneys." See Corbett *v.* Packington, 6 B. & C. 268; Mostyn *v.* Coles, 31 L. J. Ex. 151; [7 H. & N. 872.]

1. *Against a Hirer of Certain Carvings for Public Exhibition, for not taking care of them.* (*n*)

For that the plaintiff, at the request of the defendant, let to hire and delivered to the defendant certain carvings in wood, to be by the defendant kept and exhibited for profit for a certain time; yet the defendant took so little and such bad care of the said goods whilst he had them on hire, and used the same in so unreasonable and improper a manner, that the same became and were destroyed, injured, and deteriorated in value, and the plaintiff has been deprived of gains and profits which he would otherwise have derived therefrom.

ante, 57–59; Holker *v.* Parker, 7 Cranch, 436; Abbe *v.* Rood, 6 McLean, 106; Shaw *v.* Kidder, 2 How. (N. Y.) Pr. 244; Bates *v.* Seabury, 1 Sprague, 433; Derwort *v.* Loomer, 21 Conn. 245; Nolan *v.* Jackson, 16 Ill. 272; Lewis *v.* Gamage, 1 Pick. 347; Davidson *v.* Rozier, 23 Missou. 387; Filby *v.* Miller, 25 Penn. St. 364; Vail *v.* Jackson, 15 Vt. 314; Smock *v.* Dude, 5 Rand. (Va.) 639; Bonney *v.* Morrill, 57 Maine, 368.]

(*n*) See a form for not taking care of goods delivered to the defendant for that purpose, Corbett *v.* Packington, 6 B. & C. 268; [Mostyn *v.* Coles, 7 H. & N. 872; Bonneberg *v.* Falkland Islands Co. 34 L. J. C. P. 34. In a case, where it appeared that the defendant agreed for hire to store the plaintiff's carriages, and the carriages were put in a barn, the roof of which, being overloaded with snow, fell in and crushed them, it was held that the defendant was liable only in case he knew, or might, by the use of ordinary care, have discovered, that the roof was unsafe. Moulton *v.* Phillips, 10 R. I. 218.]

2. *Against the Hirer of a Steam Vessel for employing it for an Illegal Purpose, whereby the Master and Crew were imprisoned and the Vessel detained.*

Bleadon *v.* Rapallo, 3 M. & G. 116.

3. *By the Owner of Goods left in the Defendant's House, for suffering them to be distrained and sold for Rent due from him.* (*o*)

See a form in the last edition of this work.

4. *Against a Printer for pawning Paper delivered to him to print on.*

South *v.* White, 8 Dowl. 254.

5. *Against a Person intrusted with a Dog, for losing it.*

Mackenzie *v.* Cox, 9 C. & P. 632.

6. *By a Hackney Driver against the Registrar for defacing his License.*

Hurrell *v.* Ellis, 2 C. B. 295. (*p*)

7. *Against an Engraver for using for his own purposes Plates engraved by him for Plaintiff.* (*q*)

Murray *v.* Heath, 1 B. & Ad. 804.

8. *Against a Gratuitous Bailee or Lender.* (*r*)

Wilson *v.* Brett, 11 M. & W. 113; Blakemore *v.* The Bristol & Exeter Ry. Co. 8 El. & Bl. 1035; 27 L. J. Q. B. 167; McCarthy *v.* Young, 6 H. & N. 329; 30 L. J. Ex. 227.

(*o*) Goods in pledge for *advances* are not liable to be distrained for rent. See Swire *v.* Leech, 18 C. B. N. S. 479; 34 L. J. C. P. 150. In an action by the pawnbroker, the damages are the full value of the goods. Ib. See Gilman *v.* Elton, 3 B. & B. 75; Thompson *v.* Mashiter, 1 Bing. 283; Bandy *v.* Cartwright, 8 Ex. 913–922, and Jex. 285, and note p. xi.; Ralli *v.* Schofield, 36 L. J. C. P.

(*p*) See Rogers *v.* Macnamara, 14 C. B. 27; 23 L. J. C. P. 1.

(*q*) See Smith *v.* Mundy, 29 L. J. Q. B. 172.

(*r*) A gratuitous lender of a chattel is not liable for a personal injury sustained by the person to whom it is lent, or by any other person by his permission, arising from the defective construction of the article, the lender not having notice of the defect, although guilty of negligence in its construction. McCarthy *v.* Young, 30 L. J. Ex. 227; 6 H. & N. 329. As to the liability of a gratuitous bailee, see Jones on Bailments; Story on Bailments; Wilson *v.* Bett, 11 M. & W. 113; Coggs *v.* Bernard, Smith's L. Cas. The duties of a gratuitous lender and borrower of a chattel are in some degree correlative. "The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything that may be defined as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for the defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured." Blakemore *v.* Bristol & Exeter Ry. Co. 8 El. & Bl. 1035; 27 L. J. Q. B. 167–170, where see a form; [2 Kent, 573–577.]

9. *Against the Defendant for not delivering up a Ship's Register when required.* (*s*)

Wiley *v.* Crawford, 29 L. J. Q. B. 244; 30 L. J. Q. B. 319; [1 B. & S. 253.]

BANK OF ENGLAND — BANKERS. (*t*)

1. *Against the Bank of England for not transferring Stock to the Plaintiff's Vendee and Pleas.*

Stracey *v.* Bank of England, 6 Bing. 754; Henley *v.* Mayor of Lyme, 5 Bing. 91–108; Sutton *v.* Bank of England, 1 C. & P. 193; Foster *v.* Bank of England, 15 L. J. Q. B. 212; Coles *v.* Bank of England, 10 Ad. & E. 437; Partridge *v.* Bank of England, 15 L. J. Q. B. 395.

2. *Against the East India Company for not transferring Stock.*

Gregory *v.* East India Company, 7 Q. B. 199; 14 L. J. Q. B. 226. (*u*)

3. *For not providing for and honoring Customer's Check.*

Cumming *v.* Shaw, 5 H. & N. 95; 29 L. J. Ex. 129. (*x*)

BOOKING-OFFICE KEEPER.

Obs. — The duty of a booking-office keeper is to deliver to a carrier, and evidence must be given showing specifically a breach of that duty, and it is not sufficient to prove that the goods never reached their destination or were accounted for. Gilbart *v.* Dale, 5 Ad. & E. 543, where see a form.

BRIBERY. See *post*, "Parliament."

CARELESSNESS. See *post*, "Negligence."

CARRIAGES, COLLISION OF. See *post*, "Negligence."

(*s*) See merchant shipping act, 17 & 18 Vict. c. 104, s. 50.

(*t*) If the Bank of England refuse to transfer stock, an action may be maintained against them. Henley *v.* Mayor of Lyme, 5 Bing. 108. So, if the Bank of England make unreasonable delay in the passing of a power of attorney to transfer stock, an action lies against them. Sutton *v.* Bank of England, 1 C. & P. 193. See a form for not paying dividends, Foster *v.* The Bank of England, [8 Q. B. 689;] 15 L. J. Q. B. 213. See, also, Coles *v.* The Bank of England, 10 Ad. & E. 437; Partridge *v.* The Bank of England, 13 L. J. Q. B. 281; 15 L. J. Q. B. 395; Sloman *v.* The Bank of England, 14 L. J. Ch. 226. See *ante*, 70; and Grant on Bankers.

(*u*) This declaration was held bad for not averring the name of the proposed transferee.

(*x*) *Ante*, pt. 1, 70, note (*x*).

CARRIERS OF GOODS BY LAND.

Obs. — See *ante*, part 1, 94. Carriers may be sued for the consequences of their neglect in regard to the carriage or delivery of goods either in contract or tort. [Gray J. in Medfield *v.* Boston, Hartford & Erie R. R. Co. 102 Mass. 555.] The leading distinction between contract and tort as regards carriers is, that in contract a *promise* to perform the duty required by the express or implied contract of the parties is laid in the declaration. In tort the declaration does not charge a promise, but after stating the delivery to defendant as a common carrier, alleges the breach of duty as in contract. The forms in contract may, therefore, be readily applied to tort. [See 1 Chitty Pl. 397–399; Medfield *v.* Boston, Hartford & Erie R. R. Co. 102 Mass. 552, 554–557.

1. *Against a Carrier on his Common Law Liability, for losing Goods.* (*y*)

For that the defendant was a common carrier (*z*) of goods for hire from A. to B., and the plaintiff delivered to the defendant certain goods, and the defendant received the same as such carrier to be carried from A. to B. and there delivered by the defendant for the plaintiff for reward in that behalf; yet the defendant did not safely and securely, and within a reasonable time, carry and deliver the said goods for the plaintiff, and the said goods were lost to the defendant. (*a*)

2. *Against a Common Carrier for Injury to Goods.* (*b*)

For that the plaintiff delivered to the defendant, and the defendant received from the plaintiff certain goods to be carried by the defendants as common carriers from A. to B. and there delivered for the plaintiff for reward to the defendant; yet the defendants so negligently carried the same, that by means thereof the said goods were damaged and spoiled.

3. *Against a Railway Company for negligently injuring Cattle carried under Contract.* (*c*)

Carr *v.* The Lancashire & Yorkshire Ry. Co. 21 L. J. Ex. 261.

(*y*) See forms, Coombs *v.* Bristol & Exeter Ry. Co. 27 L. J. Ex. 269; 3 H. & N. 1; Metcalfe *v.* London, Brighton & South Coast Ry. Co. 4 C. B. N. S. 307; 27 L. J. C. P. 205; [Sanquer *v.* London & South Western Ry. Co. 16 C. B. 163; Simons *v.* Great Western Ry. Co. 2 C. B. N. S. 620; Harrison *v.* London & Brighton Ry. Co. 2 B. & S. 122.] Form against a carrier from the London terminus of a railway for the loss of goods delivered to the railway company at B. Coats *v.* Chaplin, 3 Q. B. 483.

(*z*) As to who are common carriers, see *ante*, pt. 1, p. 99, note (*b*).

(*a*) If there be any reason to suppose that the goods were lost by a misdelivery through the wilful negligence of the defendant, a count in trover should be added. Wyld *v.* Pickford, 8 M. & W. 443; 10 L. J. Ex. 382; Stephenson *v.* Hart, 4 Bing. 476 See Devereux *v.* Baillay, 2 B. & Ald. 702; [1 Chitty Pl. 174, and notes, 180.]

(*b*) Form, Behrens *v.* Great Northern Ry. Co. 30 L. J. Ex. 153; affirmed, 31 L. J. Ex. 299; [6 H. & N. 366; 7 Ib. 950.] The plaintiff is entitled to recover the fall in price and deterioration in market value, and is not confined to the parts actually damaged. Collard *v.* South Eastern Ry. Co. 30 L. J. Ex. 394; [7 H. & N. 79,] where see a form. [See 1 Chitty Contr. (11th Am. ed.) 725; 2 Ib. 1325, note (*h*).]

(*c*) As to the liability of railway carriers of cattle, see *ante*, pt. 1, 95, 96, Obs.; Harrison *v.* London & Brighton Ry. Co. 31 L. J. Ex. 113, in error; [2 B. & S. 122, 152;] Hodgman *v.* The West Midland Ry. Co. 33 L. J. Q. B. 233; 35 Ib. Q. B. 85; [5 B. & S. 173; 6 B. & S. 560;] Gregory *v.* West Midland Ry. Co. 35 L. J. Ex. 155; [2 H. & C. 944;] Allday *v.* Great Western Ry. Co. 34 L. J. Q. B. 5; [5 B. & S. 903;] Robinson *v.* South Western Ry. Co. 34 L. J. C. P. 234; Robinson *v.* Great Western Ry. Co. 35 L. J. C. P. 120; [19 C. B. N. S. 51; 1 Chitty Contr. (11th Am. ed.) 689, note (*a*), 721, 722; Rix-

[3a. *Against a Company for Negligence in receiving a Horse.*

Hodgman *v.* West Midland Ry. Co. 33 L. J. Q. B. 233.]

4. *Against a Common Carrier for not delivering Goods within a Reasonable Time.* (*d*)

For that the plaintiff delivered to the defendant, then being a common carrier of goods for hire, and the defendant received from the plaintiff goods of the plaintiff, to be carried by the defendant as such common carrier from A. to B. and there to be delivered by the defendant for the plaintiff for reward to the defendant; yet the defendant neglected to deliver the same within a reasonable time, whereby the plaintiff was deprived of the use of the same, and they were of much less value.

5. *Against a Carrier for not carrying and delivering Goods in Time for a Certain Market.* (*e*)

For that the defendant was a common carrier of goods for hire, and the plaintiff delivered to the defendant, and the defendant received from the plaintiff as such carrier certain goods to be carried from A. to B. and there delivered by the defendant for the plaintiff in time for the market on the —— day of ——, A. D. ——, for reward to the defendant; yet the defendant did not deliver the said goods for the plaintiff in time for the said market, whereby the plaintiff lost the profits that he would have otherwise have made, and the said goods were deteriorated and injured, and greatly diminished in value, and the plaintiff was put to cost in attending the said market to sell the said goods.

6. *Against a Carrier for not taking care of Goods after the Consignee had refused to accept them.*

Hudson *v.* Baxendale, 2 H. & N. 575; 27 L. J. Ex. 93. (*f*)

7. *Against a Common Carrier for refusing to carry Goods.*

For that the defendant was a common carrier of goods for hire from A. to B., and the plaintiff tendered at the defendant's place of business at a proper

ford *v.* Smith, 52 N. H. 355, 363, and cases cited; Lake Shore & Michigan Southern &c. R. R. Co. *v.* Perkins, 25 Mich. 329; Michigan Southern & Northern Indiana R. R. *v.* McDonogh, 21 Mich. 165; Clarke *v.* Rochester & Syracuse R. R. Co. 14 N. Y. 570; Hull *v.* Renfro, 3 Metc. (Ky.) 51; Smith *v.* N. H. & N. R. R. Co. 12 Allen, 531; American Express Co. *v.* Sands, 55 Penn. St. 140; Louisville &c. R. R. Co. *v.* Hedger, 13 Am. Law Reg. N. S. 145, and note *ad finem;* Blower *v.* G. W. R. R. Co. L. R. 7 C. P. 655; McCance *v.* London & N. W. Ry. Co. 7 H. & N. 477; S. C. 3 H. & C. 343.]

(*d*) Forms, Wise *v.* The Great Western Ry. Co. 25 L. J. Ex. 258; 1 H. & N. 63; Raphael *v.* Pickford, 5 M. & G. 551. See, also, *ante*, pt. 1, p. 103, form 10, and notes. And as to duty to carry within a reasonable time, see Great Northern Ry. Co. *v.* Taylor, 35 L. J. C. P. 210; [L. R. 1 C. P. 385; *ante*, 103, note (*h*).]

(*e*) This form is in contract, and was accidentally omitted from part 1. Other forms, Pickford *v.* The Grand Junction Ry. Co. 12 M. & W. 766; Walker *v.* York & North Midland Ry. Co. 23 L. J. Q. B. 73; [2 El. & Bl. 750;] White *v.* Great Western Ry. Co. 2 C. B. N. S. 7; 26 L. J. C. P. 158; [Hughes *v.* Great Western Ry. Co. 14 C. B. 637.]

(*f*) There is not any rule of law compelling the carrier to give notice to the consignor that the consignee refuses to receive the goods. He is merely bound to do what is reasonable in the particular circumstances. Hudson *v.* Baxendale, 2 H. & N. 575; 27 L. J. Ex. 93; [*ante*, 107, note (*p*).]

time certain goods of the plaintiff to be carried by the defendant, (*g*) for reward, from A. to B., and was then ready and willing, and offered to pay to the defendant proper reward in that behalf; yet the defendant, although he had the means of carrying the said goods, would not receive and carry the same.

[*7a. For refusing to carry a Horse unless the Value was declared and insured.*

Robinson *v.* South Western Ry. Co. 19 C. B. N. S. 51. See Cranch *v.* Great Northern Ry. Co. 11 Ex. 742.]

CARRIERS OF GOODS BY WATER.

Obs. — See *ante*, Part 1, p. 106.

1. *Against a Ship-owner for the Loss of Goods.* (*h*)

For that the plaintiff delivered to the defendant, who received the same, certain goods to be carried in a ship of the defendant from A. to B. and there delivered to the plaintiff, for freight payable by the plaintiff to the defendant, certain perils and casualties only excepted; yet the defendant, although not prevented by any of the said excepted perils and casualties, and a reasonable time in that behalf elapsed, did not carry and deliver the said goods as aforesaid, and the same were lost to the plaintiff.

2. *Against a Ship-owner for damaging Goods.* (*i*)

Alston *v.* Herring, 25 L. J. Ex. 177; [11 Ex. 822.]

(*g*) Actual tender of money not necessary, a readiness and willingness is sufficient. Pickford *v.* The Grand Junction Ry. Co. 8 M. & W. 373; 9 Dowl. 766, where see a form. See Crouch *v.* The Great Northern Ry. Co. 9 Ex. 556; 23 L. J. Ex. 148, where it was held that the defendants were not entitled to charge the plaintiff more than they did others. See, also, Johnson *v.* Midland Ry. Co. 4 Ex. 267. Common carriers are bound to carry goods tendered to them to be carried if accompanied with the proper charge, and they have no right to insist upon the sender signing unreasonable conditions, neither have they a right to refuse goods tendered with the proper price by one person, when at the same time they receive goods of the same class from another person. Garton *v.* Bristol & Exeter Ry. Co. 30 L. J. Q. B. 273; [1 B. & S. 112,] where see a form. See, also, Baxendale *v.* The Eastern Counties Ry. Co. 4 C. B. N. S. 63; 27 L. J. C. P. 137; Crouch *v.* The Great Northern Ry. Co. 11 Ex. 742; 25 L. J. Ex. 137; Sutton *v.* Great Western Ry. Co. 35 L. J. Ex. 18; [1 Chitty Contr. (11th Am. ed.) 684, 685, and cases in notes; 3 H. & C. 800; L. R. 2 Ap. Ca. 226;] Sutton *v.* South Eastern Ry. Co. [L. R. 1 Ex. 32;] Baxendale *v.* South Western Ry. Co. [L. R. 1 Ex. 137; Pickford *v.* Grand Junction Ry. Co. 8 M. & W. 372; Hales *v.* London & North Western Ry. Co. 4 B. & S. 66; Paddington *v.* South Eastern Ry. Co. 5 C. B. N. S. 111; Branley *v.* South Eastern Ry. Co. 12 C. B. N. S. 63.]

(*h*) See forms, Newberry *v.* Colvin, 7 Bing. 190; 1 Cr. & J. 192; Morewood *v.* Pollock, 1 El. & Bl. 743; 22 L. J. Q. B. 250. On a bill of lading, Colvin *v.* Newberry, 8 B. & C. 166. Where the bill of lading described the goods as "one box containing about 248 ounces of gold dust," it was decided that it was not a declaration of the true nature and value, within the merchant shipping act, 17 & 18 Vict. c. 104, s. 503, so as to render the ship-owner liable for a loss without his actual fault or privity. Williams *v.* The African Steam Ship Company, 1 H. & N. 300; 26 L. J. Ex. 69. See Gibbs *v.* Potter, 10 M. & W. 70; 11 L. J. Ex. 376.

(*i*) This form may easily be framed by reference to the last form. Damage done by rats is not within any of the exceptions in the bill of lading. Laveroni *v.* Drury, 8 Ex. 166; 22 L. J. Ex. 2; Kay *v.* Wheeler, [L. R. 2 C. P. 302;] 36 L. J. C. P. 180. See Dale *v.* Hall, 1 Wils. 281.

3. *For not delivering to Plaintiff's Assignees.*

Jones *v.* Jones, 8 M. & W. 431; 10 L. J. Ex. 481. (*k*)

4. *Against Ship-owner for Negligent Stowage.* (*l*)

For that the plaintiff delivered to the defendant, who received the same, certain goods to be properly stowed in the ship of the defendant, and safely carried in the said ship from A. to B. and there delivered to the plaintiff for freight, payable by the plaintiff to the defendant, certain perils and casualties only excepted; yet the defendant so negligently stowed the said goods that the same were thereby, and not by any of the said excepted perils and casualties, greatly damaged.

[*Like count.* Anderson *v.* Chapman, 5 M. & W. 483. *Count for damage done to goods by stowing them on deck.* Sargent *v.* Morris, 3 B. & Ald. 277. *For negligence in loading goods on board under special contract.* Cooke *v.* Wilson, 1 C. B. N. S. 153. *The like on a contract made abroad.* Cohen *v.* Gaudet, 3 F. & F. 455.]

5. *Against the Defendant for shipping Dangerous Goods without giving Notice thereof.* (*m*)

Brass *v.* Maitland, 6 El. & Bl. 474; 26 L. J. Q. B. 49; [Williams *v.* East India Co. 3 East, 192.]

6. *Against the Owner of a Ferry for Injury to Goods.*

Walker *v.* Jackson, 10 M. & W. 161. (*n*)

[7. *Against the Master of a Steam-tug for Negligence in towing the Plaintiff's Ship.*

That in consideration that the plaintiff would employ the defendant with a steam-tug of the defendant to tow a certain ship of the plaintiff from the port

(*k*) See, in this case, a plea of stoppage *in transitu*.

(*l*) See a form, Hutchinson *v.* Guion, 5 C. B. N. S. 149; 28 L. J. C. P. 63. The master of a ship is not liable to the owner of goods sent to be shipped on board a general ship, for damage done to them for the negligent stowage of a stevedore appointed by the charterer, such stevedore not being a servant or agent of the master. Nor is he liable for the acts of the stevedore, though it is stipulated by the charter-party that the stevedore shall be paid by and act under the master's orders, except such acts are done in the execution of the master's orders. Blaikie *v.* Stembridge, 28 L. J. C. P. 333; affirmed in error, 29 L. J. C. P. 212; [S. C. 6 C. B. N. S. 894;] Sack *v.* Ford, 13 C. B. N. S. 90; 32 L. J. C. P. 12; Anglo-African Company *v.* Lamzed, 35 L. J. C. P. 145; [L. R. 1 C. P. 226;] Sandeman *v.* Scurr, 36 L. J. C. P. 58; [L. R. 2 Q. B. 86;] Phillips *v.* Clarke, 2 C. B. N. S. 156; 26 L. J. C. P. 168; The Helene, L. R. 1 C. P.; 35 L. J. C. P. 1. Forms, Major *v.* White, 7 C. & P. 41; Anderson *v.* Chapman, 5 M. & W. 483; 7 Dowl. 822.

(*m*) By s. 329 of the merchant shipping act, the carrying of dangerous goods is prohibited without due notice. Brass *v.* Maitland, 6 El. & Bl. 741; 26 L. J. Q. B. 49. And it is the duty of the person shipping to give information. Alston *v.* Herring, 11 Ex. 822; 25 L. J. Ex. 177; Farrant *v.* Barnes, 31 L. J. C. P. 137; [11 C. B. N. S. 553.] See forms, Hutchinson *v.* Guion, 28 L. J. C. P. 63; [5 C. B. N. S. 149.] See Williams *v.* East India Company, 3 East, 192. By 8 Vict. c. 20, s. 105, a penalty is imposed upon any person knowingly sending dangerous goods by railway without distinctly marking their nature on the outside of the package. As to passenger ships, see 18 & 19 Vict. c. 119, s. 29.

(*n*) See a form against the master of a barge who deviated from his course, showing that a storm arose, and that the plaintiff's goods were injured, &c. Davis *v.* Garrett, 6 Bing. 716.

of —— out to sea, for reward to the defendant, the defendant promised the plaintiff so to tow the said ship in a careful, skilful, and proper manner; and the plaintiff employed the defendant, and the defendant accepted and entered upon the said employment, for the purpose and upon the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said ship so towed by the defendant in a careful, skilful, and proper manner; yet the defendant towed the said ship in a negligent, unskilful, and improper manner, whereby the said ship became and was stranded and damaged.

A like count. Symonds *v.* Pain, 6 H. & N. 709.]

CARRIERS OF PASSENGERS BY LAND.

1. *For refusing to carry.*

For that the defendants were common carriers of passengers for hire from A. to B., and the plaintiff, at a reasonable time and place, and in a fit and proper state, tendered himself to be carried as a passenger from A. to B. aforesaid for hire, and was ready and willing, and offered to pay the said hire; and the defendants had the means of carrying the plaintiff, and were able to have done so, yet refused to, and did not, nor would carry the plaintiff.

[2. *Against a Railway Company for Delay in a Train.*

That the defendants were carriers of passengers in carriages on a railway from —— to ——, for reward to the defendants, and thereupon, on the —— day of ——, A. D. ——, in consideration that the plaintiff, at the request of the defendants, would pay them a sum of money as and for the price of their carrying the plaintiff as a passenger in one of the said carriages from —— to —— aforesaid, by a train which the defendants advertised in their published train bill, and represented to the plaintiff to be a train that would start from —— to —— aforesaid at —— o'clock in the [afternoon], and arrive at —— aforesaid at —— o'clock in the [afternoon] of the said day, the defendants promised the plaintiff that they would use reasonable care and diligence that the said trains should start and arrive at the respective times aforesaid; and the plaintiff accordingly paid the defendants the said sum of money for the purpose and on the terms aforesaid, and became such passenger to be so carried by the defendants as aforesaid by the said train; yet the defendants did not use reasonable care and diligence that the said train should start and arrive at the respective times aforesaid, and for want of such care and diligence the said train started from —— aforesaid and arrived at —— aforesaid respectively at much later times than the respective times aforesaid, whereby the plaintiff was delayed and put to expense and inconvenience, and was prevented from attending to his business at —— aforesaid, as he otherwise would have done.

A like count. Hamlin *v.* Great Northern Ry. Co. 1 H. & N. 408; (*o*) and see Hurst *v.* Great Western Ry. Co. 19 C. B. N. S. 310.]

(*o*) This form was in contract, but may easily be framed in tort. [As to compensation for loss of time, as a part of the damages, in such case, see Ward *v.* Vanderbilt,

3. *For Injury to a Passenger.* (*p*)

For that the defendants were common carriers of passengers for hire from A. to B., and received the plaintiff as a passenger to be carried from A. to B. for hire; yet the defendants so negligently conducted themselves in and about carrying the plaintiff, that by reason thereof he was greatly and permanently injured, and has been put to expense in endeavoring to be cured of his said injuries and prevented for a long time from attending to his necessary affairs and business, and deprived of the gains and profits he would otherwise have derived therefrom.

4. *Against a Carrier for Negligence, by the Executor of Deceased Passenger, under* 9 & 10 *Vict. c.* 93. (*q*)

A. B., executor of the last will and testament of C. D., deceased, by his attorney sues ——. For that the defendants were common carriers of passengers for hire from E. to F., and received C. D., since deceased, to be carried from E. to F. for hire; yet the defendants so negligently conducted themselves in and about carrying the said C. D., that by reason of such negligence the said C. D. was injured, and died within twelve calendar months next before this suit; and the plaintiff, as executor as aforesaid, for the benefit of [*state follow, whether wife or children* (*r*)] of the said C. D.

4 N. Y. Court of App. Dec. App. 521.] For not running an advertised train, see Denton *v.* Great Northern Ry. Co. 5 El. & Bl. 860; 25 L. J. Q. B. 129. It was held in Kurst *v.* The Great Western Ry. Co. 19 C. B. N. S. 310, that the mere taking of a ticket for a journey by railway does not amount to a contract on the part of the railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it. This subject was discussed at considerable length in Gordon *v.* Manchester & Lawrence R. R. 52 N. H. 596, and the liability of a railroad company for failure in the departure and arrival of their cars at the times indicated in their time-tables is based upon the ground of negligence and not upon an absolute obligation to conform to their times, irrespective of circumstances.]

(*p*) See Carpue *v.* London & Brighton Ry. Co. 5 Q. B. 747; [Withers *v.* North Kent Ry. Co. 27 L. J. Ex. 417; Readhead *v.* Midland Ry. Co. 36 L. J. Q. B. 181.] Against a coach proprietor for negligent driving, Curtis *v.* Drinkwater, 2 B. & Ad. 169; against omnibus proprietor, Brien *v.* Bennet, 8 C. & P. 724; [against railway company, Martin *v.* Great Northern Ry. Co. 16 C. B. 179; against the owner of a steamer, Dalyell *v.* Tyrer, El., Bl. & El. 899.] See *post*, "Negligence."

(*q*) *Or*, "administrator," *as the case may be.*

(*r*) 9 & 10 Vict. c. 93, s. 2, directs for whose benefit the action is to be brought, and by s. 4, full particulars of the persons for whom this action is brought, and of the nature of the claim, must be delivered with the declaration. By 27 & 28 Vict. c. 95, s. 1, if there shall be no executor or administrator of the deceased, or there being one, no action shall have been brought in his name within six calendar months after the death, an action may be brought in the name or names of all or any of the persons (if more than one) for whose benefit the action would have been if brought by an executor or administrator. By s. 2, money may be paid into court in one sum without regard to its division. [It has been held that, at common law, the death of a human being is not the ground of an action for damages. Carey *v.* Berkshire Railroad, 1 Cush. 475; Eden *v.* Lexington & Frankfort Railroad, 14 B. Mon. 204; Connecticut Mut. Life Ins. Co. *v.* New York & New Haven Railroad, 25 Conn. 265; Hubgh *v.* New Orleans & C. R. R. 6 La. Ann. 495; Worley *v.* Cincinnati, Hamilton & Dayton R. R. 1 Handy, 481; Palfrey *v.* Portland, Saco & Portsmouth R. R. Co. 4 Allen, 56; Osborn *v.* Gillett, L. R. 8 Ex. 88; Hyatt *v.* Adams, 16 Mich. 180; Richardson *v.* New York Central R. R. Co. 98 Mass. 89; Nickerson *v.* Harriman, 38 Maine, 279; State *v.* Railway 58 Maine, 178; Wyatt *v.* Williams, 43 N. H. 102, and cases cited, 105, 106; State *v.* Manchester & Lawrence R. R. 52 N. H. 528, 548.]

[5. *Against a Railway Company for not running a Train, as advertised by the Time Tables.*

Denton *v.* Great Northern Ry. Co. 5 El. & Bl. 860.]

6. *Against a Carrier for Loss of Luggage.* (*s*)

For that the defendants were common carriers of passengers and their luggage for hire, and the plaintiff became, and was received by the defendants as a passenger, with his luggage, to be carried from A. to B. for hire; yet the defendants did not use due and proper care in carrying the plaintiff's luggage, and thereby the same was lost.

[*Baggage of troops. Declaration for negligence, and pleas.* Martin *v.* The Great Indian &c. Ry. Co. L. R. 3 Ex. 9.]

7. *Against a Cabman for losing the Luggage of his Fare.*

Ross *v.* Hill, 2 C. B. 877; 15 L. J. C. P. 182.

(*s*) Forms, Marshall *v.* York, Newcastle &c. Ry. 11 C. B. 655; 21 L. J. C. P. 34; Edwell *v.* Grand Junction Ry. 5 M. & W. 67. A railway company, as common carriers of passengers and their luggage, are bound, on the arrival of a train, to deliver a passenger's luggage into a carriage to be carried to its destination, if required so to do, and if such is their usual practice. Butcher *v.* London & South Western Ry. Co. 16 C. B. 13; 24 L. J. C. P. 137; Richards *v.* London & South Coast Ry. Co. 7 C. B. 839; 18 L. J. C. P. 251; Munster *v.* South Eastern Ry. Co. 27 L. J. C. P. 308; [4 C. B. N. S. 676. Common carriers of passengers and their luggage, are bound to deliver to each passenger, at the end of his journey, his trunk or luggage. The passenger is not obliged to expose his person in a crowd, or endanger his safety, in the attempt to designate or claim his property. Cole *v.* Goodwin, 19 Wend. 251; Hollister *v.* Newton, 19 Wend. 234; Bomar *v.* Maxwell, 9 Humph. 621. These carriers are liable for the luggage until its safe delivery to the owner; its delivery upon a forged order will not discharge them. Powell *v.* Myers, 26 Wend. 591; Trowell *v.* Youmans, 5 Strobh. 67. It must be luggage strictly, *i. e.* such articles of necessity and personal convenience as are usually carried by travellers. Pardee *v.* Drew, 25 Wend. 459. The goods or luggage should, however, be demanded within a reasonable time after their arrival at their place of destination. Powell *v.* Myers, 26 Wend. 591; Goold *v.* Chapin, 10 Barb. 612.] If a passenger by a third-class train carry merchandise packed up with his luggage, the company are not responsible if it is lost. Cahill *v.* London & North Western Ry. Co. 30 L. J. C. P. 289; 10 C. B. N. S. 154; Munster *v.* South Eastern Ry. Co. 4 C. B. N. S. 676; 27 L. J. C. P. 308. Where a stipulation is made that by excursion trains the company shall not carry luggage, or that it shall be at the passenger's risk, they are not liable. See Rumsey *v.* North Eastern Ry. Co. 32 L. J. C. P. 224; Stewart *v.* London & North Western Ry. Co. 33 L. J. Ex. 199; [3 H. & C. 135.] But if it be so packed as to be visible, and the company do not make any charge for the carriage, they will be responsible for the loss. Great Northern Ry. Co. *v.* Shepherd, 8 Ex. 30; 21 L. J. Ex. 114. See Great Western Ry. Co. *v.* Goodman, 21 L. J. C. P. 197. See Williams *v.* Great Western Ry. Co. 10 Ex. 15. Where, by a traffic arrangement between two companies, passengers are booked through, the contract is an entire contract between the passenger and the company issuing the ticket. Mytton *v.* Midland Ry. Co. 28 L. J. Ex. 385; [4 H. & N. 615; *ante*, 99, and note (*d*); 1 Chitty Contr. (11th Am. ed.) 704, and note (*d*) and cases cited; Martin B. in Shepherd *v.* Bristol & Exeter Ry. Co. L. R. 3 Ex. 195; Barter *v.* Wheeler, 49 N. H. 9, 25.] See a form against stage-coach proprietors, Miles *v.* Cattle, 6 Bing. 743. As to what is "a loss," see Hearn *v.* London & North Western Ry. Co. 24 L. J. Ex. 180. Against the same for loss of a parcel not *luggage*, Macklin *v.* Waterhouse, 5 Bing. 212. Reference should be had to the company's particular act, as provisions as to luggage may sometimes be found. [As to the articles included in the term luggage or baggage, see 1 Chitty Contr. (11th Am. ed.) 698, and note (*h*); Phelps *v.* London & North Western Ry. Co. 19 C. B. N. S. 321; Merrill *v.* Grinnell, 30 N. Y. 594; Dibble *v.* Brown, 12 Geo. 217; Hickox *v.* Naugatuck R. R. 31 Conn. 281; Smith *v.* Boston & Maine R. R. 44 N. H. 325; Cincinnati &c. Air Line R. R. *v.* Marcus, 38 Ill. 219; Ill. C. R. R. *v.* Copeland, 24 Ill. 332; Mississippi C. R. R. *v.* Kennedy, 41 Miss. 671. Documents and bank-notes carried by an attorney attending a county court. Phelps *v.* London & North Western Ry. Co. 34 L. J. C. P. 259; 19 C. B. N. S. 321.]

CARRIERS OF PASSENGERS BY WATER.

1. *For refusing to carry Passengers.*

Benett *v.* Peninsular & Oriental Steam Boat Co. 6 C. B. 775.

2. *For Loss of a Passenger's Luggage.*

Wilton *v.* Royal Atlantic Mail Steam Co. [10 C. B. N. S. 453;] 30 L. J. C. P. 369. (*t*)

CARRIERS OF MESSAGES.

[*Against an Electric Telegraph Company for not transmitting a Message correctly.*

That the defendants carried on the business of transmitting messages by telegraph, for reward to the defendants; and thereupon, in consideration that the plaintiff would pay to the defendants —— shillings, the defendants promised the plaintiff that they would transmit correctly for the plaintiff from —— to [the master of a ship then lying at ——] the message following, that is to say, ["Proceed to Hull direct"]; and the plaintiff paid to the defendants the said —— shillings, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said message correctly transmitted by the defendants as aforesaid; yet the defendants did not correctly transmit to the master of the said ship the said message as aforesaid, and transmitted to him another and different message, in the terms following: ["Proceed to Southampton direct"], whereby [the said master of the said ship proceeded directly with the said ship to Southampton instead of to Hull, as he would otherwise have done, and the plaintiff lost the benefit of the said ship proceeding to Hull in pursuance of the said message, and incurred great expense by reason of the said ship so proceeding to Southampton as aforesaid].

A like count. MacAndrew *v.* Electric Telegraph Co. 17 C. B. 3.

Count for injury done to telegraphic cable by negligent navigation. Submarine Telegraph Co. *v.* Dickson, 15 C. B. N. S. 759.]

COLLISION. See "Negligence," *post.*

COMMISSIONERS OF PUBLIC WORKS.

OBS. — The law as to the liability of trustees of public works, who do not receive any personal benefit for acting as trustees, has been lately settled and thoroughly considered in the case of The Mersey Docks & Harbor Board *v.* Gibbs, [11 H. L. Cas. 686; L. R. 1 H. L. 83,] and The Mersey Docks & Harbor Board *v.* Penhallow, 35 L. J. Ex. 225; [3 H. & C. 1035;] which have decided that trustees appointed by statute for public purposes, having power

(*t*) See Pianciani *v.* London & South Western Ry. Co. 18 C. B. 226; [Le Conteur *v.* London & South Western Ry. Co. L. R. 1 Q. B. 54.]

Obs. to levy tolls, but not deriving any personal benefit, are liable in their corporate capacity for damage sustained by reason of the default of their servants or agents to the same extent as absolute owners levying tolls for their own profit, although there is no improper conduct on the part of the trustees. See the opinion of the judges in the above case, delivered by Mr. Justice Blackburn, where all the cases are reviewed. [See Duncan *v.* Findlater, 6 Cl. & Fin. (Am. ed.) 894, and note (1'), and cases both English and American there cited; Stanton *v.* Haverill Bridge Co. 14 Am. Law Reg. (N. S.) 469; Winch *v.* Conservators of the Thames, L. R. 9 C. P. 378; Oliver *v.* Worcester, 102 Mass. 489, 500, 501; Mayor &c. of Lyme Regis, 2 Cl. & Fin. (Am. ed.) 331, and note (1); Water Co. *v.* Ware, 16 Wallace, 566; Coe *v.* Wise, L. R. 1 Q. B. 711; Collins *v.* Middle Level Commissioners, L. R. 4 C. P. 279; Bloomington *v.* Bay, 42 Ill. 503; Robbins *v.* Chicago, 4 Wallace, 657; Nebraska City *v.* Campbell, 2 Black, 590; Weightman *v.* Washington, 1 Black, 39; Richmond *v.* Long, 17 Grattan (Va.), 375; Carlton *v.* Franconia Iron & Steel Co. 99 Mass. 216, 218. Whether trustees may repay themselves, out of the trust funds, for damages recovered of them, in consequence of injury done to third persons, while acting in the due discharge of their duties as such trustees, see Duncan *v.* Findlater, 6 Cl. & Fin. (Am. ed.) 894, note (2).] But if the trustees employ fit and proper contractors (not servants) to execute their works, and injury accrues by reason of the negligence of such contractors and their servants, and without any interference on the part of the trustees, the contractor and his servants will be liable, and not the trustees. Holliday *v.* St. Leonard's, Shoreditch, 11 C. B. N. S. (Am. ed.) 192; [and note *ad finem*, and cases cited;] 30 L. J. C. P. 361; Jones *v.* Bird, 5 B. & Ald. 837; Clothier *v.* Webster, 31 L. J. C. P. 317. See Whitehouse *v.* Fellowes, 30 L. J. C. P. 305; [2 Chitty Contr. (11th Am. ed.) 861, and note (k^4), 862, and notes (k^5) and (k^6), 863, note (k^8); Cuff *v.* Newark & New York R. R. Co. 6 Vroom, 17; Kelly *v.* New York, 11 N. Y. 432; Pack *v.* New York, 8 N. Y. 222; Hilliard *v.* Richardson, 3 Gray, 349; Reedie *v.* London & N. W. Ry. Co. 4 Ex. 244, 256; Forsyth *v.* Hooper, 11 Allen, 419; Blake *v.* Ferris, 1 Selden, 48; Painter *v.* Pittsburgh, 46 Penn. St. 213; Eaton *v.* European & N. A. R. R. Co. 59 Maine, 520, 531; Pickard *v.* Smith, 10 C. B. N. S. 470, 480; Kellogg *v.* Payne, 21 Iowa, 575; Schwartz *v.* Gilmore, 45 Ill. 455; Brackett *v.* Lubke, 4 Allen, 138, 140; Sadler *v.* Henlock, 4 El. & Bl. 570, 578.]

For forms, see *post*, "Negligence."

[*Counts against Corporate Bodies, Commissioners, Trustees, &c. of Public Works, for Negligence.*

Against the trustees of a harbor for negligence in allowing it to become choked with mud; Metcalfe *v.* Hetherington, 11 Ex. 257; Gibbs *v.* Trustees of Liverpool Docks, 1 H. & N. 439; 3 Ib. 164; L. R. 1 H. L. 93; Thompson *v.* North Eastern Ry. Co. 2 B. & S. 106; Penhallow *v.* Mersey Docks Board, L. R. 1 H. L. 93; against the trustees of a canal for keeping a dangerous bridge, whereby a person fell in and was drowned; Manley *v.* St. Helen's Canal Co. 2 H. & N. 840; against commissioners of a canal navigation for want of repair in a lock, whereby the plaintiff's barge was delayed; Walker *v.* Goe, 3 H. & N. 395; against commissioners of sewers for negligence in constructing a sewer, whereby the plaintiff's house was injured; Jones *v.* Bird, 5 B. & Ald. 837; Ruck *v.* Williams, 3 H. & N. 308; Grocers' Company *v.* Doune, 3 Bing. N. C. 34; against commissioners under an act of parliament for the making of certain navigation works, for negligence, whereby the plaintiff's land was flooded; Allen *v.* Hayward, 7 Q. B. 960; against the trustees of a turnpike road for negligently maintaining the drains of the road; Whitehouse *v.* Fellowes, 10 C. B. N. S. 765.]

COMMON OF PASTURE.

Obs. — Common of pasture is a right of feeding beasts on the land of another, and it is either appendant, appurtenant, or in gross. Co. Litt. 122 ; 2 Bl. Com. 33 ; Com. Dig.; and Bac. Abr. "Commons;" Musgrave *v.* Cave, Willes Rep. 319.

Common appendant is a right belonging to the owners or occupiers of *arable* land to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough or such as manure the ground. 1 Bl. Com. 32, 33. It must, at common law, have existed from time *immemorial*. Selw. N. P.

Common *appurtenant* arises from no connection of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable, as hogs, goats, or the like, which neither plough nor manure the ground. This, not arising from any natural propriety or necessity like common appendant, is therefore not of general right, but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. 1 Bl. Com. 33 ; Selw. N. P.

Common in *gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed ; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor. 1 Bl. Com. 34 ; Selw. N. P. It may be granted for all manner, and for an *unlimited*, or for a certain number of, cattle. Ib. It is not necessary in pleading to distinguish between these different sorts of common. Musgrave *v.* Cave, Willes Rep. 319.

By the prescription act, 2 & 3 W. 4, c. 71, s. 1, it is enacted, "That no claim which may be lawfully made at the common law by custom, prescription, or grant to any *right of common or other profit or benefit, to be taken and enjoyed from or upon any land* (except such matters and things as are herein specially provided for, and except tithes, rent, and services), shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person *claiming right thereto without interruption for the full period of thirty years*, be defeated, or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years ; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated, and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty years*, the right thereto shall be deemed *absolute* and *indefeasible*, unless it shall appear that the same was taken and enjoyed by some *consent* or *agreement* expressly made or given for that purpose by *deed* or *writing*."

The proof of the right lies upon the person claiming it, and evidence of enjoyment for twenty-nine years will not satisfy the former part of this clause. Bailey *v.* Appleyard, 8 Ad. & E. 161–778. And where A. claims a right of common over a crown forest, in respect of an allotment of waste land made to him under an inclosure act in 1810, and relies on an uninterrupted enjoyment for thirty years, he may be defeated by showing that the enjoyment of the right commenced in 1810, and that the grant of any right over the forest was made absolutely void by a statute previous to 1810. Mill *v.* The Commissioners of New Forest, 18 C. B. 60; 25 L. J. C. P. 212. And in that case it was doubted whether the statute applied to a case in which the right claimed could not have been legally granted, by reason of an express prohibition contained in a statute. Ib.

A mere intermission of the user will not amount to a hostile interruption sufficient to defeat a claimant. Carr *v.* Foster, 3 Q. B. 581 ; 11 L. J. Q. B. 284. See Bailey *v.* Appleyard, 8 Ad. & E. 165. See Addison on Torts, 106, 107; and s. 4 of the act, which is set out at length, *ante*, "Ancient Lights," p. 479.

A declaration by a deceased tenant of a farm, unaccompanying an act, that he is not entitled to common of pasture in respect of the farm, is not admissible

Obs. evidence against the reversioner. Papendick *v.* Bridgwater, 5 El. & Bl. 166; 24 L. J. Q. B. 289.

The 4th, 5th, and 7th sections of the act have been already cited at length, *ante*, Obs. p. 479. The venue is local.

For obstructing the Plaintiff's Right of Common. (*u*)

For that the plaintiff was possessed of a messuage and land, (*x*) and by reason thereof (*y*) was entitled to have (*z*) common of pasture for all his commonable cattle, levant and couchant, (*a*) in and upon his said messuage and land in a certain common, situate at ——, called ——, every year, and at all times of the year, as to the said messuage and land belonging and appertaining. And the defendant on divers days and times disturbed and hindered the plaintiff in his enjoyment and rightful exercise of his said right of common, by wrongfully and injuriously (*b*) [erecting and continuing fences in and upon the said common, and thereby inclosing a part of the same] [*or* by digging up and subverting the soil of the said common, and carrying away the same], [*or* by planting and placing, and continuing, in the said soil of the said common, divers trees and shrubs], [*or* by putting and placing a large number of sheep in and upon the said waste and common, and there keeping the same for a long time], whereby the plaintiff was prevented from having the use and enjoyment of the said waste and common of pasture, as he otherwise might have had. (*c*)

(*u*) Form for impoverishing common by removing the manure of the cattle. Pindar *v.* Wadsworth, 2 East, 154. By putting on cattle. Bowen *v.* Jenkin, 6 Ad. & E. 911; Nichols *v.* Chapman, 29 L. J. Ex. 461; [5 H. & N. 643.]

(*x*) Proof of possession of land will suffice, Ricketts *v.* Salwey, 2 B. & Ald. 360; 1 Chit. R. 104–112, S. C., where see a form.

(*y*) These words appear unnecessary, and should be omitted if the plaintiff claim by grant. *Ante*, Obs.

(*z*) The general form of showing the title was sufficient before the late act shortening the time of prescription, and is expressly sanctioned thereby. *Ante*, Obs. Still the right should be stated accurately, and if it be subject to any condition precedent, as a money payment to the lord; Bolam *v.* Atkinson, *cor.* Bayley J. Northumberland or Northampton Summer Assizes, 1827, 2 Stark. Ev. (3d ed.) 315, note (*c*); or be subject to restriction or qualifications as to the number of cattle; see 1 Saund. 28, note (4); 346 *b*, *c*; 2 Saund. 327; Brook *v.* Willett, 2 H. Bl. 234; How *v.* Strode, 2 Wils. 269; Manifold *v.* Pennington, 4 B. & C. 161; or the time of employment; 2 Saund. 2, 3; Musgrave *v.* Cave, Willes, 320; Smith *v.* Flower, 3 Bing. 401; the restriction should be stated. But an allegation of a right "at all times," means all "usual times" of the day. Brook *v.* Willett, 2 H. Bl. 224, 234. The right alleged should not be larger than can be proved. See Beardsworth *v.* Torkington, 1 Q. B. 782. As to a statement of the right in a common field enjoyed with other persons, Cheeseman *v.* Hardman, 1 B. & Ald. 706; Pigott *v.* Bayley, 6 B. & C. 16. A claim to "turn cattle out in a field," would, it seems, be too vague. Bailey *v.* Appleyard, 8 Ad. & E. 161, 778. As to common *per cause de vicinage*, see Heath *v.* Elliott, 4 Bing. N. C. 388. How to plead it. Jones *v.* Robin, 15 L. J. Q. B. 15; [10 Q. B. 581;] Clarke *v.* Tinker, [10 Q. B. 604.] It may be claimed by prescription under 2 & 3 W. 4, c. 71. Pritchard *v.* Powell, 15 L. J. Q. B. 166. As to levancy and couchancy, see Scholes *v.* Hargreaves, 5 T. R. 46; Benson *v.* Chester, 8 T. R. 396; 1 Saund. 28, note (4); 346 *b*; Carr *v.* Lambert, 35 L. J. Ex. 121; [L. R. 1 Ex. 168;] Selw. N. P. tit. "Common." It need not be proved the land was actually *used* for supporting the cattle. Bolam *v.* Atkinson, Carr *v.* Lambert, *ubi supra*.

(*a*) If the right be for a number certain, this should be varied. 1 Saund. 28, note (4); 346 *b*, *c*; 2 Saund. 327. As to the meaning of these words, Whitelock *v.* Hutchinson, 2 M. & R. 205; Carr *v.* Lambert, 35 L. J. Ex. 121; [L. R. 1 Ex. 168.]

(*b*) Of course only such of the following modes of obstruction as apply to the particular case will be stated. A general allegation of obstruction should be avoided as improper. Tebbutt *v.* Selby, 6 Ad. & E. 787.

(*c*) No proof of actual or specific injury is requisite. Pindar *v.* Wadsworth, 2 East, 154; 2 Stark. Ev. 3d ed. 317. Therefore the plaintiff need not prove he used or attempted to use his right at the time. Wells *v.* Watling, 2 Bl. 1233.

COMPANY.

See *post*, "Public Company," and *ante*, part 1, pp. 225–229 and 451.

CONSPIRACY. (*d*)

Obs. — The old writ of conspiracy has now become obsolete, and an action for a conspiracy is now the usual remedy, and may be brought against one. 1 Saund. 230, 234, note (*b*); Mills *v.* Mills, Cro. Cas. 239; [Eason *v.* Westbrook, 2 Murph. (N. Car.) 329; Bigelow J. in Parker *v.* Huntington, 2 Gray, 126, 127; Jones *v.* Baker, 7 Cowen, 445; Hutchins *v.* Hutchins, 7 Hill, 104; Page *v.* Cushing, 38 Maine, 523; Page *v.* Parker, 40 N. H. 47; Randall *v.* Hazelton, 12 Allen, 412, 414.] See Barber *v.* Lesiter, 7 C. B. N. S. 175; 29 L. J. C. P. 161, where it was held that the declaration was bad, on the ground that, if it was a declaration on the case in the nature of a conspiracy, it did not show that the damage to the plaintiff was intended by the defendant, or was the legitimate result of his acts; and that, if it was a declaration for a malicious prosecution, it did not show that the defendant caused the prosecution to be instituted, nor a termination of it in the plaintiff's favor. See 1 Saund. 230 *a*, note (*b*). One of two parties to an agreement to suppress a prosecution for felony cannot maintain an action for a conspiracy for an injury arising out of the transaction, in which they have both been illegally engaged. Fivaz *v.* Nicholls, 2 C. B. 501; 15 L. J. C. P. 125. See Castrique *v.* Behrens, [3 El. & El. 709;] 30 L. J. Q. B. 163. [No action lies for a mere conspiracy unless it results in actual damage. Herron *v.* Hughes, 25 Cal. 555. The damage and not the conspiracy is the gist of the action. Hutchins *v.* Hutchins, 7 Hill, 104; Tappan *v.* Powers, 2 Hall (N. Y.), 277; Hinchman *v.* Richie, Bright (Pa.), 143; Chapman J. in Bowen *v.* Matheson, 14 Allen, 502; Bigelow J. in Parker *v.* Huntington, 2 Gray, 127; Page *v.* Parker, 40 N. H. 66, 67. As to the damage, see Patten *v.* Gurney, 17 Mass. 186; Swan *v.* Saddlemire, 8 Wend. 676. This action cannot be sustained against a principal and agent jointly for the unauthorized fraudulent acts and representations of the agent alone. Page *v.* Parker, 40 N. H. 47; Parsons *v.* Winchell, 5 Cush. 592. The acts of conspirators, as affecting each other, see Page *v.* Parker, 40 N. H. 47; S. C. 43 N. H. 363; Hinchman *v.* Richie, *supra*; Tappan *v.* Powers, 2 Hall (N. Y.), 277. As to the necessity for averring the means by which the injury was intended to be effected, see Setzar *v.* Wilson, 4 Ired. (Law) 501.]

Declaration for conspiring to hiss an Actor.

Gregory *v.* The Duke of Brunswick, 6 M. & Gr. 205.

CONTRACTORS.

See *ante*, "Commissioners," and *post*, "Negligence."

CONVERSION.

See *post*, "Trover."

COPYRIGHT.

Obs. — Copyright appears now to depend entirely upon statute. See Jefferys *v.* Boosey, 4 H. L. Cas. 815; Reade *v.* Conquest, 9 C. B. N. S. 766. [See Wheaton *v.* Peters, 8 Peters, 591; Clayton *v.* Stone, 2 Paine, 382; Bartlett *v.* Crittenden, 5 McLean, 32.] The law is now regulated by 5 & 6 Vict. c. 45. By s.

(*d*) See, also, Fivaz *v.* Nicholls, 15 L. J. 29 L. J. C. P. 161; Castrique *v.* Behrens, 30 C. P. 125; [2 C. B. 501;] Barber *v.* Lesiter, L. J. Q. B. 163; [3 El. & El. 709.]

Obs. 2, the period of copyright extends for forty-two years, or seven years after the author's death (whichever term shall be the longest). [Copyright is regulated entirely by acts of Congress in the United States. See Rev. Sts. U. S. tit. lx. c. 3, p. 965 *et seq.* And the courts of the United States have exclusive jurisdiction of cases arising under these acts. Rev. Sts. U. S. tit. xiii. c. 12, p. 135. Copyrights are granted for the term of twenty-eight years from the time of recording the title thereof, with a right of continuance in the author at the end of that term, in himself if he be then living, or, if not, then in his widow or children. Rev. Sts. U. S. tit. lx. c. 3, p. 966, §§ 4953, 4954. See Pierpont *v.* Fowle, 2 Wood. & M. 42.]

And it appears that a foreign author, residing abroad, who first publishes his work here, has not, nor has his assignee here, any copyright in this country. Chappell *v.* Purday, 14 M. & W. 303; 14 L. J. Ex. 258. But an alien who whilst resident in any possession of the British crown, first publishes his work in England, acquires a copyright throughout the British dominions. Low *v.* Routledge, 33 L. J. Ch. 717; [S. C. L. R. 1 Ch. Ap. 42; S. C. L. R. 3 H. L. 100. See Boucicault *v.* Wood, 7 Am. Law Reg. N. S. 539.] A gratuitous circulation is a publication for which a person is liable as an invasion of the property of the proprietor. Novello *v.* Sudlow, 12 C. B. 177; 21 L. J. C. P. 169.

The 11th section [5 & 6 Vict. c. 45] provides that a book of registry for the proprietorship of copyrights and the assignment thereof shall be kept at Stationers' Hall; and a certified copy of the entries in such book under the hand of the officer of the company, and impressed with their stamp, shall be "*primâ facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence." And by s. 24, "No action can be maintained for the infringement of the copyright of any book which shall be first published after the passing of the act, unless such entry has been made." [For corresponding provisions in the copyright laws of the United States, see Rev. Sts. U. S. tit. lx. c. 3, §§ 4948, 4956, 4957, 4962.] It would appear doubtful in an action for an infringement whether there should be an allegation that the copyright had been registered pursuant to the act; but, at all events, the non-registration should be pleaded. Chappell *v.* Davidson, 18 C. B. 194; 25 L. J. C. P. 225. [In all actions arising under the United States laws respecting copyrights, the defendant may plead the general issues, and give the special matter in evidence. Rev. Sts. U. S. tit. lx. c. 3, § 4969.] Sect. 13 [5 & 6 Vict. c. 45] provides for the form of entry of proprietorship, [see Rev. Sts. U. S. tit. lx. c. 3, § 4957,] and enacts that "it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of entry of such assignment, of the name and place of and abode of the assignee thereof in the form given in the schedule, and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed." [For provisions respecting assignments of copyright, and recording the same, in the United States, see Rev. Sts. U. S. tit. lx. c. 3, § 4955.] As to registration, see Stevens *v.* Wildy, 19 L. J. Ch. 190; Wood *v.* Boosey, 36 L. J. Q. B. 103; [L. R. 3 Q. B. 223.] To entitle any one but the author to register, there must be an absolute assignment of the copyright; Ex parte Bastow, 14 C. B. 631; Cumberland *v.* Copeland, 7 H. & N. 118; and if an entry has been improperly made, the court may order it to be varied or expunged. Ib. But the court will not order it to be expunged unless it is clearly false, or vary it unless satisfied that they would be making a true entry by so doing. Ex parte Davidson, 18 C. B. 297; 25 L. J. C. P. 237. See Ex parte Davidson, 2 El. & Bl. 577; see s. 14 of the act. As to the proper description of the proprietor's place of abode, see Lover *v.* Davidson, 1 C. B. N. S. 182; and see Graves *v.* Ashford, 36 L. J. C. P. 139; [L. R. 2 C. P. 410.] Sect. 15 enacts that "if any person shall print, or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book, so having been unlawfully printed, from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall

OBS. sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright." [For corresponding provisions in the laws of the United States, see Rev. Sts. U. S. tit. lx. c. 3, § 4964.]

As to what is an infringement of copyright, see Jefferys *v.* Boosey, 4 H. L. Cas. 876; Reade *v.* Conquest, 9 C. B. N. S. 755; Reade *v.* Conquest, 11 C. B. N. S. 479; Tinsley *v.* Lacy, 32 L. J. Ch. 535; [1 H. & M. 747;] Hotten *v.* Arthur, 32 L. J. Ch. 771; [1 H. & M. 603;] Smith *v.* Johnson, 33 L. J. Ch. 137; [4 Giff. 632;] Kelly *v.* Morris, 35 L. J. Ch. 423; [2 Dan. Ch. Pr. (4th Am. ed.) 1645 *et seq.*; Folsom *v.* Marsh, 2 Story, 100; Hodges *v.* Welsh, 2 Irish Eq. 266; Gray *v.* Russell, 1 Story, 11; Scott *v.* Stanford, L. R. 3 Eq. 718; Pike *v.* Nicholas, L. R. 5 Ch. Ap. 251; Emerson *v.* Davies. 3 Story, 768, 787; Greene *v.* Bishop, 1 Cliff. 186; Story *v.* Holcombe, 4 McLean, 306; Webb *v.* Powers, 2 Wood. & M. 497, 512; Stowe *v.* Thomas, 2 Wallace jr. 547; Atwill *v.* Ferrett, 2 Blatchf. 39; Van Hook *v.* Pendleton, 2 Blatchf. 85; 1 Watson Comp. of Eq. 122, 123. In Folsom *v.* Marsh, 2 Story, 100, Judge Story laid down the general proposition, in reference to what would constitute an infringement of copyright, that if so much of a work be taken in form and substance, that the value of the original work is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, it constitutes, in point of law, piracy *pro tanto*. This rule has been adopted or supported in subsequent cases. See Emerson *v.* Davies, Webb *v.* Powers, Greene *v.* Bishop, above cited, and Lewis *v.* Fullerton, 2 Beavan, 6; Jarrold *v.* Houldston, 3 K. & J. 708.] As to the drama and musical pieces, see also 3 & 4 W. 4, c. 15. As to engravings and prints, see 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; extended to lithographs, 15 & 16 Vict. c. 12, s. 14, and 6 & 7 W. 4, c. 59. See Graves *v.* Ashford, 36 L. J. C. P. 139; [L. R. 2 C. P. 410,] as to photographs. As to busts and sculpture, see 38 Geo. 3, c. 71; 54 Geo. 3, c. 56. As to designs for ornamenting articles of manufacture, Sarazin *v.* Hamel, 32 L. J. Ch. 378, 380; [32 Beav. 151;] Windover *v.* Smith, 32 L. J. Ch. 561; McCrea *v.* Holdsworth, L. R. 1 Q. B. 264; Ib. 2 H. L. 380; [5 B. & S. 495;] 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70. As to lectures, 5 & 6 W. 4, c. 65. As to international copyright, 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; Boucicault *v.* Delafield, 33 L. J. Ch. 38; [1 H. & M. 597;] Wood *v.* Boosey, 36 L. J. Q. B. 103; [L. R. 2 Q. B. 340; S. C. L. R. 3 Q. B. 223.]

See *ante*, part 1, p. 368.

1. *For printing for Sale Pirated Copies of a Book.* (*e*)

For that the plaintiff was the proprietor of the subsisting copyright in a book intituled ——; yet the defendant, after the passing of the act of parliament passed in the sixth year of the reign of Queen Victoria to amend the law of copyright, wrongfully and without the consent in writing of the plaintiff, printed and caused to be printed for sale [*or* "exportation"] divers copies of the said book (*f*) contrary to the said statute, whereby the profits of the plaintiff in his said copyright therein have been diminished and lessened, and he has been otherwise injured.

(*e*) Form, Sweet *v.* Benning, 16 C. B. 459; 24 L. J. C. P. 175. A "sheet of music" is comprised in the term "book." 5 & 6 Vict. c. 45, s. 2. See, further, as to the piracy of music, Clementi *v.* Walker, 2 B. & C. 861; White *v.* Geroch, 2 B. & Ald. 298; Jefferys *v.* Boosey, 24 L. J. Ex. 81; [4 H. L. Cas. 815;] Cocks *v.* Purday, 5 C. B. 860; 17 L. J. C. B. 273; Boosey *v.* Purday, 4 Ex. 145; 18 L. J. Ex. 378; Chappell *v.* Davidson, 18 C. B. 194; 25 L. J. C. P. 225; Novello *v.* Sudlow, 12 C. B. 177; 21 L. J. C. P. 169, where see various forms.

(*f*) The declaration need not state that defendant published plaintiff's book. It states a good cause of action if it avers publication of parts of a book. Rooney *v.* Kelly, 14 Ir. C. L. Rep. 158.

2. *For selling, &c. Printed Copies.* (*g*)

For that the plaintiff was the proprietor of the subsisting copyright in a book intituled ——. And after the passing of the act of parliament passed in the sixth year of the reign of Queen Victoria, to amend the law of copyright, divers copies of the said book had been wrongfully, and without the consent of the plaintiff in writing, and contrary to the said statute, printed by A. B. [*or* "by a person to the plaintiff unknown"] for sale [*or* "imported for sale from parts beyond the seas into England"]; yet the defendant, after the passing of the said act, and without the consent in writing of the plaintiff, and contrary to the said act, sold divers copies of the said book, whereby the profits [*conclude as in last form*].

References to other Forms, &c.

For pirating a print, contrary to 8 Geo. 2, c. 13, s. 1, see, also, 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; West *v.* Francis, 5 B. & Ald. 737; Brooks *v.* Cock, 3 Ad. & E. 138. See Moore *v.* Clarke, 9 M. & W. 622; Page *v.* Townsend, 5 Sim. 305; Martin *v.* Wright, 6 Sim. 297. [For infringing the copyright in a print by means of photography. Gambart *v.* Ball, 14 C. B. N. S. 306; Graves *v.* Ashford, L. R. 2 C. P. 410.] No action for the piracy of a print can be sustained unless the date of the first publication was engraved on the plates. See Brooks *v.* Cock, 3 Ad. & E. 138; Colnaghi *v.* Ward, 12 L. J. Q. B. 1; Avanzo *v.* Mudie, 10 Ex. 203. A knowledge of the print being spurious is not necessary. Gambart *v.* Sumner, 5 H. & N. 5; 29 L. J. Ex. 98).

For piracy of the model of a bust, see Gahagan *v.* Cooper, 3 Camp. 112.

Piracy of dramatic literary property. Cumberland *v.* Planché, 1 Ad. & E. 580; Shepherd *v.* Conquest, 17 C. B. 427; 25 L. J. C. P. 127; Morton *v.* Copeland, 16 C. B. 517; Hatton *v.* Kean, 7 C. B. N. S. 268; 29 L. J. C. P. 20; Reade *v.* Conquest, 3 C. B. N. S. 755; 30 L. J. C. P. 209; Cumberland *v.* Copeland, 7 H. & N. 118; 31 L. J. Ex. 19, 353. Debt for penalties. Planché *v.* Braham, 8 C. & P. 68; Fitzball *v.* Brooke, 6 Q. B. 873.

Of designs for manufacturers. Millengen *v.* Picken, 1 C. B. 799; McCrea *v.* Holdsworth, 33 L. J. Q. B. 329; [L. R. 1 Q. B. 264.]

Of registered designs under 5 & 6 Vict. c. 100, see Harrison *v.* Taylor, 3 H. & N. 301; 4 Ib. 815; 27 L. J. Ex. 315; Heywood *v.* Potter, 1 El. & Bl. 439; Norton *v.* Nicholls, 28 L. J. Q. B. 225; [4 K. & J. 475.]

Under international copyright act. Wood *v.* Boosey, 36 L. J. Q. B. 103; [L. R. 3 Q. B. 223.]

CORPORATIONS.

Obs. — See *ante*, "Commissioners." Corporation is included in the words "person or persons." Mayor of Hereford *v.* Morton, 15 L. T. N. S. 187; [Boyd *v.* The Croydon Ry. Co. 4 Bing. N. C. 669. So by statute, in Massachusetts, Genl. Sts. c. 3, § 7, div. 13.] A corporation is liable for a tort, if the act complained of is within the purpose of the corporation, and is committed in such a manner as to constitute an actionable wrong if done by an individual.

(*g*) Form, Wright *v.* Tallis, 1 C. B. 893; 14 L. J. C. P. 283.

Obs. Green *v.* London General Omnibus Co. [7 C. B. N. S. 290;] 29 L. J. C. P. 13; [Angell & Ames Corp. § 311, and cases cited; Ranger *v.* Great Western Ry. Co. 5 H. L. Cas. 72, 87; New York & New Haven R. R. *v.* Schuyler, 34 N. Y. 30, 50; Brokaw *v.* New Jersey R. R. & Transp. Co. 3 Vroom, 328, 330; Atlanta & G. W. R. Co. *v.* Dunn, 19 Ohio St. 162; 1 Chitty Pl. 86, note (*u*), and cases cited.] So a corporation may be made responsible for the negligent or unskilful conduct of its servants in the execution of the ordinary work and business of the corporation, without proof that the work was ordered under the corporation seal. Scott *v.* Mayor &c. of Manchester, 1 H. & N. 59; 2 Ib. 204; 26 L. L. J. Ex. 132–406; [2 Kent, 284; Thayer *v.* Boston, 19 Pick. 516, 517. A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. Moore *v.* Fitchburg R. R. Co. 4 Gray, 465; Hewitt *v.* Swift, 3 Allen, 420; Holmes *v.* Wakefield, 12 Allen, 580; 1 Chitty Pl. 86, note (*u*); Rounds *v.* Delaware, Lackawanna &c. R. R. Co. 5 N. Y. Sup. Ct. 475, 483. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent; Howe *v.* Newmarch, 12 Allen, 49; or even if it is contrary to an express order of the master. Philadelphia & Reading R. R. Co. *v.* Derby, 14 How. (U. S.) 468. Such a corporation is liable for an assault and battery committed by the conductor of one of its trains upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. Ramsden *v.* Boston & Albany R. R. Co. 104 Mass. 117; 1 Chitty Pl. 92, note (*q*). And in other cases, corporations may be held responsible in actions for assault and battery. See Brokaw *v.* New Jersey R. R. & Transp. Co. 3 Vroom, 328; Hewitt *v.* Swift, 3 Allen, 420; St. Louis, A. & C. R. R. *v.* Dalby, 19 Ill. 353; Rounds *v.* Delaware, Lackawanna & Western R. R. Co. 5 N. Y. Sup. Ct. 475.] A corporate body may be liable for negligence of their servants, although there is no improper conduct on the part of the corporation. Mersey Docks & Harbor Board *v.* Gibbs, 35 L. J. Ex. 225; [11 H. L. Cas. 686; L. R. 1 H. L. 83; *ante*, 494, 495.] An action is maintainable against a corporation aggregate for a libel published by the order of the corporation, and in such an action it is not necessary to show that the defendants had any ill-will, or that they meant to injure the plaintiff. Whitfield *v.* South Eastern Ry. Co. 1 El., Bl. & El. 121; 27 L. J. Q. B. 229. See Stevens *v.* Midland Ry. Co. 10 Ex. 352; 23 L. J. Ex. 328; [Aldrich *v.* Press Printing Co. 9 Minn. 133; Philadelphia &c. R. R. Co. *v.* Quigley, 21 How. (U. S.) 202; Maynard *v.* Firemen's Fund Ins. Co. 34 Cal. 48. So a corporation may be liable for malicious prosecution. Goodspeed *v.* East Haddam Bank, 22 Conn. 530; Vance *v.* Erie R. R. Co. 3 Vroom, 334; but see Owsley *v.* Montgomery R. R. Co. 37 Ala. 560. Coulter *v.* Dublin & Belfast Junction Ry. Co. Ir. L. T. Rep. 209; Carmichael *v.* Waterford & Limerick R. R. Co. 13 Ir. L. Rep. 313.] So a corporation may maintain an action for a libel. Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 87; 28 L. J. Ex. 201; [The Trenton Mut. Life & Fire Ins. Co. *v.* Perrine, 3 Zabr. 402.] So a trading corporation may be liable in trover. Giles *v.* Taff Vale Ry. Co. 2 El. & Bl. 831. [As to *municipal corporations*, it has been held that a private action cannot be maintained against a town, or other *quasi* corporation, for a neglect of corporate duty, unless such action be given by statute. Mower *v.* Leicester, 9 Mass. 247; Riddle *v.* Proprietors of Locks & Canals on Merrimac River, 7 Mass. 169, 187; Holman *v.* Townsend, 13 Met. 297, 300; Brady *v.* Lowell, 3 Cush. 124; Adams *v.* Wiscasset Bank, 1 Greenl. 361; Oliver *v.* Worcester, 102 Mass. 489, 496; Reed *v.* Belfast, 20 Maine, 248; Eastman *v.* Meredith, 36 N. H. 284; Commissioners of Hamilton Co. *v.* Mighels, 7 Ohio St. 109; Ward *v.* County of Hartford, 12 Conn. 404; Pray *v.* Jersey City, 32 N. J. 394; Freeholders *v.* Strader, 3 Harr. (N. J.) 108; Bigelow *v.* Randolph, 14 Gray, 541, 543; Dillon *v.* Munic. Corp. 716–723, §§ 761–765; 1 Chitty Pl. 86, note (*y*) and cases cited. In the above case of Bigelow *v.* Randolph, 14 Gray, 543, Mr. Justice Metcalf said: "This rule of law, however, is of limited application. It is applied in the case of towns only to the neglect or omission of a town to perform those duties which are imposed upon all towns, without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed upon it, with its consent express or implied, or a special authority is

Obs. conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties to which private corporations would be, if the same duties were imposed or the same authority conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents." See, also, Conrad *v.* Ithaca, 16 N. Y. 158; Hafford *v.* New Bedford, 16 Gray, 297; Barry *v.* Lowell, 8 Allen, 127; Sawyer *v.* Northfield, 7 Cush. 494; Walcott *v.* Swampscott, 1 Allen, 101; Hyde *v.* Jamaica, 27 Vt. 443; Jones *v.* New Haven, 34 Conn. 1.]

See *post*, "Public Company."

DEATH BY ACCIDENT. See "Carriers," p. 491, "Negligence."

DECEIT. See "Fraud."

DETINUE. See "Trover."

DEFAMATION. See "Libel and Slander."

DILAPIDATIONS. See *post*, "Rector," "Landlord and Tenant."

DISTRESS FOR RENT, &c.

Obs. — See Bullen on Distresses; Woodfall's Landlord and Tenant, by Cole. By the common law, a party making a distress for rent became a trespasser *ab initio* if he were guilty of any irregularity in conducting it, although his right to distrain was undisputed. The Six Carpenters' Case, 8 Co. 146; Bac. Abr. Trespass, B.; Dye *v.* Leatherdale, 3 Wils. 20. This rule still prevails in the case of distress taken, *damage feasant;* Ib.; Wilder *v.* Speer, 8 Ad. & E. 547; but is annulled as to distresses for rent by 11 Geo. 2, c. 19, s. 19, which enacts that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be *afterwards* done by the party distraining, or his agent, the *distress* shall not therefore be deemed *unlawful*, nor the party making it deemed a trespasser *ab initio*, but the party aggrieved by such wilful act or irregularity shall recover full satisfaction for the *special damage* he shall have sustained, and *no more*, in an action of trespass, or on the case, with full costs." Section 20 provides that tender of amends may be made. The object of the act was to limit the claim to damages for the specific injury received, and no more.

The correct practice in actions for irregular distresses is to make either the landlord alone, if he can be fixed (see Crabb *v.* Killick, 6 C. & P. 216), or the landlord and the broker defendants, and not to join appraisers, &c.; and if a plaintiff do join them, the judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back with a view to fixing such appraisers, &c. Child *v.* Chamberlain, 6 C. & P. 213–484; 5 B. & Ad. 1049. In replevin against a broker, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant. Duncan *v.* Meikleham, 3 C. & P. 172. A count in trover may and should be added where the validity of

Obs. the distress is denied, and then the plaintiff may without notice proceed on that count. See *post*, Obs. 506; 2 Stark. Ev. 283, 2d ed. When the landlord is liable in trover for the act of the bailiff, Lewis *v.* Read, 13 M. & W. 234. Trover lies where a party pays money to redeem his goods illegally distrained without any right of distress. Shipwick *v.* Blanchard, 6 T. R. 298. Frivolous actions of this kind are discouraged, and if the damages be under 40*s.* the plaintiff will get no costs unless the judge certify.

To justify levying and distress, there must be an actual tenancy; Anderson *v.* Midland Ry. Co. 30 L. J. Q. B. 94; How *v.* Scarott, 28 L. J. Ex. 325; and there must also be an *ascertained* rent. Gardiner *v.* Williamson, 2 B. & Ad. 339; Neale *v.* Mackenzie, 1 M. & W. 763. And the rent must also be due; see Lee *v.* Smith, 9 Ex. 665; 23 L. J. Ex. 198; Co. Litt. 161 *a*: or the tenant may resist the distress by force, and if the goods be taken, may rescue them. Ib. A mortgagor in possession may distrain for rent; Trent *v.* Hunt, 22 L. J. Ex. 318; and also his assignee. Snell *v.* Finch, 32 L. J. C. P. 117; 13 C. B. N. S. 651. See, also, Brown *v.* Metropolitan Ry. Co. 28 L. J. Q. B. 236. As to right to distrain under an agreement for a lease, Anderson *v.* Midland Ry. Co. 30 L. J. Q. B. 94. A landlord by distraining for rent affirms the continuance of the tenancy up to the day when the rent so distrained for became due. Cotesworth *v.* Spokes, 30 L. J. C. P. 220.

The landlord may distrain after the termination of the tenancy within six months of such termination, and during the continuance of the landlord's title, and during the possession of the tenant. 8 Anne, c. 14, ss. 6 and 7. But where a tenant at will died leaving rent in arrear, and the next day the landlord distrained on the premises which were then occupied by the deceased's servants, and his widow subsequently took possession the day after, and afterwards administered, it was held that the distress was not justified by the act, as not being made "during the possession of the tenant from whom the rent became due." Turner *v.* Barnes, 31 L. J. Q. B. 170.

By 3 & 4 W. 4, c. 42, ss. 37, 38, executors and administrators of a lessor or landlord may distrain for rent due in the deceased's lifetime.

A tender of the rent before a distress is levied, although the warrant is issued, renders the execution of such distress wrongful *ab initio*. Bennett *v.* Bayes, 29 L. J. Ex. 224. A tender after levy and before impounding or sale makes the subsequent proceedings wrongful. Johnson *v.* Upham, 28 L. J. Q. B. 252; and see *post*, form 15.

"Before sunrising or after sunset no man may distrain but for damage feasant" The Mirrour of Justices, 100; Co. Litt. 142 *a*; Tutton *v.* Darke, 5 H. & N. 654; 29 L. J. Ex. 271. The rent is not due until midnight, and therefore a distress cannot be levied before the day following. Duppa *v.* Mayo, 1 Saund. 285.

A landlord, under a warrant of distress, is not justified in breaking open an outer door. Brown *v.* Glen, 20 L. J. Q. B. 205; 16 Q. B. 254. Nor in opening a window fastened by means of a hasp. Hancock *v.* Austin, 32 L. J. C. P. 252. But he may open an outer door which is not fastened. Ryan *v.* Shilcock, 21 L. J. Ex. 55; 7 Ex. 72. And if he enters in an unlawful way, he is a trespasser, and the value of the goods is the measure of the damages. Attack *v.* Bramwell, 32 L. J. Q. B. 146. The 11 Geo. 2, c. 19, s. 19, which enacts that distresses for rent shall not be unlawful for any irregularity in the disposition of them, does not apply where the original entry was unlawful. Ib. Where the person lawfully in possession leaves the distress for a temporary purpose, and is locked out, he may break open the outer door to obtain possession. Bannister *v.* Hyde, 29 L. J. Q. B. 141.

By 7 Anne, c. 12, s. 3, the goods of ambassadors and their domestic servants are exempt from distress. Goods in pawn are privileged from distress. Swire *v.* Leach, 34 L. J. C. P. 150; [18 C. B. N. S. 479.] Goods of a stranger on the premises to be manufactured or worked upon are not distrainable. Wood *v.* Clarke, 1 Cr. & J. 484; Gibson *v.* Ireson, 3 Q. B. 39; Brown *v.* Shevill, 2 Ad. & E. 138. See Reeve *v.* Whitmore, 32 L. J. Ch. 497. So, also, goods in the hands of a factor, or warehouseman. Ralli *v.* Scholefield, C. P. 36 L. J.; Gilman *v.* Elton, 3 B. & B. 75; Thompson *v.* Mashiter, 1 Bing. 283. So, also, fixtures attached to the freehold. Pitt *v.* Shew, 4 B. & Ald. 207; Dalton *v.* Whittem, 3 Q. B. 961; Hellawell *v.* Eastwood, 6 Ex. 309; 20 L. J. Ex. 155.

Obs. A landlord who gives a broker a general authority to distrain is liable equally with the broker. Lewis *v.* Read, 13 M. & W. 837; Gauntlett *v.* King, 3 C. B. N. S. 59; Hart *v.* Leach, 1 M. & W. 560. Even though the broker is guilty of an irregularity. Haseler *v.* Lemoyne, 28 L. J. C. P. 103; [5 C. B. N. S. 530.] See, also, an authorized agent. Bennett *v.* Bayes, 29 L. J. Ex. 224; [5 H. & N. 391.] A mere license to distrain does not entitle the landlord to distrain goods of a stranger. Reeve *v.* Whitmore, 32 L. J. Ch. 497.

1. *For distraining, &c. where no Rent was due, to recover Double Value.* (*h*)

For that the plaintiff was tenant to defendant of a messuage and premises, (*i*) at a rent payable by the plaintiff to the defendant; (*k*) and the defendant wrongfully, and contrary to the statute in that behalf, seized the goods of the plaintiff in the said messuage and premises, as a distress for rent pretended to be in arrear and due in respect of the said messuage and premises, and sold the same as such distress, whereas at the time of making such distress and sale of the said goods no such rent was due or in arrear. (*l*)

2. *For taking an Excessive Distress.*

Obs. — See form, &c. Yates *v.* Tearle, 6 Q. B. 283. This count was formerly framed on the statutes of Marlbridge, 52 H. 3, c. 4, when the landlord could not sell the distress; now, since 2 W. & M. c. 5, it would be proper to aver a

(*h*) See forms, &c. Yates *v.* Tearle, 6 Q. B. 282; Hoare *v.* Lee, 5 C. B. 754; 17 L. J. C. P. 196. By 2 W. & M. sess. 1, c. 5, s. 5, "in case any such distress and *sale* as aforesaid shall be made by virtue or color of this present act for rent pretended to be in arrear and due, where in truth no rent is in arrear or due to the person or persons distraining, or to him or them in whose names or right such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may by action of trespass, or upon the case to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit;" and the jury ought to be directed to give such double value if they find for the plaintiff at all. Masters *v.* Farris, 1 C. B. 715. The distress is absolutely void where no rent was due when it was taken, and trespass or trover may be maintained.

(*i*) In general the tenancy should be shown to be subsisting when the grievance was committed. Rideley *v.* Ryle, 10 M. & W. 106. The venue being transitory, the situation of the premises need not be stated; but, if stated, should be stated correctly. Harris *v.* Cooke, 2 Moore, 587.

(*k*) In Salter *v.* Brunsden, 4 Mod. R. 231, and see Com. Dig. Distress, D., G., it was held, *after verdict*, that a declaration in trespass on 2 W. & M. c. 5, for making a colorable distress, need not state a demise in form, but that it is sufficient to aver that the goods were taken *nomine districtionis;* but, as the tenancy is a material and traversable allegation (Yates *v.* Tearle, 6 Q. B. 282), it would be safer to aver it as above. If inserted, it ought to be described correctly. Ireland *v.* Johnson, 1 Bing. N. C. 162.

(*l*) If it be doubtful whether some rent may not have been due, but the distress was for more rent than was in arrear and was excessive, it will be as well to insert counts adapted to such charges. See form 2. Add a count in trover if the existence of a tenancy, at a fixed rent, be doubtful, or if fixtures (Darby *v.* Harris, 1 Q. B. 895; Dalton *v.* Whitten, 3 Q. B. 961) or other goods not legally distrainable be taken. A distrainer is not liable for assuming to distrain fixtures unless he actually removes them. Beck *v.* Denbigh, 29 L. J. C. P. 273. The right to insist upon an illegality of a distress is not waived by bringing trover for fixtures severed and distrained. Dalton *v.* Whitten, *ubi supra.* In Hoare *v.* Lee, 5 C. B. 754; 17 L. J. C. P. 196, the court refused to allow a count for trespass, *sed vid.* the case. Distraining for a greater amount of rent than is due is not *per se* actionable. Tancred *v.* Leyland, 16 Q. B. 669; 20 L. J. Q. B. 316; French *v.* Phillips, 1 H. & N. 564; 26 L. J. Ex. 82; Stevenson *v.* Newnham, 13 C. B. 297; 22 L. J. C. P. 110. See, also, Phillips *v.* Whitsed, 29 L. J. Q. B. 164. If a landlord distrains for more rent than is due, the tenant's proper course is to tender the amount really due; and if the landlord refuse to accept that sum to replevy the goods and try the disputed question of amount in an action of replevin. Glynn *v.* Thomas, 11 Ex. 870; 25 L. J. Ex. 125. See Lucas *v.* Tarleton, 27 L. J. Ex. 246; [3 H. & N. 116;] or if the landlord sells after such tender, the tenant may have his action on the case. See *post*, form 15

Obs. sale if one has taken place. Thompson *v.* Wood, 4 Q. B. 493. Trover does not lie in the above case; Lynn *v.* Moody, Fitzg. 89; 2 Str. 851; Hutchins *v.* Chambers, 1 Burr. 590; Whitworth *v.* Smith, 1 M. & Rob. 193, Tenterden C. J.; unless it seems gold and silver be taken to excess, for they are of known value. Ib.; and per Lord Kenyon, Crowther *v.* Ramsbottom, 7 T. R. 658; 2 Stark. Ev. 390, note (*p*), 3d ed. See Hutchins *v.* Whitaker, 2 Ld. Kenyon, 204. To entitle a plaintiff to maintain this action, the distress must be clearly disproportionable and excessive. Roden *v.* Eyton, 6 C. B. 430; 18 L. J. C. P. 1.

The landlord and broker distraining are bound to use due care and reasonable judgment, skill, and discretion, in regard to the quantity and value of the goods they take, in reference to the amount of rent for which the distress is made. If from gross carelessness or error in judgment, though without malice (Field *v.* Mitchell, 6 Esp. 71), they levy goods *manifestly* of much greater value (Field *v.* Mitchell, 3 Stark. Ev. 283, 3d ed.; Crowder *v.* Self, 2 M. & Rob. 190) than the arrears of rent and probable costs of the distress, appraisement, and sale, the tenant, being the owner of the goods (Fisher *v.* Algar, 2 C. & P. 374), may maintain an action against them, or any one of them, to recover damages. Where there are several goods upon the premises, the landlord is liable if he take one article or chattel of much greater value than the rent and costs, the other effects being of less value than the chattel distrained, but sufficient to satisfy his claim, as if he take a cow, there being a sheep clearly of sufficient value; but, however large the value of the chattel may be, the landlord is justified if there be no other article sufficient for his purpose. See Field *v.* Mitchell, 6 Esp. 71; Avenell *v.* Croker, M. & M. 172. As to excessive seizure of growing crops, Piggott *v.* Birtles, 1 M. & W. 441. In order to maintain this action, the goods taken need not be sold; but if there has been a sale, it ought to be averred, or damages cannot be recovered for it. Thompson *v.* Wood, *supra*. An action will lie for an excessive distress, although the sale (minus the expenses) does not realize the rent due. Smith *v.* Ashworth, 29 L. J. Ex. 259. The tenant is injured, and may sue, if a man be left in possession, and all the goods be subject to the coercion of the distress, although the effects be not so completely taken from the tenant's control as to prevent him from carrying on his business. Baylis *v.* Fisher, 7 Bing. 153. And a cause of action once acquired for an excessive distress, is not divested by a subsequent arrangement with the landlord as to the sale. Willoughby *v.* Backhouse, 2 B. & C. 821; and see Holland *v.* Bird, 10 Bing. 15; Branscomb *v.* Bridges, 1 B. & C. 145; 3 Stark. R. 171. If a count in trover be added, the plaintiff may at the trial abandon the special count for the excess, and dispute the tenancy, and recover on the count in trover (the issue thereon being sufficient to let in such a case), without prior notice that he will take that course. Spargo *v.* Brown, 9 B. & C. 935.

At the trial of an action for an excessive distress, the question is what the goods seized would have sold for at a broker's sale; if it be excessive, the plaintiff is entitled to recover the fair value of the excess. Wells *v.* Moody, 7 C. & P. 59. Where there has been an action of replevin stayed by consent, and the plaintiff has recovered the taxed costs, he cannot in this action recover also as damages the *extra* costs occasioned to him by the replevin. Grace *v.* Morgan, 2 Bing. N. C. 534. See Phillips *v.* Berryman, 3 Dougl. 286. In an action for an excessive distress, the plaintiff is entitled to nominal damages, although he proves no actual damage. Chandler *v.* Doulton, 34 L. J. Ex. 89, and cases cited therein. To a declaration for an excessive distress for rent, the defendant pleaded that the whole sum distrained for was due; held, on issue joined thereon, defendant was not precluded from insisting on certain arrears by the fact that since they became due, other arrears had become due and been distrained for; and this, although on the first distress the warrant and notice stated the distress to be for rent due up to a named day, being subsequent to those on which the arrears now in question accrued, and although in the distress the defendant stated it was for rent due since the last distress. Gambrell *v.* Lord Falmouth, 4 Ad. & E. 73.

A lodger may maintain this action if his goods are taken on an excessive distress by the landlord of his landlord. Fisher *v.* Algar, 2 C. & P. 374; Bail *v.* Mellor, 19 L. J. Ex. 279.

For that the plaintiff was tenant to the defendant of a messuage and premises at a rent payable by the plaintiff to the defendant; and the defendant wrongfully (*m*) distrained for arrears of rent goods of the plaintiff of greater value than the amount of the said arrears, and of the charges of the said distress, and the appraisement and sale of the said goods, although a part only of the said goods was of sufficient value to have satisfied the said arrears, and the costs, expenses, and charges of the said distress, and the appraisement and sale thereof, and thereby took an excessive distress for the said arrears, contrary to the statute in that behalf. (*n*)

3. *For taking an Excessive Distress for a Poor Rate.*

Sturch *v.* Clarke, 4 B. & Ad. 113; and see The Governors of Bristol Poor *v.* Wait, 1 Ad. & E. 264.

4. *For distraining and selling without Notice.*

Obs. — See a form for impounding the goods off the premises, and not giving notice thereof, 2 Chit. on Pl. 539, 7th ed. and see note there. It would seem to be necessary to give notice of distress, although there were no removal or sale. See Ib.; Com. Dig. Distress, D. 7. A paro notice is insufficient. Wilson *v.* Nightingale, 15 L. J. Q. B. 309. The omission to give notice would not be sufficient to enable the tenant to support trespass. The form here given is founded on the equity and provisions of the statutes 2 W. & M. c. 5, s. 2; 11 Geo. 2, c. 19, s. 10. By the former statute it is enacted that, "Where any goods shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever; and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises, charged with the rent distrained for, replevy the same; then, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods so distrained to be appraised by two sworn appraisers, to appraise the same truly, according to the best of their understanding; and, after such appraisement, shall and may lawfully sell the goods so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable for the owner's use."

By 11 Geo. 2, c. 19, s. 10, it is enacted, "that any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made in such place or in such part of the premises chargeable with the rent, as shall be most fit and convenient for impounding and securing such distress; and may appraise, sell, and dispose of the same upon the premises, in like manner and under the like directions and restraints as any person taking a distress for rent may now do off the premises by virtue of 2 W. & M. c. 5, s. 2, or of 4 Geo. 2, c. 28."

As to the form of notice of distress, see Woodfall's Landlord and Tenant, by Cole; Moss *v.* Gallimore, 1 Dougl. 279; Bullen on Distresses, 135; Wakeman *v.* Lindsey, 14 Q. B. 625; 19 L. J. Q. B. 166; Kerby *v.* Harding, 6 Ex. 234; 20 L. J. Ex. 163. It need not state when the rent became due. Ib. Notice to the tenant personally is good. Walker *v.* Rumbal, Lord Raym. 53; 12 Mod. 76; Salk. 247. A landlord may distrain for one cause, and justify or

(*m*) Express malice need not be proved. Field *v.* Mitchell, 6 Esp. 71.

(*n*) Add any special damage for loss of business, &c. As to adding a count in trover, see *ante*, form 1, p. 505, note (*l*). See form for excessive distress where a portion of the goods belonged to a third person, Bail *v.* Mellor, 19 L. J. Ex. 269.

Obs. avow for another. See Crowther *v.* Ramsbottom, 7 T. R. 658; Gambrell *v.* Earl of Falmouth, 4 Ad. & E. 73. Notice where growing corn is distrained, 11 Geo. 2, c. 9, s. 8.

For that the plaintiff was tenant to the defendant of a messuage and premises, at a rent payable by the plaintiff to the defendant, and the defendant seized the goods of the plaintiff in the said messuage and premises as a distress for rent in arrear, and wrongfully sold the same as such distress towards satisfaction of the rent, for which the same were so distrained, and of the costs and charges of the said distress, and of the appraisement and sale of the said goods, without having given to the plaintiff notice of the distress, and of the cause of taking the same, or left such notice at the chief mansion-house or other most notorious place on the said premises five days before the sale of the said goods, contrary to the statute in that behalf. [*Add special damage.* (*o*)]

5. *For not selling the Goods for the Best Price.*

Obs. — This action is founded on 2 W. & M. sess. 1, c. 5, s. 2, cited *ante*, 507, Obs. to form 4. The price at which the goods were appraised will be presumed to be the best until the contrary appear. Walter *v.* Rumbal, 4 Mod. 390: Com. Dig. Distress, D. 8; 2 Stark. Ev. 391, note (*y*), 3d ed. Reasonable care and diligence must be used to obtain the best price, and perhaps the landlord is not justified in parting with the goods for a price manifestly inadequate to their value, although no better be offered at the time, but ought, if only such a price be offered, to defer the sale by analogy to the instance of a sheriff selling under a *venditioni exponas*. Keightly *v.* Birch, 3 Camp. 521; Barnard *v.* Leigh, 1 Stark. R. 43. In Poynter *v.* Buckley, 5 C. & P. 512, Tindal C. J. allowed a plaintiff, upon the above form of count, to prove that the goods were improperly lotted, and were allowed to stand in the rain. In general, no particular order is required by law to be observed on the sale of goods of different descriptions, as that beasts of the plough should be postponed to other goods, and the sale of such beasts first does not furnish a cause of action. Jenner *v.* Yolland, 6 Price R. 5; 2 Chit. R. 167. A landlord who has distrained his tenant's hay, made on the premises, and has sold it, subject to a condition that it shall be consumed on the premises, by reason of which it sold for less than the usual price, is liable for not selling for the best price, although the tenant was under covenant to consume all hay on the premises. Ridgway *v.* Lord Stafford, 6 Ex. 404; 20 L. J. Ex. 226.

For that the plaintiff was tenant to the defendant of a messuage and premises, at a rent payable by the plaintiff to the defendant; and the defendant seized the goods of the plaintiff in the said messuage and premises as a distress for rent in arrear, and sold the same towards satisfaction of the said rent, and of the costs and charges of the distress, and of the appraisement and sale of the said goods,* but did not sell the same for the best price that could have been gotten for the same, contrary to the statute in that behalf. [*Add special damage.* (*p*)]

6. *For selling without having the Goods appraised by Two Appraisers.* (*q*)

Same as Form 5 *to the* *], without causing the said goods to be duly ap-

(*o*) Actual damage must be proved, otherwise the plaintiff is not entitled even to nominal damages. See Rogers *v.* Parker, 25 L. J. C. P. 220; 18 C. B. 112; Lucas *v.* Tarleton, 27 L. J. Ex. 246; 3 H. & N. 116.

(*p*) See *ante*, 508, note (*o*).

(*q*) See form, &c. Yates *v.* Tearle, 6 Q. B. 283. The action is founded on 2 W. & M. sess. 1, c. 5, s. 2. It seems, on the construction of 57 Geo. 3, c. 93, that two ap-

praised by two sworn appraisers, contrary to the statute in that behalf. [*Add special damage.*]

7. *For making Extortionate Charges and selling the Goods for them.* (*r*)

Child *v.* Chamberlain, 5 B. & Ad. 1049.

8. *For not taking due care of Goods distrained.* (*s*)

For that [*as in* Form 5, *to the* *], and by the said sale satisfied the said arrears of rent and the charges of the said distress and sale; and the defendant under the said distress had the charge and possession of the said goods until the sale, and after the said sale had the charge and possession of the remainder of the said goods not then sold; yet the defendant did not, while the said goods were in his charge and possession, and until the said sale, take proper care of the same, nor did after the sale, and until the return of the said remainder of the said goods, take proper care of the said remainder, so that the goods so sold as aforesaid were greatly injured and deteriorated in value, and did not sell for so much as they otherwise would have done, and the said goods that remained unsold were injured and deteriorated in value, and were returned to the plaintiff greatly damaged.

9. *Against a Distraining Broker for not giving the Tenant a Copy of the Charges of the Distress.* (*t*)

Hart *v.* Leach, 1 M. & W. 560.

10. *For not leaving the Overplus of the Proceeds of a Distress with the Sheriff, &c.* (*u*)

For that the plaintiff was tenant to the defendant of a messuage and prem-

praisers are in all cases necessary. Allen *v.* Fricker, 10 Ad. & E. 640; Bishop *v.* Bryant, 6 C. & P. 484. The broker distraining should not be one of the appraisers. Lyon *v.* Weldon, 2 Bing. 334; Westwood *v.* Cowne, 1 Stark. Rep. 172; Bull. N. P. 81. The latter should be sworn before the constable of the parish in which the distress is made; Avenell *v.* Croker, M. & M. 172; and the constable should attend at the time of the appraisement, and then, before it is made, should administer the oath. Kenny *v.* May, 1 M. & Rob. 56. See a form on 13 Eliz. c. 37, for distraining by other persons than by bailiffs duly sworn. Child *v.* Chamberlain, 6 C. & P. 213; 5 B. & Ad. 1049. The value of the goods, minus the arrears of rent, is the measure of damage, with special damage if laid and proved. Knotts *v.* Curtis, 5 C. & P. 322; Biggins *v.* Goode, 2 C. & P. 364.

(*r*) Form *in extenso*, see the last edition of this work, p. 539. A similar count was some few years ago adopted in practice; and see per Lord Abinger C. B. Lyon *v.* Tomkies, 1 M. & W. 608. It was there held that the reasonableness of the charges might be questioned upon a count for not leaving the overplus with the sheriff. See form 10, *post*. An action for money had and received also lies against a *broker* who receives excessive charges, although the tenant had obtained time to prevent a sale. Hills *v.* Street, 5 Bing. 37. The 57 Geo. 3, c. 93, regulates and fixes the charges where the sum due does not exceed £20, though the goods are appraised at a loss. Child *v.* Chamberlain, 5 B. & Ad. 1049; 6 C. & P. 213. Where the rent exceeds £20, the reasonableness of the charges is a question for the jury. Ib. See Lyon *v.* Tomkies, *supra*.

(*s*) See Evans *v.* Wright, 2 H. & N. 527; 27 L. J. Ex. 50.

(*t*) See a form in *extenso in* the last edition of this work, p. 542. By 57 Geo. 3, c. 93, s. 6, every broker or other person who shall make and levy any distress whatsoever shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him to the person or persons on whose goods and chattels any distress shall be levied. A landlord who does not personally interfere in the distress is not liable for the neglect of his broker in not delivering a copy of his charges. Hart *v.* Leach, 1 M. & W. 560. See 1 W. & M. c. 12, s. 2, which enacts that a copy must be given if sum distrained for is under £20.

(*u*) This action is founded on 2 W. & M.

ises, at a rent payable by the plaintiff to the defendant; and the defendant seized the goods of the plaintiff in the said messuage and premises as a distress for rent in arrear, and sold the same as such distress towards satisfaction of the rent, for which the same were so distrained, and of the costs and charges of the said distress, and of the appraisement and sale of the said goods, for a sum more than sufficient to discharge the said arrears, costs, and charges, and the defendant received the said sum, but did not leave the overplus of the said sale in the hands of the sheriff or under sheriff of the county, or of the constable of the parish, hundred, or place where the said distress was taken, although a reasonable time for that purpose elapsed, contrary to the statute in that behalf. [*State special damage.* (*x*)]

11. *For distraining Beasts of the Plough and Sheep, there being other Sufficient Goods.*

Obs. — "Unqore est purveu que null home de religion n'autre, soit distreinte per bestes, que gaignent sa terre, ne per ses brebis, taunt come lem trove autre destresce et autres chateux suffisant." 51 H. 3, st. 4. See form of declaration, Keen *v.* Priest, 28 L. J. Ex. 157; 2 Chit. Pl. 535, 7th ed.; Burn's J. tit. "Distress;" Bradby, by Bullen, 193. This action does not lie if there were reasonable ground, upon the appraisement of competent persons, to suppose at the time that the other chattels upon the premises would not be sufficient, and the other effects need not first be sold to ascertain the fact. Jenner *v.* Yolland, 6 Price, 3; 2 Chit. R. 167. And beasts of the plough may be taken, if there be nothing else but growing crops. Piggott *v.* Birtles, 1 M. & W. 441. Trover without a demand before action (Ward *v.* Ventom, Peake's Add. Cas. 126) would lie for taking beasts of the plough, or sheep, or implements of trade, or other privileged goods, where there were other sufficient distrainable goods upon the premises. F. N. B. 88; Hutchins *v.* Chambers, 1 Burr. 579; Gorton *v.* Falkner, 4 T. R. 565. See Davies *v.* Aston, 1 C. B. 746. Sheep not being distrainable at common law, if there is other sufficient distress on the premises, the taking and selling them is unlawful, and an action is maintainable, the damage being the full value of the sheep. Keen *v.* Priest, 28 L. J. Ex. 157; 4 H. & N. 236.

12. *For distraining Tools of Trade, there being other Sufficient Goods.*

Obs. — Forms, &c. 2 Chit. Pl. 535, 7th ed. As to this privilege, &c. see Burn's J. tit. "Distress." Trover lies, *supra*, form 11; Brown *v.* Shevil, 2 Ad. & E. 138. Damages, Harvey *v.* Pocock, 11 M. & W. 740.

Implements of husbandry and the tools of a man's trade not in use, are not distrainable, if there are other goods sufficient to satisfy the distress upon the

sess. 1, c. 5, s. 2, stated at length, *ante*, Obs. The action must be brought by the *owner* of the goods. It seems that the owner might demand his overplus of the broker (see Anon. Lofft, 201; Sampson *v.* Routh, 2 B. & C. 682), before payment of it to the sheriff, and bring an action for money had and received against the broker, but not the landlord; but non-payment cannot be made the subject of an action of trover. In Lyon *v.* Tomkies, 1 M. & W. 603, it was decided that the overplus, which by the above statute is directed to be left in the hands of the sheriff, undersheriff, or constable on a distress, for the owner's use, means the overplus after payment of the rent and of the *reasonable* charges; and that, therefore, in an action for not leaving the overplus in the hands of the sheriff, &c. the plaintiff may question the reasonableness of the charges. In that case the plaintiff received from the broker the balance remaining after payment of the rent and the actual charges, making no objection to their reasonableness. Held, that it was a question for the jury whether he accepted such balance in *satisfaction*, and if not, whether it was sufficient to satisfy the real balance, but that it was not correct to lay it down as matter of law that such payment and receipt substantially satisfied the requisition of the statute. The venue is transitory. As to where money had and received is not maintainable, see Yates *v.* Eastwood, 20 L. J. Ex. 303; Evans *v.* Wright, 2 H. & N. 527; 27 L. J. Ex. 50.

(*x*) See *ante*, 508, note (*o*).

Obs. premises. Simpson *v.* Hartopp, Willes, 512; 1 Smith's L. Cas.; Nargatt *v.* Nias, 28 L. J. Q. B. 143; 1 El. & El. 439.

So as to looms in work. Harvey *v.* Pocock, 11 M. & W. 740; 12 L. J. Ex. 434.

So, also, perishable commodities, such as flesh of animals incapable of being restored in the same condition. But 2 W. & M. c. 2, s. 3, and 11 Geo. 2, c. 19, ss. 8, 9, now make loose corn, and corn in the sheaf, and growing crops distrainable. See *post*, form 18.

13. *For making a Second Distress for the same Rent on the same Goods.*

Obs. — Forms, &c. Lear *v.* Caldecott, 12 L. J. Q. B. 169; 4 Q. B. 123; 2 Chit. Pl. 538, 7th ed.; Bishop *v.* Bryant, 6 C. & P. 484. Law, &c. Dawson *v.* Cropp, 1 C. B. 961; Bagge *v.* Mawby, 8 Ex. 641. Count for making a second distress, there having been a prior distress for the arrears under which the defendant had sold part of the goods, and still retained growing crops seized. Piggott *v.* Birtles, 1 M. & W. 441. It seems trover is maintainable where the second taking is illegal. "It is the duty of a landlord to make a distress at once for his whole rent, if he can find sufficient goods on the premises, for various distresses are vexatious to the tenant. And, therefore, at the common law, if the landlord make an insufficient distress when he might have taken more, a second distress for the remainder of the same rent was illegal, for it was his own folly not to have taken enough at first; but if it appeared that he could not find a sufficient distress on the land, then it seems that even at common law he might distrain again." Bradby on Distresses, c. 5, p. 130. If, however, rent becomes due at different times, separate distresses may be taken. Gambrell *v.* Falmouth, 4 Ad. & E. 75. The statute 17 Car. 2, c. 7, s. 4, enables the landlord in the cases there pointed out to make successive distresses, if the distress shall not be found to be of the value of the arrears distrained for. See, further, Gambrell *v.* Falmouth, *supra;* Pulfrey *v.* Baker, 3 Price, 572; Lear *v.* Caldecott, *supra.*

14. *For driving a Distress more than Three Miles out of the Hundred.*

Obs. — Form and law, 2 Chit. Pl. 539, 7th ed. and notes; 1 & 2 W. & M. c. 12, entitles the parties aggrieved to £5, and treble damages.

15. *For refusing to restore the Goods on Tender of the Rent and Costs.*

Obs. — Forms, Boulton *v.* Reynolds, 29 L. J. Q. B. 11; Johnson *v.* Upham, 28 L. J. Q. B. 252; 2 Chit. Pl. 540, 7th ed.; Loring *v.* Warburton, [El., Bl. & El. 507;] 28 L. J. Q. B. 31. Where the tender is before *seizure*, trespass or trover is the correct form of action; Branscomb *v.* Bridges, 3 Stark. R. 172; 1 B. & C. 145; but even in such instances the tenant may waive the trespass and sue for any excess or irregularity, as for taking too many goods, &c. See Ib.; Holland *v.* Bird, 10 Bing. 15. And trover, replevin, or case lies for a detention or sale after a tender made subsequently to the seizure and before impounding. See Evans *v.* Elliott, 5 Ad. & E. 142; West *v.* Nibbs, 4 C. B. 172; 17 L. J. C. P. 150; Loring *v.* Warburton, *supra.* An action is maintainable upon the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2, for selling goods seized under a distress for rent where a tender of the rent and expenses has been made before the sale and within five days of the seizure, although after impounding. Johnson *v.* Upham, 28 L. J. Q. B. 252. As to what is an impounding, see Tenant *v.* Field, 8 El. & Bl. 336; 27 L. J. Q. B. 33.

Tender may be made to the landlord although he put in a broker; see Smith *v.* Goodwin, 4 B. & Ad. 413; or to the broker authorized; Evans *v.* Elliott, 5 Ad. & E. 142; Hatch *v.* Hale, 19 L. J. Q. B. 289; but not to a man merely left in possession. Boulton *v.* Reynolds, 29 L. J. Q. B. 11. Although a dis-

Obs. tress warrant has issued, a tender before it has been levied need not include the costs of the distress. Bennett *v.* Bayes, [5 H. & N. 391;] 29 L. J. Ex. 254. In the case of a distress damage feasant, see Anscomb *v.* Shore, 1 Camp. 265; Sheriff *v.* James, 1 Bing. 341; 2 Stark. Ev. 390, note (*l*), 3d ed.; and see Gulliver *v.* Cosens, 1 C. B. 788. See a form of declaration for distraining and selling after replevin granted by the sheriff, and pleas, Mounsey *v.* Dawson, 6 Ad. & E. 752.

16. *For selling the Goods within the Five Days.*

Obs. — Form, Robinson *v.* Waddington, 18 L. J. Q. B. 250; 13 Q. B. 753. This is founded on the equity of 2 W. & M. sess. 1, c. 5, s. 2, fully cited, *ante*, form 4, Obs. Trespass or trover will lie where an unripe crop of growing corn taken as a distress is sold within the five days, such sale being *void*. See Owen *v.* Legh, 3 B. & Ald. 470. The five days given by the statute to replevy a distress for rent are to be reckoned exclusively both of the day of distress and the day of sale. Robinson *v.* Waddington, *supra*.

17. *For not removing the Goods within a Reasonable Time after the Lapse of the Five Days.*

Obs. — Form, &c. 2 Chit. Pl. 542, 7th ed. This action is on the equity of 2 W. & M. sess. 1, c. 5, s. 2, and 11 Geo. 2, c. 19, s. 10, cited, *ante*, form 4, Obs. See Winterborne *v.* Morgan, 11 East, 395; Ludd *v.* Thomas, 12 Ad. & E. 126. A reasonable time is allowed by law after the five days to remove and sell. The reasonableness of the time is a question for the jury. Pitt *v.* Shew, 4 B. & Ald. 208. Of course, if the tenant consent verbally or by writing to the delay, he has no ground of action. See Harrison *v.* Bray, 7 Price, 610.

18. *For selling a Growing Crop before it was gathered and appraised.*

Obs. — See form, &c. 2 Chit. Pl. 543, 7th ed. This action is on 11 Geo. 2, c. 19, s. 8. See Owen *v.* Legh, 3 B. & Ald. 470; *supra*, form 16; see Proudlove *v.* Twemlow, 1 Cr. & M. 326, as to the damage, which it appears must arise from the irregularity and no more. In such action with a count in trover the landlord was held entitled to deduct the rent due to him from the difference between the price which might have been obtained had the sale been regular, and that which was obtained under the irregular sale; so that where no such difference existed, from the crops having been sold for their full value, while the rent due exceeded the produce of that sale, the tenant recovered nominal damages only. Ib.

19. *For selling more Goods than was necessary under a Distress for Rent.*

Form, &c. 2 Chit. Pl. 544, 7th ed. It would seem doubtful whether trover lies. In Batchelor *v.* Vyse, 1 M. & Rob. 331, Tindal C. J. held that trover did not lie against the sheriff to recover the value of goods sold in excess beyond what was necessary to satisfy the execution; but it seems the court of common pleas inclined on a motion for a new trial to think that trover might be supported in such a case. Ib.; 4 M. & Sc. 552; and see Whitworth *v.* Smith, 1 M. & R. 193; 5 C. & P. 250. Where the overplus is not paid to the sheriff, Form 10, *ante*, 509, might be sustained.

20. *For impounding Sheep in an Improper Pound.*

Bignell *v.* Clarke, (*y*) 29 L. J. Ex. 257; 5 H. & N. 485; Wilder *v.* Speer, 8 Ad. & E. 547.

(*y*) A person who impounds cattle damage feasant is bound at his peril to take care that the place in which he impounds them is in a fit and proper state, and is liable for the con-

DITCHES. See "Fences."

EASEMENTS.

Obs. — See "Ancient Lights," "Common of Pasture," "Fences," "Support," "Watercourses," "Ways," "Trespass;" Prescription act, 2 & 3 W. 4, c. 71; *ante*, 479, and Obs. *ante*, 479–481. In general the declaration must show an obstruction in the place or thing wherein the plaintiff is entitled; and therefore a declaration for obstructing the plaintiff in his enjoyment of a right to take water, from a cistern was held bad in arrest of judgment, because it alleged that the obstruction consisted in wrongfully locking up a door *leading* to the cistern, without stating that the plaintiff had any *right* to pass *through the door* in question. Tebbutt *v.* Selby, 6 Ad. & E. 786; Manning *v.* Wasdale, 5 Ad. & E. 758. So a plea justifying a nuisance on the ground that the defendant had a twenty years' right of keeping a mixen on his own land, and thus to cause offensive smells, was held bad, because it did not allege the right to cause the smells to pass on to the plaintiff's premises. Flight *v.* Thomas, 10 Ad. & E. 590. Disturbance of franchise, see 2 Chit. Pl. 628, 7th ed. Form for obstructing a lodger in the use of a bell, knocker, outer door, &c. and law, Underwood *v.* Burrows, 7 C. & P. 26. See, generally, on the subject of "Easements," Gale on Easements, by Willes; [Washburn Easements, &c. Servitudes.]

ELECTION. See "Parliament."

ESCAPES. See *post*, "Sheriff."

EXECUTORS AND ADMINISTRATORS.

Obs. — See form of commencement by or against executors, *ante*, pt. 1, p. 13; by or against an administrator, *ante*, pp. 7, 8.

By the common law the right to recover damages for an injury done to property or person did not survive to executors or administrators. But an executor, 4 Ed. 3, c. 7, or executor of an executor, 25 Ed. 3, stat. 5, c. 5, or administrator, 31 Ed. 3. stat. 1, c. 11, now has the same right of action for an injury to the personal estate of the deceased in his lifetime, as the deceased would have had. Wheatley *v.* Lane, 1 Saund. 217, note (1). But this act does not extend to injuries to the person or freehold of the testator. But a remedy as to the freehold is given by 3 & 4 W. 4, c. 42, s. 2, which enacts, "that an action of trespass or trespass on the case, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person." And by the same section actions may be brought against executors or administrators for injuries committed by their testator to real or personal property. [See 1 Chitty Pl. 77 *et seq.* and notes, 100, and notes, for cases showing what

sequences if it is not; Ib.; [Brightman *v.* Grimnell, 9 Pick. 14; Adams *v.* Adams, 13 Pick. 384;] and if a distrainer abuses a distress by working it, the owner may interfere and prevent it, and no action can be brought against him for pound breach or rescue. Smith *v.* Wright, [6 H. & N. 821;] 30 L. J. Ex. 313, where see a form for pound breach or rescue.

Obs. actions survive in the American states; Soule *v.* N Y. & N. H. R. R. 21 Conn. 575; Pennsylvania R. R. *v.* McCloskey, 23 Penn. St. 526.]

As to injuries resulting in death, the 9 & 10 Vict. c. 93, s. 1 (Lord Campbell's act), enacts, "That, whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof; then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." By s. 2, "every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury, by their verdict, shall find and direct." [See *ante*, 492, note (*r*). Statutes intended to attain a similar result have been passed in many of the American states. See Genl. Sts. Mass. c. 166, § 34; Richardson *v.* New York Central R. R. Co. 98 Mass. 85; N. Y. Acts of 1847, c. 450, and of 1849, c. 256. In Massachusetts, Maine, New Hampshire, Connecticut, and Rhode Island, the remedy is by indictment. In Maryland, the action must be brought in the name of the state, but is in form civil, and is for the benefit of the person entitled to damages. In most of the other states, as well as in England, the statutes authorize a civil action for damages in behalf of widow, child, or heir. But in all their different forms of proceeding the same end is to be attained, and substantially the same rules are to be applied as though they were civil actions for damages. Sargent C. J. in State *v.* Manchester & Lawrence R. R. 52 N. H. 528, 547; State *v.* Railway, 58 Maine, 176. For form of indictment, and the averments necessary, see State *v.* Manchester & Lawrence R. R. 52 N. H. 528; Commonwealth *v.* Boston & Worcester R. R. Corp. 11 Cush. 512; Corey *v.* Bath, 35 N. H. 530. The right conferred, however, can be enforced only within the jurisdiction of the respective statutes. Richardson *v.* New York Central R. R. Co. 98 Mass. 85; Woodward *v.* Mich. Southern & Northern Ind. R. R. 10 Ohio St. 121; Whitford *v.* Panama R. R. 23 N. Y. 465; Needham *v.* Grand Trunk R. R. 38 Vt. 294.] By the 27 & 28 Vict. c. 95, s. 1 (which is to be read together with Lord Campbell's act as one act), if there shall be no executor or administrator of the person deceased; or, if there being such executor or administrator, no such action, as in Lord Campbell's act mentioned, shall, within six calendar months after the death of such deceased person as therein mentioned, have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator. And by s. 2 it shall be sufficient if the defendant is advised to pay money into court, that he pay it as a compensation, in one sum, to all persons entitled, under Lord Campbell's act, for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury: and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict on that issue. By s. 3 of Lord Campbell's act, not more than one action shall lie for and in respect of the same subject-matter of complaint, and the action must be commenced within twelve months after the death. By s. 4, the plaintiff on the record shall deliver with the declaration a full particular of the person or persons for whom and on whose behalf the action is brought, and of the

OBS. nature of the claim in respect of which damages shall be sought to be recovered. An action cannot be maintained under this act on behalf of a bastard child. Dickenson *v.* North Eastern Ry. Co. 2 H. & C. 735.

Under this act the defendant is not liable, except in cases where the deceased could himself have maintained an action, so that, if the death was caused by the deceased's negligence, or if there was contributory negligence, the personal representatives cannot maintain an action. Senior *v.* Ward, 28 L. J. Q. B. 139 ; 1 El. & El. 385 ; Waite *v.* North Eastern Ry. Co. 28 L. J. Q. B. 258 ; El., Bl. & El. 719; Witherley *v.* Regent's Canal Company, 12 C. B. N. S. 2 ; [Richardson *v.* N. Y. Central Railroad Co. 98 Mass. 89, 90. But it has been held that the statute gives to the representatives of the deceased a cause of action beyond that which the deceased would have had if he had survived, and based on a different principle. Pym *v.* Great Northern Ry. Co. 4 B. & S. 396 ; Safford *v.* Drew, 3 Duer, 627 ; Yertone *v.* Wiswall, 16 How. Pr. 8, 12; Whitford *v.* Panama R. R. 23 N. Y. 465; Needham *v.* Grand Trunk R. R. 38 Vt. 294 ; Pennsylvania R. R. *v.* Henderson, 51 Penn. St. 315.]

In assessing the damages, the jury are confined to injuries of which a pecuniary estimate can be made, and cannot take into their consideration the mental suffering occasioned to the survivors. Blake v. Midland Ry. Co. 18 Q. B. 93; 21 L. J. Q. B. 233 ; [Pym *v.* Great Northern Ry. Co. 4 B. & S. 396 ; Duckworth *v.* Johnson, 4 H. & N. 653 ; Nickerson *v.* Harriman, 38 Maine, 279.] So the funeral, &c. expenses cannot be given as damages. Dalton *v.* South Eastern Ry. Co. 4 C. B. N. S. 296 ; 27 L. J. C. P. 227. [Expenses of medical attendance have been held recoverable ; and so the loss occasioned to the estate of the deceased from his being unable to attend to his business previous to his death. Bradshaw *v.* Lancashire & Yorkshire Ry. Co. L. R. 10 C. P. 189.] But a reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into consideration by the jury. Ib.; see Chapman *v.* Rothwell, 27 L. J. Q. B. 315 ; [El., Bl. & El. 168;] Franklin *v.* South Eastern Ry. Co. 3 H. & N. 311 ; see, also, Pym *v.* Great Northern y. Co. [4 B. & S. 396 ;] 31 L. J. Q. B. 249, and Riley *v.* Baxendale, 30 L. J. Ex. 87 ; [6 H. & N. 445.] But some *actual* damage must be proved. Duckworth *v.* Johnson, 4 H. & N. 653 ; 29 L. J. Ex. 25. [No legal claim to support from the deceased need be shown by the plaintiff. Illinois Central R. R. *v.* Bannon, 5 Wallace, 90.]

See *post*, "Negligence."

But executors or administrators cannot maintain an action for assault, or false imprisonment, or slander, or deceit, the common law prevailing in such cases. [But see 1 Chitty Pl. 77, notes (*b*), (*f*), and (*g*), 78, note (*m*), 80, note (d^1), 100, and notes.] The title of an administrator, in all cases, relates back to the time of the death of the intestate ; Welchman *v.* Sturgis, 13 Q. B. 552 ; 18 L. J. Q. B. 211 ; [*ante*, 120 ;] and it is no objection, therefore, even in actions of tort, that the cause of action accrued before the letters. Forster *v.* Bates, 12 M. &. W. 226 ; Tharpe *v.* Stallwood, 1 D. & L. 24 ; 5 M. & G. 760.

The death of a plaintiff or defendant, pending an action, does not abate it if it be of such a nature that it can be continued by or against the legal representive (if a sole plaintiff or defendant). Common Law Procedure Act, 1852, ss. 137, 138.

See, generally, Williams on Executors, 7th ed.

1. *By an Executor or Administrator for an Injury to the Real Estate of the Testator or Intestate.* (*z*)

For that the said A. B. died within one year next before the commencement of this action, and the defendant in the lifetime of the said A. B., and within six calendar months before his death, broke and entered a certain house [*or* "land"] of the said A. B. deceased, situate [*or* "called," *describe the situation by name or abuttals*], (*a*) to the damage of the plaintiff as executor as aforesaid.

(*z*) 3 & 4 W. 4, c. 42, s. 2, *ante*, Obs., venue local.

(*a*) See *post*, "Trespass to Realty."

2. *By an Executor for Trover and Conversion in the Testator's Lifetime, &c.*

2 Chit. on Pleading, 643, 7th ed.

3. *By the Executor of a Passenger who was killed by the Negligence of the Defendants as Carriers of Passengers.* (*b*)

Ante, 492. For other forms, see Manley *v.* St. Helen's Canal Co. 27 L. J. Ex. 159; 2 H. & N. 840; Binks *v.* South Yorkshire Ry. & Dock Co. 3 B. & S. 244; Cotton *v.* Wood, 27 L. J. C. P. 333; 8 C. B. N. S. 568; Hutchinson *v.* Yorkshire & North British Ry. Co. 5 Ex. 343; Dalton *v.* South Eastern Ry. Co. 27 L. J. C. P. 227; [4 C. B. N. S. 296.]

FALSE IMPRISONMENT. See "Trespass to the Person," *post.*

FALSE REPRESENTATION. See "Fraud," *post.*

FENCES AND PARTY-WALLS.

Obs. — A wall separating adjoining premises belongs *primâ facie* to the owners in equal moieties, as tenants in common. Cubitt *v.* Porter, 8 B. & C. 257. But this presumption may be rebutted, as where the land upon which the wall stands can be ascertained and identified, in which case each party owns so much of the wall as stands on his own land. Watts *v.* Hawkins, 5 Taunt. 20. "In general, however, party-walls will be found 'to be built on the common property of both;' and in the absence of any further proof than that which is afforded by evidence of a common user, such will be presumed to be the case." Gale on Easements, by Willes, 412; [3 Kent, 438, and note (*a*); Washburn Easements and Servitudes (2d ed.), 535, [454] *et seq.*]

Every hedge, separating two estates, is *reputed* common to both unless there be proof to the contrary.

Every owner of land is bound to maintain such fences as shall prevent his cattle from trespassing on the lands of his neighbors. See Boyle *v.* Tamlyn, 6 B. & C. 337, per Bayley J. But this liability to fence against cattle only applies to the cattle of a neighbor. Dovaston *v.* Payne, 2 H. Bl. 527. See Rooth *v.* Wilson, 1 B. & Ald. 59; Lee *v.* Riley, 34 L. J. C. P. 212; [18 C. B. N. S. 722; 3 Kent, 438; Washburn Easements and Servitudes (2d ed.), 601, [514] *et seq.*; 1 Chitty, Pl. 159, and cases in note (*o*); Lyons *v.* Merrick, 105 Mass, 71, 75, 76; Cate *v.* Cate, 50 N. H. 146.] The remedy being against the occupier of the land. Cheetham *v.* Hampson, 4 T. R. 318. But where cattle had strayed from a field through a fence, which A. was liable to repair, and ultimately strayed into A.'s close, and were there taken damage feasant, it was held that A. was in the wrong, the trespass of the cattle being the result of his own negligence in not keeping the fence through which they first passed in repair. Singleton *v.* Williamson, 31 L. J. Ex. 17; [7 H. & N. 410. See Lyons *v.* Merrick, 105 Mass. 71; Cate *v.* Cate, 50 N. H. 144, 146.]

If a man dig a pit in his own close, he is not under any obligation to fence it, but if the pit be substantially adjacent to a highway, he is bound to do so. See Barnes *v.* Ward, 9 C. B. 392; 19 L. J. C. P. 195; Hardcastle *v.* South Yorkshire Ry. Co. 28 L. Ex. 139; [4 H. & N. 67; Jordin *v.* Crump, 10 M.

(*b*) The declaration need not negative the existence of any other relations entitled to recover, other than those on whose behalf the action is brought. Barnes *v.* Ward, 9 C. B. 392; 19 L. J. C. P. 195.

Obs. & W. 988; Hounsell *v.* Smyth, 7 C. B. N. S. 731; 29 L. J. C. P. 203. [But see Howland *v.* Vincent, 10 Met. 371; Knight *v.* Abert, 6 Penn. St. 472;] see, also, *post*, "Negligence."

The railway clauses consolidation act (8 & 9 Vict. c. 20, s. 68) throws upon railway companies the obligation of making and maintaining fences; and, in conjunction with that act, the same rule of law applies as in ordinary cases affecting private individuals. See Ricketts *v.* East & West India Docks Ry. Co. 12 C. B. 160; Manchester &c. Ry. Co. *v.* Wallis, 14 C. B. 230.

As to ditches, no man making a ditch can cut into his neighbor's soil, but only to the very extremity of his own. Vowles *v.* Miller, 3 Taunt. 137. [But it has been held in Massachusetts that partition fences and ditches are to be placed on the lands of both parties equally. Newell *v.* Hill, 2 Met. 180.] The venue is local. See, generally, Gale on Easements, by Willes; forms, 2 Chit. on Pl. 7th ed.; Powell *v.* Salisbury, 2 Y. & J. 391; Rooth *v.* Wilson, 1 B. & Ald. 59.

For forms, see Marfell *v.* South Wales Ry. Co. 8 C. B. N. S. 525; Ellis *v.* London & South Western Ry. Co. 2 H. & N. 424; Fawcett *v.* Yorkshire & North Midland Ry. Co. 16 Q. B. 610. See, also, Besant *v.* Great Western Ry. Co. 8 C. B. N. S. 368; Sharrod *v.* London & North Western Ry. Co. 4 Ex. 580.

FERRY.

Obs. — See Hussey *v.* Field, 2 Cr., M. & R. 432, for a form and law. It is sufficient for the plaintiff to prove that he was in possession of the ferry at the time when the cause of action arose. Peter *v.* Kendall, 6 B. & C. 703; Trotter *v.* Harris, 2 Y. & J. 285. And it is not necessary to allege or prove the payment of any specified sum for passage-money. Peter *v.* Kendall, 6 B. & C. 703. The owner of a ferry must have the right to use the land on both sides of the water for the purpose of embarking his passengers, but he need not have any property in the soil. Ib. See, also, Pim *v.* Curell, 6 M. & W. 234; Blacketer *v.* Gillett, 9 C. B. 26; 19 L. J. C. P. 307; Giles *v.* Groves, 12 Q. B. 721; 17 L. J. Q. B. 323; Newton *v.* Cubitt, [2 C. B. N. S. 627;] 28 L. J. C. P. 176. See a form for loss of goods intrusted to a ferryman to carry, Walker *v.* Jackson, 10 M. & W. 161; 12 L. J. Ex. 165.

The venue is local.

[*Count for disturbing the Plaintiff's Ferry*,

Venue local.] That the plaintiff was possessed of an ancient ferry, called —— Ferry, for the carriage [of foot passengers and their goods] across the river —— from —— to ——, taking for the carriage of such [passengers and goods] across such ferry certain reasonable freights and ferryages; and the defendant wrongfully disturbed the plaintiff in the possession of his said ferry by carrying divers [foot-passengers and their goods] for hire across the said river near to the said ferry of the plaintiff, whereby the plaintiff has lost the profits of his said ferry.]

FISHERY AND FISHING.

Obs. — Trespass may be maintained for breaking and entering, &c. a several fishery, though no fish are taken, and though in the soil of another. Holford *v.* Bailey, 8 Q. B. 1000; in error, 13 Q. B. 426; Marshall *v.* The Ulswater Steam Navigation Company, 3 B. & S. 732; 32 L. J. Q. B. 139. A custom for all the inhabitants of a parish to angle for, catch, and carry away fish, is a bad custom. Bland *v.* Lipscombe, 4 El. & Bl. 713, note; 24 L. J. Q. B. 155, note.

The venue is local.

Where a plaintiff, while fishing for pilchards, had nearly encompassed the fish

Obs. with a net, and the defendant, by rowing his boat to the entrance, disturbed the fish and prevented the capture, it was held that he could not maintain trespass, as he did not prove any special custom of the fishery. Young *v.* Hichens, 6 Q. B. 606.

As to the whale fishery, and where a fish may be considered fast, see Fennings *v.* Grenville, 1 Taunt. 241; Littledale *v.* Scaith, Ib. 243, note; Hogarth *v.* Jackson, 2 C. & P. 595; Skinner *v.* Chapman, 1 M. & M. 59, note. Where a statute confers a right, and annexes a penalty for its infringement, no remedy is available to the party aggrieved but that prescribed by the statute. Stevens *v.* Jeacocke, 11 Q. B. 741; 17 L. J. Q. B. 163.

See a form of trespass in a fishery, Mannall *v.* Fisher, 5 C. B. N. S. 856.

See a form for injuring oyster beds, Mayor of Colchester *v.* Brooke, 7 Q. B. 339; 15 L. J. Q. B. 59. See the statutes 24 & 25 Vict. c. 109, applicable to salmon fisheries in England; 29 & 30 Vict. c. 85, applicable to Great Britain; and 29 & 30 Vict. c. 97, applicable to Ireland. [See Garnett *v.* Backhouse, L. R. 3 Q. B. 30; Rawstorne *v.* Backhouse, L. R. 3 C. P. 67.]

See a form in trespass for throwing down a weir appurtenant to a fishery, Williams *v.* Wilcox, 8 Ad. & E. 314.

[*Count for Trespass to Plaintiff's Fishery.*

Venue local.] That the defendant, on divers days and times, broke and entered the several fishery of the plaintiff in the river ——, and fished in the said fishery for fish, and chased and disturbed the fish therein, and caught, took, and carried away and converted to his own use divers quantities of the plaintiff's fish therein.

Like counts. Smith *v.* Kemp, 2 Salk. 637; Richardson *v.* Mayor of Orford, 2 H. Bl. 182.]

FIXTURES. See *post*, "Landlord and Tenant."

FRAUD.

Obs. — Either an action on contract or tort lies for the breach of an express warranty. Williamson *v.* Allison, 2 East, 446. See *ante*, "Warranty," 256 *et seq.*; [Fisk *v.* Hicks, 31 N. H. 535, 540, 541; Webster *v.* Hodgskins, 25 N. H. 128, 142; Cooper *v.* Landon, 102 Mass. 58, 60.] The rule is now settled that, "Where upon the sale of goods the purchaser is satisfied, without requiring a warranty, he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud; if, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive *evidence* of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, this does not amount to fraud in law; the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action." Ormrod *v.* Huth, 14 M. & W. 664. See Horsfall *v.* Thomas, 1 H. & C. 90; 31 L. J. Ex. 322; [Mahurin *v.* Harding, 28 N. H. 128; 1 Chitty Contr. (11th Am. ed.) 639, 640; Childers *v.* Wooler, 2 El. & El. 287; Behn *v.* Kemble, 7 C. B. N. S. 260; Pettigrew *v.* Chellis, 41 N. H. 95; Page *v.* Parker, 40 N. H. 47; S. C. 43 N. H. 363; Bigelow C. J. in King *v.* Eagle Mills, 10 Allen, 548, 551, 552; Collins *v.* Evans, 5 Q. B. 826; Attwood *v.* Small, 6 Cl. & Fin. (Am. ed.) 232, and notes; Colt J. in Milliken *v.* Thorndike, 103 Mass. 385; Stone *v.* Denney, 4 Met. 151; Page *v.* Bent, 2 Met. 371; Hanson *v.* Edgerly, 29 N. H. 343; Tryon *v.* Whitmarsh, 1 Met. 1; Russell *v.* Clark, 7 Cranch, 69; Lord *v.* Goddard, 13 How. (U. S.) 196; Weeks *v.* Burton, 7 Vt. 67; Young *v.* Covell, 8 John. 25; Boyd *v.* Brown, 6 Barr, 310; Marshall *v.* Gray, 47 Barb. 414; Staines *v.* Shore, 16 Penn. St. 200; Taylor *v.* Frost, 39 Miss. 528; Holmes

Obs. *v.* Clark, 10 Iowa, 423; Bendurant *v.* Crawford, 22 Iowa, 40; Allen *v.* Wanumaker, 2 Vroom, 370; Morton *v.* Scull, 23 Ark. 289; Bond *v.* Clark, 35 Vt. 577; Peers *v.* Davis, 29 Missou. 184; Zehner *v.* Kipler, 16 Ind. 290; Simar *v.* Canaday, 53 N. Y. 298, 306, 307; Collins *v.* Denison, 12 Met. 549.] "An action cannot be supported, for telling a bare naked lie, where no loss or damage is caused; but if it be attended with damage, it then becomes the subject of an action." Pasley *v.* Freeman, 3 T. R. 65; 2 Smith's L. Cases; [Hubbard J. in Medbury *v.* Watson, 6 Met. 246; Tryon *v.* Whitmarsh, 1 Met. 1; Colt J. in Randall *v.* Hazelton, 12 Allen, 412, 414 *et seq.* "The *gravamen* of the charge is, that the plaintiff has been deceived to his hurt; not that the defendant has gained an advantage." Wells J. in Fisher *v.* Mellen, 103 Mass. 505; Stiles *v.* White, 11 Met. 356.] Where a representation, false to the knowledge of A., has been made by him for his benefit to B., and is acted on by B. to B.'s injury, an action will lie at his suit against A. Barley *v.* Walford, 9 Q. B. 197; 15 L. J. Q. B. 369. See Rawlings *v.* Bell, 1 C. B. 951; Langridge *v.* Levy, 2 M. & W. 529; Levy *v.* Langridge, 4 M. & W. 338; Behn *v.* Kemble, 7 C. B. N. S. 260. And if such false representation be communicated by B. to C., with notice to A., and C. acts upon it, an action will lie by C. against A. Pilmore *v.* Hood, 4 Bing. N. C. 97. [See Irving *v.* Thomas, 18 Maine, 418; Paddock *v.* Strobridge, 29 Vt. 470; Crocker *v.* Lewis, 1 Sumner, 1, 8; Bowens *v.* Johnson, 10 Sm. & M. 169; Hunt *v.* Moore, 2 Barr, 105; Thom *v.* Bigland, 8 Ex. 725, 731; Gerhard *v.* Bates, 2 El. & Bl. 476; Bedford *v.* Bagshaw, 4 H. & N. 538; New Brunswick &c. R. Co. *v.* Conybeare, 9 H. L. Cas. 711.] Where there is no express warranty but a representation false to the knowledge of the maker of it, an action lies for the fraud and deceit. Powell *v.* Edmunds, 12 East, 11; Meyer *v.* Everth, 4 Camp. 28; Ormrod *v.* Huth, *ubi sup.* So, if the false representation substantially lead to the giving credit for goods. Wade *v.* Tatton, 25 L. J. C. P. 240. [The presumption, in the absence of evidence to the contrary, would be that the vendor did rely on the representation. Holbrook *v.* Burt, 22 Pick. 546.] If a party makes a representation for a fraudulent purpose, and intending to induce another to do something which, when done, is to his prejudice, an action will lie; and it is not necessary that the defendant knew the representation to be false if he communicated it for a deceitful purpose. Taylor *v.* Ashton, 11 M. & W. 401; 12 L. J. Ex. 363; [2 Chitty Contr. (11th Am. ed.) 1044, 1045, and note (*d*).] A statement is fraudulent if made dishonestly or with a reckless ignorance of whether it is true or false. Behn *v.* Burness, 32 L. J. Q. B. 204; [3 B. & S. 751; Hazard *v.* Irwin, 18 Pick. 95; Stone *v.* Denny, 4 Met. 151; Ames J. in Cooper *v.* Lovering, 106 Mass. 79; Brown *v.* Castles, 11 Cush. 348; Attwood *v.* Small, 6 Cl. & Fin. (Am. ed.) 233, note (1) and cases cited to this point; Fisher *v.* Mellen, 103 Mass. 503, 506; Page *v.* Bent, 2 Met. 371; Hammatt *v.* Emerson, 27 Maine, 308, 326; Harding *v.* Randall, 15 Maine, 332; Smith *v.* Mitchell, 5 Geo. 458; Mitchell *v.* Zimmerman, 4 Texas, 75; Bennett *v.* Judson, 21 N. Y 238; Wilcox *v.* The Iowa Wesleyan University, 32 Iowa, 367; Rawlins *v.* Wickham, 3 De G. & J. 313; 2 Chitty Contr. (11th Am. ed.) 1045, note (*p*) and cases cited; Atwood *v.* Wright, 29 Ala. 346; Craig *v.* Ward, 36 Barb. 377; Sharp *v.* New York, 40 Barb. 256; Evans *v.* Edmonds, 13 C. B. 777; Mason *v.* Chappell, 15 Grattan, 572; Cabot *v.* Christie, 42 Vt. 121, 126.

But, if the false representation was made *bonâ fide*, the defendant believing in its truth, the plaintiff cannot maintain an action. Shrewsbury *v.* Blount, 2 M. & G. 475; Rawlins *v.* Wickham, 28 L. J. Ch. 188; [3 De G. & J. 304;] Slim *v.* Crouch, [1 De G., F. & J. 518;] 29 L. J. Ch. 273; [2 Chitty Contr. (11th Am. ed.) 1044, and cases in note (*m*).] And an untrue representation, not embodied in a contract, will not render it void unless it also be fraudulent. Cornfoot *v.* Fowke, 6 M. & W. 358; Collins *v.* Evans, 5 Q. B. 820; Childers *v.* Wooler, 29 L. J. Q. B. 136; [2 El. & El. 287.]

In order to maintain the action, it must be proved that the plaintiff acted on the faith of the false representation, and sustained damage arising therefrom. Eastwood *v.* Bain, 28 L. J. Ex. 74. [If the plaintiff chose to act on his own judgment, with full knowledge or means of knowledge of the facts, he cannot be heard to say he was deceived by the defendant's representations respecting them. Attwood *v.* Small, 6 Cl. & Fin. (Am. ed.) 233, and note (2), and

Obs. cases cited. Hoitt *v.* Holcomb, 32 N. H. 202–205; Aberaman Iron Works *v.* Wickens, L. R. 4 Ch. Ap. 101; Veasey *v.* Doten, 3 Allen, 380; Stephens *v.* Orman, 10 Florida, 9; Mooney *v.* Miller, 102 Mass. 220; Dickinson *v.* Lee, 106 Mass. 557; 2 Chitty Contr. (11th Am. ed.) 1039, and note (*z*), 1040, note (*a*). But see, how far one, who has received from another a positive representation respecting a material fact, is bound to inquire into the truth of it, 2 Chitty Contr. (11th Am. ed.) 1041, and note (*c*); Attwood *v.* Small, 6 Cl. & Fin. (Am. ed.) 233, note (2); Rose *v.* Hurley, 39 Ind. 83; Mead *v.* Bunn, 32 N. Y. 275; Vandewalker *v.* Osmer, 65 Barb. 556.] There is no necessity for any privity between the parties. Gerhard *v.* Bates, 2 El. & Bl. 746; 22 L. J. Q. B. 364. [See Thomas *v.* Winchester, 2 Selden, 397; Davidson *v.* Nichols, 11 Allen, 514; McDonald *v.* Snelling, 14 Allen, 290, 295.] The alleged damage must arise from the alleged wrongful act. Collins *v.* Cave, 6 H. & N. 131; 30 L. J. Ex. 55.

As to false representations made by directors, see Scott *v.* Dixon, 29 L. J. Q. B. 69, note; Clarke *v.* Dixon, 7 C. B. N. S. 453; 28 L. J. C. P. 225; Bedford *v.* Bagshaw, 29 L. J. Ex. 59; [4 H. & N. 538.]

As to false representation of authority by agents, see Collen *v.* Wright, 8 El. & Bl. 647; 26 L. J. Q. B. 147; 27 Ib. 215; Pow *v.* Davis, 7 El. & Bl. 220; 30 L. J. Q. B. 257; Oxenham *v.* Smythe, 6 H. & N. 690; 31 L. J. Ex. 110; Hughes *v.* Græme, 33 L. J. Q. B. 335; [*ante*, 45, note (*c*).] False and fraudulent representation made by an agent do not affect the principal unless the principal adopts them with knowledge. Udell *v.* Atherton, 7 H. & N. 181; 30 L. J. Ex. 337; [Bennett *v.* Judson, 21 N. Y. 238; Crans *v.* Hunter, 28 N. Y. 389; Mundorff *v.* Wickersham, 63 Penn. St. 87; Haseler *v.* Lemoyne, 5 C. B. N. S. 530; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; 2 Chitty Contr. (11th Am. ed.) 1036, and note (*h*); 1 Chitty Contr. (11th Am. ed.) 284, note (*l*), 291, and notes (*n*) and (*m*); Grant *v.* Beard, 50 N. H. 129. As to the effect of the fraud of an authorized agent in negotiating a contract on behalf of his principal, see *ante*, 392.]

As to the use of trade-marks, see 25 & 26 Vict. c. 88; and see The Leather Cloth Co. *v.* The American Cloth Co. 33 L. J. Ch. 199; [11 H. L. Cas. 523;] M'Andrew *v.* Bassett, 33 L. J. Ch. 568; Hall *v.* Burrows, [10 Jur. N. S. 55;] 33 L. J. Ch. 204; [Perry *v.* Truefitt, 6 Beav. 66; Seixo *v.* Provezende, L. R. 1 Ch. Ap. 192, 196; 2 Chitty Contr. (11th Am. ed.) 1043, note (*i*); Bradley *v.* Norton, 33 Conn. 157; Emerson *v.* Badger, 101 Mass. 82; Edelsten *v.* Edelston, 1 De G., J. & S. 185, and cases in note (*z*); Walton *v.* Crowley, 3 Blatchf. C. C. 440; 10 Am. Law Reg. N. S. 694, 707, 708, in note; Hostetter *v.* Vowinkle, 1 Dillon, 329; Burnett *v.* Phalon, 3 Keyes, 594; Lord Westbury L. C. in Leather Cloth Co. *v.* American Leather Cloth Co. 4 De G., J. & S. 137, 139.]

As to what amounts to fraud in obtaining a deed, see Spencer *v.* Hardley, 4 M. & S. 414; *ante*, pt. 1, p. 392. A contract procured by fraud is voidable only at the election of the party defrauded; Murray *v.* Mann, 2 Ex. 538; 17 L. J. Ex. 256; and if a sale of goods be not avoided before the goods are resold, the property passes. White *v.* Garden, 20 L. J. C. P. 166; [10 C. B. 919; Kingsford *v.* Merry, 11 Ex. 577, 579; Titcomb *v.* Wood, 38 Maine, 561; Stevenson *v.* Newnham, 13 C. B. 285, 303; Parke B. in Powell *v.* Hoyland, 6 Ex. 67, 72; Load *v.* Green, 15 M. & W. 216, 219; Bean *v.* Smith, 2 Mason, 252; Hall *v.* Hicks, 21 Md. 406; Hardman *v.* Booth, 1 H. & C. 803; Oakes *v.* Turquand, L. R. 2 H. L. 325; Sinclair *v.* Healy, 40 Penn. St. 417; 1 Chitty Contr. (11th Am. ed.) 566, and note (*e*); Williams *v.* Given, 6 Gratton, 268.] But where goods are delivered to one person upon a fraudulent representation that he is purchasing for or is another person, no property passes, and the goods or their proceeds may be recovered from a *bonâ fide* holder for value. Higgons *v.* Burton, 26 L. J. Ex. 342; Hardman *v.* Booth, 32 L. J. Ex. 105; [1 H. & C. 803;] and see Milne *v.* Leisler, 31 L. J. Ex. 257. A fraud of the testator is a good answer to an action by the executor Connop *v.* Levy, 11 Q. B. 769; 17 L. J. Q. B. 125.

1. *Against the Seller of Goods for a False Warranty.* (*d*)

For that the defendant, by falsely and fraudulently (*e*) warranting a horse to be then sound, induced the plaintiff to purchase the same for £——, which he then paid to the defendant; yet the said horse was not sound, as the defendant then well knew, (*f*) whereby the said horse was useless to the plaintiff, and he was put to expense, and incurred loss in keeping and reselling the same.

[1*a*. *Against the Seller of Goods for falsely representing himself to be the Owner.*

And the plaintiff says the defendant sold to him ten bags of coffee, and to induce the plaintiff to buy the same the defendant falsely represented to him that said coffee was the property of the defendant; and the plaintiff, believing that said representation was true, was thereby induced to purchase, and did purchase said coffee, and paid therefor to the defendant the sum of one hundred dollars; and the said coffee was not the property of the defendant, which the defendant then knew, but was the property of one A. J., who has taken the same from the plaintiff.

1*b*. *Against Seller of Chattel for False Representation of Soundness.*

And the plaintiff says the defendant sold him a horse, for which the plaintiff paid him one hundred dollars; and to induce the plaintiff to buy said horse, the defendant falsely represented to the plaintiff that said horse was sound, so far as the defendant knew; and the plaintiff, believing that said representation was true, was thereby induced to buy, and did buy said horse; and the said horse was not sound, but had a certain disease called ——, which the defendant then knew.]

2. *For using Fraudulent Means to prevent the Plaintiff from discovering the Unsoundness of a Horse sold by the Defendant to the Plaintiff.* (*g*)

For that the defendant was possessed of a horse which to his knowledge was affected with glanders; yet the defendant, by false and fraudulent means, concealed from the plaintiff that the said horse was so affected, and thereby

(*d*) See a form for exhibiting false samples, and thereby inducing plaintiff to buy, &c. Ormrod *v.* Huth, 14 M. & W. 651; [for selling a cargo of wheat by a false representation that it accorded with report and samples, Russell *v.* Nicolopulo, 8 C. B. N. S. 362; for selling the cargo of a ship by a false representation that the ship was on its voyage, Risbourg *v.* Bruckner, 3 C. B. N. S. 812; and a form in tort, that manufactured goods were fit for the purpose for which they were bought, Jones *v.* Bright, 5 Bing. 533; for manufacturing a rope for a specific purpose, which was not fit for that purpose, and which broke, Brown *v.* Edgington, 2 M. & G. 279; *ante*, 260, note (*f*), 261, note (*h*).

(*e*) [See Cooper *v.* Landon, 102 Mass. 58, 60.]

(*f*) [Mahurin *v.* Harding, 28 N. H. 128, 131; Pettigrew *v.* Chellis, 41 N. H. 95.]

(*g*) This is clearly a ground of action, without reference to a warranty. See a form for fraudulently representing a ship bought of the defendant to be copper fastened, and keeping it afloat to prevent plaintiff from discovering the truth, Freeman *v.* Baker, 5 B. & Ad. 797; 5 C. & P. 475. See Milne *v.* Marwood, 15 C. B. 778; 24 L. J. C. P. 36. [For selling a log of mahogany by fraudulently concealing a defect. Udell *v.* Atherton, 7 H. & N. 172; for selling a diseased cow by fraudulently concealing that it was diseased. Mullett *v.* Mason, L. R. 1 C. P. 559.]

induced the plaintiff to purchase the same for £—— then paid to the defendant, and the said horse afterwards died of the said disease, and was lost to the plaintiff, whereby the plaintiff lost the said £—— and was put to expense in keeping and endeavoring to cure the said horse.

3. *For Deceit in selling a Picture as painted by a particular Master, which it was not.* (*h*)

For that the defendant, by falsely and fraudulently representing to the plaintiff that a certain picture was painted by ——, induced him to purchase the same for £——, which he paid to the defendant; yet the said picture was not painted by ——, as the defendant then well knew, whereby the plaintiff lost the said £——.

4. *For inducing Plaintiff to purchase Defendant's Practice as a Surgeon, &c. by misrepresenting the Extent of the Business, &c.* (*i*)

For that the defendant was possessed of a shop, and the lease thereof, and carried on the business and profession of a surgeon and apothecary therein, and was also possessed of fixtures, drugs, medicines, and stock in the said shop; and the defendant, by falsely and fraudulently representing to the plaintiff that the defendant's business and practice were more extensive than they really were, and that the defendant made £—— per annum by the said business and practice, and that he had as many as 400 patients, as such surgeon and apothecary [*add any other false representation*], induced the plaintiff to enter into a certain agreement with the defendant, whereby the plaintiff purchased the said practice and business with the said fixtures, drugs, medicines, and stock, and also took an assignment of the said lease for £——, and paid the same to the defendant; yet the defendant's business and practice produced him less than £—— per annum, and the defendant had not as many as 400 patients [*negative the false representations*], as the defendant well knew, whereby the plaintiff lost the said sum of £——, and the said business and practice, and lease of the said premises were of no value to him, and he has lost the expenses incurred by him in endeavoring to carry on the same.

5. *For falsely representing to the Purchaser of a Lease and Fixtures that the latter were the Vendor's Property.* (*k*)

For that the defendant was possessed of a messuage by virtue of a lease thereof for —— years unexpired, and also of fixtures in and upon the said messuage; and the defendant, by falsely and fraudulently representing to the plaintiff that the said fixtures were the property of the defendant, and that

(*h*) Power *v.* Barham, 4 Ad. & E. 473; 7 C. & P. 350.

(*i*) See forms of declaration for misrepresenting the business of a public house purchased by the plaintiff of the defendant, Dobell *v.* Stevens, 3 B. & C. 623; Meyer *v.* Everth, 4 Camp. 22; Pewtriss *v.* Austin, 6 Taunt. 522; Roles v. Davis, 4 H. & N. 484; 28 L. J. Ex. 287; Richardson *v.* Dunn, 8 C. B. N. S. 655; 30 L. J. C. P. 44; the sale of a baker's business, Taylor *v.* Green, 8 C. & P. 316; ditto of a potato salesman, Mummery *v.* Paul, 1 C. B. 315; 2 D. & L. 582. According to Dobell *v.* Stevens, *supra*, an action lies for a fraudulent misrepresentation, although there be a written agreement between the parties, not noticing such representation. See D'Aranda *v.* Houston, 6 C. & P. 511; Pearson *v.* Wheeler, R. & M. 303; Ormrod *v.* Huth, 14 M. & W. 664.

(*k*) See a form for fraudulently representing that land was unincumbered, whereby the plaintiff was induced to become the purchaser. Sikes *v.* Wild, 30 L. J. Q. B. 325.

he was entitled to dispose of the said lease and the said fixtures, induced the plaintiff to buy the defendant's unexpired interest in the said lease, and the said fixtures, for £——, which the plaintiff paid to the defendant; yet the said fixtures were not the property of the defendant, nor was he entitled to sell the same, as he well knew. And the plaintiff, after the expiration of the said lease, surrendered and yielded up the said messuage, and was forced to and did surrender, and yielded up the said fixtures to A. B., then being the ground landlord of the said messuage as and being fixtures belonging to the freehold, and which could not be lawfully removed, without receiving any value or compensation for the same, whereby the plaintiff lost the said £——.

6. *For selling to the Plaintiff a Policy of Insurance which the Defendant had fraudulently effected on the Life of another Person (his Debtor), and which the Insurance Office refused to pay.* (*l*)

See a form in the 2d edition of this work, p. 549.

REFERENCES TO OTHER FORMS, &c.

1. *By an Auctioneer against his Employer, upon his Implied Warranty that he had Authority to sell Goods put up to Auction, showing that the true Owner recovered their Value against the Plaintiff.*

Adamson *v.* Jarvis, 4 Bing. 66.

2. *For falsely pretending to be the Principal, Defendant being only Agent, and thereby inducing the Plaintiff to accept Bills.*

Dyster *v.* Battye, 4 B. & Ald. 448.

3. *Against an Architect for falsely pretending that he had A.'s Authority to order Stone for building a Church, and thereby inducing Plaintiff to deliver Stone that was used, and that Plaintiff sued A. and failed in his Action, and had to pay A.'s Costs.*

Randall *v.* Trimer, 18 C. B. 786; 25 L. J. C. P. 307.

4. *For accepting a Bill as Agent of the Drawee, without his Authority, per quod, Plaintiff sued the latter as Acceptor and failed in his Suit.*

Polhill *v.* Walter, 3 B. & Ad. 114.

5. *For falsely pretending to a Person who had sold Goods to Plaintiff that Defendant had a Lien thereon, and thereby inducing such Person to withhold the Goods from Plaintiff.*

Green *v.* Button, 2 Cr., M. & R. 707.

(*l*) Where a defendant ascertained that a party assured was dangerously ill, and concealing this from the plaintiff, bought a policy from him, on the representation that it was worth a small sum only, the sale was held fraudulent and void. Jones *v.* Keene, 2 M. & Rob. 348.

6. *For falsely representing that Defendant had received Goods of the Plaintiff which the Plaintiff had purchased, whereby the Plaintiff was induced to pay for the said Goods.*

Coleman *v.* Riches, 16 C. B. 104.

7. *For falsely pretending to have Authority from Plaintiff's Debtor, then in Custody, to make an Arrangement for him, and thereby inducing Plaintiff not to charge the Debtor in Execution.*

Hewitt *v.* Milton, 1 Cr., M. & R. 232.

8. *By a Sheriff against the Plaintiff in a former Suit for falsely representing that certain Goods belonged to the Defendant in such former Suit, and thereby induciug the Sheriff to seize them in Execution, whereby he was sued, &c. by the Real Owner, &c.*

Humphreys *v.* Pratt, 5 Bligh N. S. 154.

9. *By a Sheriff against an Attorney for falsely representing that a Prisoner was another Man (against whom the Sheriff had Detainers), and thereby inducing the Sheriff to detain him.*

Evans *v.* Collins, 5 Q. B. 804.

10. *By a Bailiff for falsely representing Goods as liable to Distress, showing Special Damage.*

Rawlings *v.* Bell, 1 C. B. 951.

11. *Against an Attorney for pretending that he had Authority to Distrain.*

Oxenham *v.* Smythe, 31 L. J. Ex. 110.

12. *For selling a falsely warranted Gun to A. for the Use of the Plaintiff, which afterwards burst and injured Plaintiff.*

Langridge *v.* Levy, 2 M. & W. 519; S. C. in error, 4 M. & W. 337; (*m*) [Langmeid *v.* Holliday, 6 Ex. 761.]

13. *For employing an Agent to sell a House, who falsely represented that it was Rate Free.*

Fuller *v.* Wilson, 3 Q. B. 58; and see Cornfoot *v.* Fowke, 6 M. & W. 358; Collins *v.* Evans, (*n*) 5 Q. B. 804.

(*m*) See this case commented on, Winterbottom *v.* Wright, 10 M. W. 109; [Alton *v.* Midland Ry. Co. 19 C. B. N. S. 213; Collis *v.* Selden, L. R. 3 C. P. 495.]

(*n*) Observed upon by Campbell C. J. in Wheelton *v.* Hardisty, 26 L. J. Q. B. 265, 275; [8 El. & Bl. 232].

14. *For falsely representing to A., who had agreed to purchase a Public House for Defendant, the Amounts of its Receipts, A. having afterwards, with the Knowledge of the Defendant, communicated such Representation to Plaintiff, who was thereby induced to become a Purchaser.*

Pilmore *v.* Hood, 4 Bing. N. C. 97; S. C. 7 Dowl. 136.

15. *Against the Director of a Bank for making a False Report as to its Solvency, and thereby inducing Plaintiff to purchase Shares in it.*

Taylor *v.* Ashton, 11 M. & W. 401; Gerhard *v.* Bates, 2 El. & Bl. 476; Scott *v.* Dixon, 29 L. J. Ex. 62, note.

16. *Against a Chairman of a Mining Company, who had falsely represented to the Committee of the Stock Exchange that two thirds of the Shares had been taken and paid upon, and thereby procured the Shares to be entered in the Official List, whereby the Plaintiff was induced to purchase Shares.*

Bagshaw *v.* Seymour, 32 L. T. 81; H. of L., June, 1855; Bedford *v.* Bagshaw, 4 H. & N. 538; 29 L. J. Ex. 59; Lane *v.* Bagshaw, 16 C. B. 576. For another form, Clarke *v.* Dickson, 28 L. J. C. P. 225.

17. *Against the Directors of a Registered Joint Stock Company, for falsely representing that they had Authority to accept Bills of Exchange.*

Eastwood *v.* Bain, 28 L. J. Ex. 74.

18. *For falsely representing the State of the Norwich Union Insurance Company, whereby Plaintiff was induced to insure in it.*

Pontifex *v.* Bignold, 3 M. & G. 63; S. C. 3 Scott N. R. 390.

19. *For falsely representing to Plaintiff that the Pattern of some Handkerchiefs, which he had sent to Defendant, was a registered one, and that Plaintiff would be proceeded against for the Piracy, and thereby inducing Damage to Plaintiff.*

Barley *v.* Walford, 9 Q. B. 197; 15 L. J. Q. B. 369.

20. *For falsely representing that a Claim of a Third Person on Government would be paid, and thereby inducing Plaintiff to advance Money to such Third Party.*

Turnley *v.* Macgregor, 6 M. & G. 46; S. C. 1 D. & L. 506.

21. *For False Representations as to the Character, &c. of Third Persons.*

Obs. — An action lies at common law for a *false* representation as to the character, credit, or circumstances of another person in order that he may obtain credit,

Obs. &c. provided the party making the representation *knew* it was untrue, and the party to whom it was made relied upon the representation, and sustained an *injury* by trusting the person recommended. Pasley *v.* Freeman, 3 T. R. 51; Smith's Leading Cases; Sheen *v.* Bumpstead, 32 L. J. Ex. 271; [1 H. & C. 358;] and the cases *supra;* [Tryon *v.* Whitmarsh, 1 Met. 1; Patten *v.* Gurney, 17 Mass. 182; Adams *v.* Anderson, 4 Harr. & J. 558; Medbury *v.* Watson, 6 Met. 246.] In such case it is not necessary to prove that the defendant was actuated by direct malice against the plaintiff, or anticipated any pecuniary advantage to himself. See Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105. As to the nature of the credit given, and injury resulting in consequence of the representation, in order to fix the party making the representation, see Corbett *v.* Brown, 1 Bing. 33; De Graves *v.* Smith, 2 Camp. 533; Hutchinson *v.* Bell. 1 Taunt. 558.

By 9 Geo. 4, c. 14, s. 6, "No action shall be brought to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the conduct, credit, trade, ability, or dealing of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in *writing signed by the party to be charged therewith.*" The memorandum need not be stamped by s. 8. [Statutes requiring a writing signed by the party to be charged, have been passed in several of the American states, Maine, Massachusetts, Vermont, Virginia, Michigan, Indiana, Kentucky, Missouri, and Alabama. Browne St. of Frauds, § 181 *et seq.* A representation by one member of a firm, as to the trustworthiness of the firm, is within the meaning of this act.] See Devaux *v.* Steinkeller, 6 Bing. N. C. 84; Clarke *v.* Dickson, 28 L. J. C. P. 225; 6 C. B. N. S. 453; Tatton *v.* Wade, 25 L. J. C. P. 243; 18 C. B. 371. [For other cases upon this subject, see Haslock *v.* Ferguson, 7 Ad. & E. 86; Tryon *v.* Whitmarsh, 1 Met. 1; Medbury *v.* Watson, 6 Met. 246; Norton *v.* Huxley, 13 Gray, 285, 287; Wells *v.* Prince, 15 Gray, 562; Kimball *v.* Comstock, 14 Gray, 508; McKinney *v.* Whiting, 8 Allen, 207; Mann *v.* Blanchard, 2 Allen, 386; Hearn *v.* Waterhouse, 39 Maine, 96.] A representation by the defendant that money might be safely lent to A. B. because the title-deeds of an estate, which belonged to A. B., were in the defendant's possession, and that nothing could be done without the knowledge of the defendant, and that plaintiff would be safe in making the loan, is within this statute. Swann *v.* Phillips, 8 Ad. & E. 457; Turnley, *v.* Macgregor, 6 M. & G. 46, where see a form of declaration. [So is a fraudulent representation, made concerning a corporation, in order to induce a person to give up property to a corporation and take its notes in payment, within the corresponding statute of Massachusetts, although the one who makes the representation is himself the treasurer of the corporation. McKinney *v.* Whiting, 8 Allen, 207. See Patten *v.* Gurney, 17 Mass. 182.] In Lyde *v.* Barnard, 1 M. & W. 101, the court were equally divided in opinion in regard to the true construction of the word *ability* in this enactment; two of the judges, Lord Abinger and Gurney B. thinking it applied to a misrepresentation of the extent of the incumbrances upon the interest of a third person in certain funds, proposed to be transferred by him to the plaintiff as a security for the payment of an annuity to be granted to him; and Parke and Alderson BB. being of opinion that it did not apply to such case. It is observable that the statute renders the signature of an agent insufficient. See Hyde *v.* Johnson, 2 Bing. N. C. 776. [An agent lawfully authorized may sign the writing in Massachusetts. Genl. Sts. c. 105, § 4.]

The declaration need not show that the representation was in writing. 1 Saund. 276, note (1). The statute is satisfied if a material part of the representation be in writing. Tatton *v.* Wade, *ubi sup.* [In Hunter *v.* Randall, 62 Maine, 423, 426, Peters J. said: The statute of Maine "does not require that the plaintiff must, in terms, declare upon the representation. The true test whether the cause of action, in whatever form alleged, comes within the statute is, whether the action can be sustained without proof of the representation. If such proof is essential to the action, the statute applies."]

22. *For inducing the Plaintiff to supply a Third Person with Goods, by a Fraudulent Misrepresentation of his Circumstances.*

Corbett *v.* Brown, 8 Bing. 33; Pasley *v.* Freeman, 3 T. R. 51; Eyre *v.* Dunsford, 1 East, 318; Haycraft *v.* Creasy, 2 East, 92.

[22*a*. *For falsely representing a Third Person to be a Man of Large Property, and able to pay his Debts.*

And the plaintiff says the defendant, to induce the plaintiff to sell property on credit to one S. C., falsely represented to the plaintiff in writing that said S. C. was a man possessed of a large property, and able to pay his debts (a copy of which writing is hereto annexed); and thereupon the plaintiff, believing said representation to be true, was induced to sell, and did sell to said S. C. the goods mentioned in the account hereto annexed, and gave the said S. C. credit for the price of said goods, being —— dollars, for the term of six months from the —— day of ——; and the said S. C. was not a man of property, nor able to pay his debts, but was insolvent, which the defendant then knew; and the plaintiff has not been paid for said goods, and is unable to obtain payment therefor of said S. C.]

23. *For inducing the Plaintiff to employ an Agent not trustworthy.*

Forster *v.* Charles, 6 Bing. 396.

24. *For fraudulently inducing the Plaintiff to pirate another's Trade-mark.*

Dixon *v.* Fawcus, 30 L. J. Q. B. 137; [3 El. & El. 537.]

HEDGES. See "Fences."

HIGHWAY.

Obs. — See *post*, "Way," "Negligence." A surveyor of highways appointed under 5 & 6 W. 4, c. 50, is not liable to an action for damages resulting from an accident caused by the non-repair of the highway. Young *v.* Davis, 31 L. J. Ex. 250; Mackinnon *v.* Penson, 9 Ex. 609; 23 L. J. M. C. 97; [Parson *v.* The Vestry of St. Matthew, L. R. 3 C. P. 56;] see Every *v.* Smith, 26 L. J. Ex. 344; Highway Acts, 5 & 6 W. 4, c. 50; 25 & 26 Vict. c. 61; 27 & 28 Vict. c. 101; [Hubbard J. in White *v.* Phillipston, 10 Met. 108; Elder *v.* Bemis, 2 Met. 599; Benjamin *v.* Wheeler, 8 Gray, 409.]

HUNDRED.

Obs. — By 7 & 8 Geo. 4, c. 31, s. 2, the hundred are liable to make full compensation for damage done by rioters in certain cases, by action if the damage exceeds £30. See s. 8. But every such action must be brought within three calendar months. S. 1. See form, &c. 2 Chit. Pl. 635, 7th ed.; Lowe *v.* Broxtowe, 3 B. & Ad. 550; Newcastle *v.* Broxtowe, 4 B. & Ad. 273; Tilladam, *v.* Bristol, 2 Ad. & E. 389; Rex *v.* Bateman, 1 N. & M. 718; Birley *v.* Sal-

Obs. ford, 11 M. & W. 391; 13 L. J. Ex. 361. The writ may be served on the constable. 2 W. 4, c. 39, s. 13.

HUNTING.

Obs. — See *post*, Pleas, "Trespass to Land;" Com. Dig. Chase; Geush *v.* Mynns, Cro. Jac. 321; see a form, 2 Chit. Pl. 665, 7th ed. see *post*, "Shooting."

HUSBAND AND WIFE.

Obs. — A husband is liable for the torts of his wife during marriage, as also for all causes of action against her which accrued before the marriage. And this is so, even though they may be permanently living apart. Head *v.* Briscoe, 6 C. & P. 484. On the other hand, he has a right of action against any one committing a wrong to her, or to her personal or real property during or before coverture. Milner *v.* Milnes, 3 T. R. 627; Ayling *v.* Whicher, 6 Ad. & E. 259. See Carne *v.* Brice, 7 M. & W. 183; Bird *v.* Peagrum, 13 C. B. 649; Dengate *v.* Gardner, 4 M. & W. 6; [1 Chitty Pl. 82–85.]

The action should be brought in the names of husband and wife; but if the wife sues alone, the non-joinder of the husband must be pleaded in abatement, Milner *v.* Milnes, *supra;* Dalton *v.* The Midland Ry. Co. 13 C. B. 474. And the husband suing with his wife in tort may add claims in his own right. Common Law Procedure Act, 1852, s. 40.

A husband may be jointly sued in trespass for the joint act of himself and wife. Vine *v.* Saunders, 4 Bing N. C. 96; Keyworth *v.* Hill, 3 B. & Ald. 685.

As to the frauds of the wife, see Adelphi Loan Association *v.* Fairhurst, 9 Ex. 422, 23 L. J. Ex. 163; Wrignt *v.* Leonard, 30 L. J. C. P. 365; [11 C. B. 258, and note *ad finem;* Keen *v.* Coleman, 39 Penn. St. 299.]

After the death of the wife, the husband is discharged from all liability for the tortious acts of the wife. Vine *v.* Saunders, 4 Bing. N. C. 162.

After a divorce *à vinculo matrimonii*, a man is not liable to be sued jointly with his former wife for a tort committed by her during the coverture. Capel *v.* Powell, 34 L. J. C. P. 168; [17 C. B. N. S. 743.]

Where the husband is bankrupt his assignees must join with the wife in suing in respect of causes of action, such as a conversion of the wife's goods before the marriage, and the husband must not join. Richbell *v.* Alexander, 10 C. B. N. S. 324; 30 L. J. C. P. 268.

By 20 & 21 Vict. c. 85, s. 59, the action for criminal conversation is abolished.

[By statute in Massachusetts, a married woman may sue and be sued in actions of tort in the same manner as if she were sole, and her husband shall not be liable to pay the judgment against her for damages or costs in any such suit, but the same may be collected out of her property, real or personal; and all sums recovered by her in any such suit, shall be her sole and separate property. St. 1871, c. 312; St. 1874, c. 184, § 3. See 1 Chitty Pl. 82, note (*g*), 83–85, and notes; Michigan Central R. R. Co. *v.* Coleman, 28 Mich. 440, 444, and cases there cited; Berger *v.* Jacobs, 21 Mich. 215; Emerson *v.* Clayton, 32 Ill. 493; Berger *v.* Belsley, 45 Ill. 72.]

See *post*, "Trespass to the Person and to Property."

For enticing away Plaintiff's Wife.

Winsmore *v.* Greenbank, Willes, 577.

IMPRISONMENT. See "Trespass to the Person."

INDEMNITY. See "Landlord and Tenant," *post*, 537.

INFANT.

OBS. — See *ante*, 14, 406; and *post*, Pleas, "Infancy."

INJUNCTION.

OBS. — By the common law procedure act, 1852 (15 & 16 Vict. c. 76), after reciting, that it is expedient that injunctions and orders to stay proceedings should be rendered more effectual, it is enacted as follows:

Section 226. "In case any action, suit, or proceeding in any court of law or equity shall be commenced, sued or prosecuted, in disobedience of and contrary to any writ of injunction, rule, or order of either of the superior courts of law or equity at Westminster, or of any judge thereof, in any other court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other court or judge thereof of such writ of injunction, rule, or order, the said other court (in which such action, suit, or proceeding may be commenced, prosecuted, or taken), or any judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order; and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes: provided always, that nothing herein contained shall be held to diminish, alter, abridge, or vary the liability of any person or persons commencing, suing, or prosecuting any such action, suit, or proceeding contrary to any injunction, rule, or order of either of the courts aforesaid, to any attachment, punishment, or other proceeding to which any such person or persons are, may, or shall be liable in cases of contempt of either of the courts aforesaid, in regard to the commencing, suing, or prosecuting such action, suit, or proceeding."

And by the common law procedure act, 1854 (17 & 18 Vict. c. 125), by section 79, "In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

Section 80. "The writ of summons in such action shall be in the same form as the writ of summons in any personal action, but on every such writ and copy thereof there shall be indorsed a notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction." For form of indorsement on writ under this section, see R. M. V. 1854, Sch. 36.

Section 81. "The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge."

Section 82. "It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge: provided always, that any order for a writ of injunction made by a judge, or any

OBS. writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order."

And by the common law procedure act, 1860 (23 & 24 Vict. c. 126), it is enacted by s. 32: "In all cases in which a writ of mandamus, or of injunction, is issued under the provisions of 'The Common Law Procedure Act, 1854,' such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable."

Section 33. Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a *mandamus*, or by writ of sequestration against their property and effects, to be issued in such form, and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the court of chancery.

By 15 & 16 Vict. c. 83, s. 42, the courts of common law may grant injunctions for infringing patents.

It appears that the above powers will only be put in force to enforce legal rights. And under s. 82 of the common law procedure act, 1854, the court will grant only a rule *nisi*, in the first instance, for an injunction against a defendant in an action for infringing a patent; and on cause being shown, it will give such directions as would be given by a court of equity. Gittens *v.* Symes, 15 C. B. 362; 24 L. J. C. P. 48.

When a declaration, claiming a writ of injunction, did not disclose facts showing clearly that there could not be an injunction, the court refused to allow the defendant to demur to so much of the declaration as claimed the writ. Bilke *v.* London, Chatham & Dover Ry. Co. 33 L. J. Ex. 206. So a defendant cannot plead to so much of a declaration as claims a writ of injunction, the claim being in the nature of a notice only that the plaintiff intends subsequently to ask for the writ. Booth *v.* Taylor, 35 L. J. Ex. 56; [Booth *v.* Taylor, L. R. 1 Ex. 51.]

When a writ of injunction has been granted by a court of common law to restrain the defendant from committing nuisances for which the action has been brought, such injunction continues until it has been got rid of by the defendant. De la Rue *v.* Fortescue, 2 H. & N. 324; 26 L. J. Ex. 339. And where a court of equity has issued an order for an injunction to restrain an action, a court of common law will enforce such order by staying proceedings under the common law procedure act, 1852, s. 226, although no writ of injunction has actually been issued. Cobbett *v.* Ludlam, 11 Ex. 446; 25 L. J. Ex. 25. In Mayall *v.* Higbey, 31 L. J. Ex. 329, the court granted an injunction to restrain the making and selling of photographic copies.

Under what circumstances an injunction will be granted for obstruction to light, see Clarke *v.* Clark, 35 L. J. Ch. 151; [L. R. 1 Ch. Ap. 16;] Yates *v.* Jack, 35 L. J. Ch. 539; [L. R. 1 Ch. Ap. 295;] Dent *v.* Auction Mart Company, 35 L. J. Ch. 555; [L. R. 2 Eq. 245;] R. *v.* Darlington, 35 L. J. Q. B. 45; [2 Dan. Ch. Pr. (4th Am. ed.) 1638, and cases cited in note (2); Jackson *v.* Duke of Newcastle, 3 De G., J. & S. 275, and cases in note (1).]

A court of common law cannot grant an injunction in an action of ejectment. Baylis *v.* Legros, 2 C. B. N. S. 316; 26 L. J. C. P. 176. When, by the terms of a contract, a sum by way of liquidated damages is made payable in case of breach, no injunction will be granted. Carnes *v.* Nisbett, 30 L. J. Ex. 348; 31 L. J. Ex. 273.

Where a plaintiff in an action for a nuisance obtained an order for an injunction *ex parte* under s. 82 of common law procedure act, 1854, which was silent as to costs; and a writ was also issued under s. 32 of common law procedure act, 1860, for payment of the costs, the plaintiff was not allowed to proceed to recover the costs of the injunction before the trial. Grindley *v.* Booth, 34 L. J. Ex. 135.

Claim of Writ of Injunction.

At the end of the declaration, after the claim of damages add the claim of the writ of injunction, according to the facts of the case.] And the plaintiff also claims a writ of injunction to restrain the defendant from practising as a surgeon within —— miles of —— without the consent in writing of the plaintiff, contrary to the above mentioned agreement. (*o*)

INNKEEPER.

OBS. — An inn is a house where the traveller is furnished with everything he has occasion for while on his way. Thompson *v.* Lacy, 3 B. & Ald. 283. Thus, a coffee-house, where beds and provisions are furnished (Ib.; Jones *v.* Osborn, 2 Chit. R. 484), is held to be an inn. "A person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is no way material whether he have any sign before his door or not." Bac. Abr. Inns and Innkeepers, B. But if the landlord only professes to supply refreshment, and not beds, his house is not a common inn. Doe *v.* Laming, 4 Cam. 77. See Calye's case, 8 Coke, 32 : 1 Smith's L. C. [One who entertains strangers only occasionally is not thereby shown to be an innkeeper, although he receives a compensation. Lyon *v.* Smith, 1 Morris (Iowa), 184; State *v.* Matthews, 2 Dev. & Bat. 424. And where a person becomes a mere boarder at an inn, the innkeeper's peculiar liability either does not attach or ceases. Manning *v.* Wells, 9 Humph. 746.]

An innkeeper is bound by the custom of the realm to receive travellers and guests at all hours and times if they tender and are ready to pay the customary charge, are in a fit and proper condition as to conduct and health, and if there is accommodation for them. And if he refuse to admit them, he is liable to an action. Fell *v.* Knight, 8 M. & W. 269; 10 L. J. Ex. 277; Hawthorn *v.* Hammond, 1 C. & K. 404; or to an indictment. R. *v.* Ivens, 7 C. & P. 219; per Holroyd J. Ansell *v.* Waterhouse, 6 M. & S. 285. But a guest has no right to select a particular room, or to occupy a bedchamber as a sitting room, so long as the innkeeper provides him with a proper room for that purpose. Fell *v.* Knight 8 M. & W. 269; 10 L. J. Ex. 277. [An innkeeper would not be bound to entertain an agent of a rival inn, who sought to decoy away his customers. Story J. in Jencks *v.* Coleman, 2 Sumner, 221. And if it appear to be necessary for the protection of himself or his guests, the innkeeper may prohibit a person from entering his inn, until the ground of apprehension be removed; and may even treat such a person as a trespasser if he enter after such prohibition. Markham *v.* Brown, 8 N. H. 523.]

The liability of innkeepers has been greatly modified by 26 & 27 Vict. c. 41. Section 1 enacts, that "No innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of £30, except in the following cases (that is to say):

1. "Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ:
2. "Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:

"Provided always, that, in the case of such deposit, it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same."

(*o*) Carnes *v.* Nisbett, 31 L. J. Ex. 273; [7 H. & N. 158, 778.] For form of writ of injunction in an action for infringement of a patent or copyright, see *post*, "Patents."

Obs. By s. 2, the innkeeper is obliged to receive the property of guests for safe custody, or shall not be entitled to the benefits of the act in respect of such goods or property.

By s. 3, "Every innkeeper shall cause at least one copy of the first section of this act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited."

By s. 4, "'Inn' shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the word 'innkeeper' shall mean the keeper of any such place."

Subject to the provisions of this act, an innkeeper is bound to use the greatest diligence in regard to the goods and chattels of his guest; Calye's case, 8 Co. R. 32; 1 Smith's L. C.; and he is liable for the frauds and defaults of his servants and his guests. Ib.; Kent *v.* Shuckard, 2 B. & Ad. 803. In short, he appears to be *primâ facie* liable for any loss not occasioned by the act of God or the queen's enemies. Richmond *v.* Smith, 8 B. & C. 11; [Sibley *v.* Aldrich, 33 N. H. 553.] But the innholder shall not be charged unless there be a default in him or his servants in the well and safe keeping or custody of his guest's goods and chattels within his common inn. Calye's case, 8 Co. R. 32. [And so it was held in Cutter *v.* Bonney, Michigan, 14 Am. Law Reg. N. S. 445; and in Merritt *v.* Claghorn, 23 Vt. 177; Metcalf *v.* Hess. 14 Ill. 129. But in Sibley *v.* Aldrich, 33 N. H. 553, it was maintained by Perley C. J. who gave the opinion, that the innkeeper cannot discharge himself from liability by showing that the damage did not happen through his actual negligence or that of his servants. And there are many other cases which bear in the same direction, some of which are cited in Sibley *v.* Aldrich, *supra*, and see, also, Pinkerton *v.* Woodward, 33 Cal. 557; Hulett *v.* Swift, 33 N. Y. 571; Wilkins *v.* Earle, 44 N. Y. 172; Norcross *v.* Norcross, 53 Maine, 163; Shaw *v.* Berry, 31 Maine, 478; Fuller *v.* Coats, 18 Ohio St. 343; Mason *v.* Thompson, 9 Pick. 280; Piper *v.* Manny, 21 Wend. 282; Grinnell *v.* Cook, 3 Hill (N. Y.), 485; Manning *v.* Wells, 9 Humph. 746; Fowler *v.* Dorlon, 24 Barb. 384; Thickstun *v.* Howard, 8 Blackf. 535; Chamberlain *v.* Masterton, 26 Ala. 371; 2 Kent. 592; Day *v.* Bather, 2 H. & C. 14; Oppenheim *v.* White Line Hotel Co. L. R. 6 C. P. 515.] "The loss of the goods while at an inn will be presumptive evidence of negligence on the part of the innkeeper or of his domestics; [Cutter *v.* Bonney, Michigan, 14 Am. Law Reg. N. S. 445; Merritt *v.* Claghorn, 23 Vt. 177; Shaw *v.* Berry, 31 Maine, 478; Johnson *v.* Richardson, 17 Ill. 302; McDaniels *v.* Robinson, 26 Vt. 316; Read *v.* Amidon, 41 Vt. 15, 18; Kelsey *v.* Berry, 42 Ill. 469; Laird *v.* Eichold, 10 Ind. 212;] but he may, if he can, repel the presumption and show that there has been no negligence whatever, or that the loss is attributable to the proper negligence of his guest, or that it has been occasioned by inevitable casualty or superior force." Story on Bailments, c. 6, s. 470; Dawson *v.* Chamney, 5 Q. B. 164; 13 L. J. Q. B. 33; [but see Sibley *v.* Aldrich, 33 N. H. 553.] And he is liable even for the money of his guest. Kent *v.* Shuckard, 2 B. & Ad. 803; Doorman *v.* Jenkins, 2 Ad. & E. 256. [There is no distinction in this respect between goods and money. Fletcher J. in Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417, 427; Eppes *v.* Hinds, 27 Miss. 657; Quinton *v.* Courtney, 1 Hay. 40; Sneider *v.* Geiss, 1 Yates, 35. The innkeeper is liable for the horse, carriage, and harness of his guest. Mason *v.* Thompson, 9 Pick. 280; Piper *v.* Manny, 21 Wend. 282; Clute *v.* Wiggins, 14 John. 175. His liability extends to all the money and goods of the guest that are placed within his control. Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; 2 Kent, 593; McDonald *v.* Edgerton, 5 Barb. 560; Taylor *v.* Monnot, 4 Duer (N. Y.), 116; Weisenger *v.* Taylor, 1 Bush (Ky.), 275; Pinkerton *v.* Woodward, 33 Cal. 557: Sasseen *v.* Clark, 37 Geo. 342; Treiber *v.* Burrows, 27 Md. 130; Dickinson *v.* Winchester, 4 Cush. 114.] The innkeeper is not liable if the goods be stolen by the guest's own servant or companion. Calye's case, *supra;* Burgess *v.* Clements, 4 M. & S. 306, 310; or if the guest himself is guilty of negligence which conduces to the loss. Morgan *v.* Ravey, [6 H. & N. 265;] 30 L. J. Ex. 131; Cashill *v.* Wright, 6 El. & Bl. 891; Armistead

Obs. *v.* Wilde, 17 Q. B. 261. [And so it was held in Cutter *v.* Bonney, Michigan, 14 Am. Law Reg. N. S. 445, that the innkeeper is not liable where the loss happens by an accidental fire or other casualty coming from without, or of such a nature as to negative his negligence. The law casts no duty on a lodging-house keeper to take care of the goods of his lodgers. Holder *v.* Soulby, 8 C. B. N. S. 254.]

An innkeeper has the right of lien on the luggage, horses, or carriages of his guest for a debt incurred while they are in his custody, but not for a debt accrued prior to that time. Jones *v.* Thurloe, 8 Mod. 173. And his lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily travel with. Snead *v.* Watkins, 1 C. B. N. S. 267; Turrill *v.* Crawley, 13 Q. B. 197; and see Broadwood *v.* Granara, 10 Ex. 417. This right of lien depends upon the fact that the articles detained came into the defendant's possession in the character of innkeeper, as belonging to a guest at his inn; so that it is always important to ascertain whether the owner of the goods occupies the position of a guest. Smith *v.* Dearlove, 6 C. B. 132; 17 L. J. C. P. 219; Binns *v.* Piggott, 9 C. & P. 208. The innkeeper has no right to detain the person of his guest. Sunbolf *v.* Alford, 3 M. & W. 248; Wolf *v.* Summers, 4 Camp. 631. If the lien is once parted with, it is gone forever. Jones *v.* Peale, 1 Str. 557; Jones *v.* Thurloe, 8 Mod. 173. He cannot sell for the amount due except by the custom of London and Exeter. Ib.; Moss *v.* Townsend, 3 Bulst. 271; Robinson *v.* Walter, Ib. 269. See per Lord Ellenborough, Chase *v.* Westmore, 5 M. & W. 185.

To render the innkeeper liable the goods must be those of a guest. Bac. Abr. Inns and Innkeepers, C.; York *v.* Grindstone, 1 Salk. 388; Jelly *v.* Clarke, Cro. Jac. 188; Bennett *v.* Mellor, 5 T. R. 273; [Towson *v.* Havre de Grace Bank, 6 Harr. & J. 47. The goods, however, are for this purpose sufficiently those of a guest, and will be protected and the innkeeper liable, if they are at the inn in possession of a guest, who is a servant or friend of the owner; and one who has hired the goods is a servant within this rule. Mason *v.* Thompson, 9 Pick. 280; Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; Towson *v.* Havre de Grace Bank, 6 Harr. & J. 47, 83; Dickinson *v.* Winchester, 4 Cush. 114, 121.] But an innkeeper is not liable for goods lost out of a private room in the inn chosen by the guest for the purpose of exhibiting them to his customers, the use of which was granted by the innkeeper, who at the same time gave him a key of the room to lock the door, which the guest neglected to do. Burgess *v.* Clements, 4 M. & S. 306; Farnwork *v.* Packwood, 1 Stark. 249, 251, note. See Richmond *v.* Smith, 8 B. & C. 9; Armistead *v.* Wilde, 17 Q. B. 261. It is said that if a person hire a room in an inn for a term, he is no guest, but a lodger, and therefore the innkeeper is not liable as such. Walbroke *v.* Griffith, Moore, 877; Holder *v.* Soulby, 29 L. J. C. P. 246; [8 C. B. N. S. 254. See per Lord Campbell C. J. and Coleridge J. in Dansey *v.* Richardson, 3 El. & Bl. 144. As to who are to be considered guests, see Chamberlain *v.* Masterton, 26 Ala. 371; McDaniels *v.* Robinson, 26 Vt. 316; Peet *v.* McGraw, 25 Wend. 653; Grinnell *v.* Cook, 3 Hill (N. Y.), 485; Thickstun *v.* Howard, 8 Blackf. 535; McDonald *v.* Edgerton, 5 Barb. 560. A person is none the less a guest, because he makes a particular contract respecting the price of his board and lodging. Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; Pinkerton *v.* Woodward, 33 Cal. 557.] See "Lodging-house Keeper," *post.*

An action will lie against the executors of an innkeeper for loss of the goods of the guest, if brought within the time limited by 3 & 4 W. 4, c. 42, s. 2. Morgan *v.* Ravey, *supra.*

1. *Against Defendant as an Innkeeper for not receiving the Plaintiff as a Guest.* (*p*)

Hawthorne *v.* Hammond, 1 C. & K. 404.

(*p*) See form for turning a guest out of an inn, and pleas justifying, Fell *v.* Knight, 8 M. & W. 269; L. J. Ex. 277.

2. *By a Guest against an Innkeeper for the Loss of his Goods.* (*q*)

That the defendant was an innkeeper and kept a common inn for the accommodation and reception of travellers, and received the plaintiff, being a traveller, into the said inn as a guest therein, together with a trunk of the plaintiff's containing his goods; yet the defendant, while the plaintiff was a guest therein, with his said trunk and goods, did not keep the said trunk and goods safely and securely, but he and his servants so negligently conducted themselves in that behalf, that by reason thereof the said trunk and goods were wrongfully taken and carried away by some person to the plaintiff unknown, and are wholly lost to the plaintiff.

JUDGE AND JUSTICES OF THE PEACE.

Obs. — "By the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet, sitting as a judge in a court of justice subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded." *Per cur.* Mostyn *v.* Fabrigas, Cowp. 172; 1 Smith's L. Cas. See Milward *v.* Thatcher, 2 T. R. 87. Thus an action will not lie against a judge for what he does *judicially*, though erroneously. Hammond *v.* Howell, 1 Mod. 184, 2d vol. 219; Dicas *v.* Lord Brougham, 6 C. & P. 249; [1 Chitty Pl. 203. An action does not lie against a judge of one of the superior courts of England for a judicial act, though it be alleged to have been done maliciously and corruptly. Fray *v.* Blackburn, 3 B. & S. 576; Kemp *v.* Neville, 10 C. B. N. S. 523; Pratt *v.* Gardner, 2 Cush. 63, 69, 70; Yates *v.* Lansing, 5 John. 282; S. C. 9 John. 395.] So no action will lie against a coroner for turning a person out of a room where he is about to hold an inquisition. Garnett *v.* Ferrand, 6 B. & C. 611. "The general rule of law as to actions against persons having a limited authority (as commissioners in bankruptcy) is plain and clear. If they do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action." *Per cur.* Doswell *v.* Impey, 1 B. & C. 169. See Kemp *v.* Neville, 10 C. B. N. S. 532; 31 L. J. C. P. 158. [1 Chitty Pl. 203.]

But a justice is answerable for an act done by his command where he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends; Houlden *v.* Smith, 14 Q. B. 841; or if he knows or has the means of knowing he was exceeding his jurisdiction. Calder *v.* Halket, 3 M. P. C. C. 28; [1 Chitty Pl. 203, 206, and note (*b*).]

As to who are judicial officers, see Holroyd *v.* Breare, 2 B. & Ald. 472; Tanno *v.* Morris, 2 Cr., M. & R. 298; Kemp *v.* Neville, *ubi supra.*

Justice of the Peace. — By 11 & 12 Vict. c. 44, s. 1, "Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action upon the general issue being pleaded, the plaintiff shall fail to

(*q*) See a form against the executor of an innkeeper, Morgan *v.* Ravey, 6 H. & N. 265; 30 L. J. Ex. 131; and for injuring a guest's horse, Dawson *v.* Chamney, 5 Q. B. 164; 13 L. J. Q. B. 33. See Day *v.* Barber, [2 H. & C. 14;] 32 L. J. Ex. 171.

Obs. prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

S. 2. "That for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause: provided nevertheless that no such action shall be brought for anything done under such conviction or order, until after such conviction shall have been quashed, either upon appeal or upon application to her majesty's court of queen's bench, nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid, or if such last mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless, if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for anything done under such warrant."

By s. 6, after a conviction or order has been confirmed on appeal, no action can be brought for anything done under a warrant upon it.

By s. 8, the action must be brought within six months next after the thing complained of shall have been committed, and by s. 9, not until after a month's notice of intention to bring such action. See *post*, "Notice of Action."

Ss. 1 & 2 are to be read together, and the latter only applies to a case where the act for which the action is brought is of itself an excess of jurisdiction. Barton *v.* Bucknell, 13 Q. B. 393; 20 L. J. M. C. 1. And it would appear that the words "exceeding his jurisdiction," in s. 2, means assuming to do something which the act under which he is proceeding could by no possibility justify. Per Jervis C. J. Ratt *v.* Parkinson, 20 L. J. M. C. 208–212. See Kendal *v.* Wilkinson, 24 L. J. M. C. 89; Pedley *v.* Davis, 10 C. B. N. S. 492; 30 L. J. C. P. 374; Pease *v.* Chaytor, 1 B. & S. 658; 31 L. J. M. C. 1; 33 L. J. M. C. 121. And where the justice has committed a mere irregularity, and not an excess of jurisdiction, an action will not lie against him. Bote *v.* Ackroyd, 28 L. J. M. C. 207; [1 Chitty Pl. 206.] See form for a malicious conviction, Gelan *v.* Hall, 27 L. J. M. C. 78; 2 H. & N. 379. Forms, Taylor *v.* Nesfield, 23 L. J. M. C. 169; 3 El. & Bl. 72; Pease *v.* Chaytor, [1 B. & S. 658;] 31 L. J. M. C. 1; 32 L. J. M. C. 121.

LANDLORD AND TENANT.

See "Distresses," "Reversion."

Obs. — An action lies by a landlord against his tenant, or a stranger, for voluntary waste committed during his tenancy, or by a party entitled to the *immediate reversion* against the tenant for life, &c.; see 1 Saund. 323 *b*; 2 Saund. 255 *b*; provided the plaintiff have a vested interest at the time of the committing of the waste. Bacon *v.* Smith, 1 Q. B. 346; [1 Chitty Pl. 157 *et seq.*] "Waste is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the dishonor of him who hath the remainder or reversion. It is either voluntary, which is a crime of commission, as by pulling down a house, or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste." 2 Bl. Ch. 18, s. 6.

Tenants for life or for years are liable for waste; 52 H. 3, c. 23, and 6 Ed. 1, c.

Obs. 5; Yellowby *v.* Gower, 11 Ex. 294; 24 L. J. Ex. 299; but a tenant at will or from year to year is not liable for *permissive* waste; Harnett *v.* Maitland, 16 M. & W. 257; 16 L. J. Ex. 134; Gibson *v.* Wells, 1 Nev. R. 290; Toriano *v.* Young, 6 C. & P. 8; Martin *v.* Gillham, 7 Ad. & E. 542; nor a tenant for a term not under a covenant to repair. Herne *v.* Benbow, 4 Taunt. 764. An action for *commissive* or *voluntary* waste lies against a tenant, although he hold under a lease with a covenant to repair; Kenlyside *v.* Thornton, 2 W. Bl. 1111; 2 Saund. 252 *a*, note (*b*); see Jones *v.* Hill, 7 Taunt. 392; Burnett *v.* Lynch, 5 B. & C. 603; or commit waste while holding over after notice to quit. Burchell *v.* Hornsby, 1 Camp. 360. One tenant in common cannot maintain this action against another tenant in common who is not in possession. Martyn *v.* Knowllys, 8 T. R. 45. See Fennings *v.* Lord Grenville, 1 Taunt. 241. In the instance of a tenant *neglecting* to keep the premises in repair, or to cultivate according to good husbandry, an action on contract would appear to be the proper remedy, see forms *ante*, 187–190; but the mortgagee of a lessee for years may maintain a count in tort against the assignee of the tenant. Hitchman *v.* Walton, 4 M. & W. 409. As to what is waste, see Phillips *v.* Smith, 14 M. & W. 589. A tenant who plants fruit-trees for sale, may remove them if not too aged to be transplanted. Wardell *v.* Usher, 3 Scott N. R. 508.

The venue is local.

1. *By a Landlord for Voluntary Waste, by injuring the Premises, and taking down and removing the Plaintiff's Fixtures.* (*r*)

For that the defendant was tenant to the plaintiff (*s*) of a dwelling-house, and the defendant during the said tenancy wrongfully damaged parts of the said dwelling-house, and wrongfully pulled down the fixtures affixed thereto, (*t*) and disposed of the same to his own use, and at the termination of the said tenancy delivered the said dwelling-house to the plaintiff greatly damaged. (*u*)

[1*a*. *Count for Permissive Waste in a Dwelling-house.*

That the defendant was tenant to the plaintiff of a dwelling-house for the term of —— years from the —— day of ——, A. D. ——, and during the said

(*r*) See other forms, Martyr *v.* Bradley, 9 Bing. 26; Taylor *v.* Stendall, 3 D. & L. 161. Case for inclosing waste land, part of the premises demised. Queen's College, Oxford, *v.* Hallett, 14 East, 489. For opening a door in a wall demised, and as to form of declaration, &c. Young *v.* Spencer, 10 B. & C. 145. By an incoming against an outgoing tenant on the custom of the country for not leaving a third of the offgoing crop, &c. Boraston *v.* Green, 16 East, 71. If by the express covenant in the lease, all future fixtures, &c. set up on the premises, are to be delivered up at the end of the term to the landlord, see West *v.* Blakeway, 2 M. & G. 729; this will override any right which the tenant would otherwise have to remove them, on the ground of their being trade fixtures or otherwise, see Chit. Contr. Ind. "Fixtures;" Naylor *v.* Collinge, 1 Taunt. 19; Mostyn *v.* Bradley, 9 Bing. 24; Ex parte Bentley, 2 Mont., Dea. & De Gex, 591; and an action will lie against all concerned in the removal. See Walmsley *v.* Milne, 7 C. B. N. S. 115; Hitchman *v.* Walton, 4 M. & W. 409.

(*s*) No variance, though *cestui que* trust actually let, but plaintiff was his trustee with the legal title. Valance *v.* Savage, 7 Bing. 595. Mortgagor tenant to mortgagee. Partridge *v.* Bere, 5 B. & Ald. 604. It is not a material variance to allege, contrary to the fact, that the tenancy and reversion still continue. Vowles *v.* Miller, 3 Taunt. 137.

(*t*) The nature or kind of waste should be stated according to the facts, see 2 Saund. 252 *d*, *e*, *f*; forms in trespass, *post*, "Trespass;" and if any *permissive* waste be intended to be charged, the declaration should contain words accordingly; Martin *v.* Gilham, 7 Ad. & E. 546; for cutting trees, 2 Chit. Pl. 7th ed. 595. Where trees are excepted from the demise, *trespass*, and not case, for cutting them, is the proper form of action for the landlord. Goodright *v.* Vivian, 8 East, 190; 1 Saund. 322, note (5); Ward *v.* Andrews, 2 Chit. R. 636; 2 Camp. 491. Whether the trees be excepted or not, the landlord may in general maintain trespass or trover against a person who removes them after severance. Ib. When otherwise, see Channon *v.* Patch, 5 B. & C. 897.

(*u*) Omit this last allegation, if the tenancy was not at an end when the action was brought, or the action be against a stranger, not against the tenant.

tenancy wrongfully permitted waste to the said dwelling-house, by suffering the same to become and be ruinous and in decay, in the doors, windows, and roofs of the said dwelling-house, for the want of needful and necessary repairing thereof.

See Gibson *v.* Wells, 1 B. & P. N. R. 290; Hartnell *v.* Maitland, 16 M. & W. 257.]

2. *Landlord against a Tenant for not taking care of Furniture, &c.*

See *ante*, "Hire," p. 144, and "Bailees," p. 484, where will be found forms which may be easily adapted.

3. *Tenant against Landlord for not indemnifying him against a Distress for Ground Rent.*

See form, &c. Hancock *v.* Caffin, 8 Bing. 358. Tort seems to be the appropriate form of action. See Burnett *v.* Lynch, 5 B. & C. 609. The common count in contract for money paid for defendant at his request would lie, where the plaintiff has paid the arrears to prevent a sale, otherwise not; and to recover damages for a sale under a distress, &c. or expenses, the declaration must be special. Exall *v.* Partridge, 8 T. R. 308; Moore *v.* Pyrke, 11 East, 52.

4. *By the Assignor against the Assignee of a Lease for not indemnifying him against the Breaches of Covenant after the Assignment.*

See form, &c. Burnett *v.* Lynch, 5 B. & C. 589. An action on contract also would, it seems, be sustainable. An action of covenant does not lie, where the assignee does not execute the assignment, or it contains no covenant by him to pay the rent and perform the covenants; and the usual words of assignments, "subject to the rent," &c. do not constitute a covenant by the assignee. See Wolveridge *v.* Steward, 1 Cr. & M. 644; *ante*, 195, note (*y*).

5. *By a Tenant, not bound to repair, against his Landlord, who had commenced repairing, for not doing Repairs in a Proper Manner.*

For that the plaintiff was tenant to the defendant of a certain messuage for one year, and so on from year to year, for so long a time as the plaintiff and defendant should respectively please; and the said messuage was dilapidated and out of repair, and in part not fit for occupation; and the defendant entered upon and in part performed certain repairs necessary and proper to be done, and which the plaintiff was not bound or under any legal or just obligation to do or perform; yet the defendant did not use due care, skill, or diligence in performing or completing the said repairs, but wrongfully neglected and refused so to do, whereby the said messuage was greatly and unnecessarily injured and damaged, and the said repairs were not proceeded with, or performed within a reasonable time, and thereby the plaintiff was put to great loss in regard to his use, occupation, and enjoyment of the said messuage, and was deprived of the use of a great part thereof for a long time, and incurred great expense in repairing the said messuage.

6. *By a Lodger against his Landlord for obstructing him in the Use of the Bell, &c.*

Underwood *v.* Burrows, 7 C. & P. 26.

LIBEL AND SLANDER.

Obs. — See, in general, Com. Dig. Action on the Case for Defamation; Bac. Abr. Libels; Vin. Abr. Slander; Cooke on Defamation, and Holt on Libel; Starkie on Libel and Slander. [For definition of libel, see Townshend in Slander, pp. 35, 45, 68, and 237; Christiancy J. in Weiss *v.* Whittemore, 28 Mich. 371. A corporation aggregate may sue or be sued for a libel. *Ante*, 502; Aldrich *v.* Press Printing Co. 9 Minn. 133. As to the liability of publishers of newspapers, see Commonwealth *v.* Morgan, 107 Mass. 199; Snyder *v.* Fulton, 34 Md. 128; Buckley *v.* Knapp, 48 Missou. 152; Fry *v.* Bennett, 28 N. Y. 324; Smart *v.* Blanchard, 42 N. H. 137.]

As to costs, see 3 & 4 Vict. c. 24; *ante*, 462. A judge may certify to give the plaintiff his costs when the damages are under 40*s*. Foster *v.* Painter, 8 M. & W. 395. The new county courts have no jurisdiction in these actions. *Ante*, 462, Obs.

Verbal slander is actionable, *without* special damage.

1. When it contains an imputation of some crime liable to temporal punishment; Fleming *v.* Power, 10 M. & W. 564; Alfred *v.* Farlow, 8 Q. B. 854; 4 Co. Rep. 16; [Blackburn J. in Watkin *v.* Hall, L. R. 3 Q. B. 399; Spooner *v.* Keeler, 51 N. Y. 527; Mayer *v.* Schleichter, 29 Wisc. 646; Haynes *v.* Ritchley, 30 Iowa, 76; Murray *v.* Murray, 1 Cinc. (Ohio) 290; Filben *v.* Daughtermann, 26 Wisc. 518; Miller *v.* Parish, 8 Pick. 385; Lukehart *v.* Byerly, 53 Penn. St. 418; Murray *v.* McAllister, 38 Vt. 167; Redway *v.* Gray, 31 Vt. 292;] as theft, &c.; Curtis *v.* Curtis, 10 Bing. 447; Rowcliffe *v.* Edmunds, 7 M. & W. 12; [Simmons *v.* Holster, 13 Minn. 249; Van Akin *v.* Caler, 48 Barb. 58;] keeping a bawdy house. Brayne *v.* Cooper, 5 M. & W. 250; [Peterson *v.* Sentman, 37 Md. 140; Huckle *v.* Reynolds, 7 C. B. N. S. 114; Widrid *v.* Oyer, 13 John. 124; Martin *v.* Stillwell, 13 John. 275; Young *v.* Miller, 3 Hill (N. Y.), 21; Bush *v.* Prosser, 13 Barb. 221; Wright *v.* Paige, 36 Barb. 438; S. C. 3 Keyes, 581; Alexander *v.* Alexander, 9 Wend. 141.] But not that the defendant *suspects* plaintiff of such a crime; Tozer *v.* Mashford, 6 Ex. 539; 20 L. J. Ex. 225; [see Dickey *v.* Andros, 32 Vt. 55;] nor a mere imputation that he is "living by imposture." Wilby *v.* Elston, 8 C. B. 142; 18 L. J. C. P. 320. See Tozer *v.* Mashford, 6 Ex. 539. [To say of a person, that he is the author of a libel which has been published, is actionable. Viele *v.* Gray, 10 Abb. Pr. 1; S. C. 18 How. Pr. 550. See, also, Kern *v.* Towsley, 51 Barb. 385; Mayhee *v.* Fisk, 42 Barb. 326. It is actionable to say of a person that he has been imprisoned for larceny in a foreign country. Krebs *v.* Oliver, 12 Gray 239. As to imputations of offences against chastity, see Cleveland *v.* Delmeiler, 18 Iowa, 299; Beardsley *v.* Bridgman. 17 Iowa, 290; Ranger *v.* Goodrich, 17 Wisc. 78; Adams *v.* Rankin, 1 Duvall, 58; Linck *v.* Kelley, 25 Ind. 278; Rodgers *v.* Lacey, 23 Ind. 507; Downing *v.* Wilson, 36 Ala. 717; Miles *v.* Vanhorn, 17 Ind. 245; Proctor *v.* Owens, 18 Ind. 21; Dailey *v.* Reynolds, 4 Greene (Iowa), 354; Wagaman *v.* Byers, 17 Md. 183; Estes *v.* Carter, 10 Iowa, 400; Guard *v.* Risk, 11 Ind. 156. For circumstances under which words, charging an unmarried woman with unchaste conduct, are actionable, see Underhill *v.* Welton, 32 Vt. 40; Lucas *v.* Nichols, 7 Jones (*N. Car.*), 32; Richardson *v.* Roberts, 23 Geo. 215. In Roberts *v.* Roberts, 5 B. & S. 384, 390, Blackburn J. said: "For words spoken imputing unchastity to a woman no action can be maintained unless special damage is shown; for which purpose there must be material injury to the interests of the person slandered." The words "your boys have stolen my corn," spoken to a father, who had three boys, were held actionable *per se* in a suit brought by one of them. Mayhee *v.* Fisk, 42 Barb. 326. As to a defence in such case,

Obs. that the other two did steal the corn, see Mayhee *v.* Fisk, *supra*. The words "Your children are theives" will give a right of action to each. Gidney *v.* Blake, 11 John. 54. See Ellis *v.* Kimball, 16 Pick. 132; Foxcraft *v.* Lacy, Hob. 89; Bellows J. in Smart *v.* Blanchard, 42 N. H. 151, 152. "The right of the plaintiff to sustain the action does not depend upon the question whether he was liable to be prosecuted and punished for the crime charged against him." Van Ankin *v.* Westfall, 14 John. 234. It has been held actionable to say of a person that he has been imprisoned for larceny in a foreign country. Krebs *v.* Oliver, 12 Gray, 239. So to say of one, "He is a returned convict." Fowler *v.* Dowdney, 2 M. & Rob. 119. And see other cases cited in Krebs *v.* Oliver, 12 Gray, 242.] As to imputing that the plaintiff suffers from a contagious disorder, see Bloodworth *v.* Gray, 7 M. & G. 334; [Blackburn J. in Watkin *v.* Hall, L. R. 3 Q. B. 399; Golderman *v.* Stearns, 7 Gray, 181; Irons *v.* Field, 9 R. I. 216; Williams *v.* Holdredge, 22 Barb. 396. In Joannes *v.* Burt, 6 Allen, 236, 239, Hoar J. said: "An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders." And in this case it was decided that no action lies for orally imputing insanity to the plaintiff, without an averment of special damage. See, as to a written imputation of insanity, Perkins *v.* Mitchell, 31 Barb. 461. The imputation must be of the present existence of the disease. Irons *v.* Field, 9 R. I. 216; Metcalf J. in Golderman *v.* Stearns, 7 Gray, 182. See Wagaman *v.* Byers, 17 Md. 183.]

2. When it is spoken of the plaintiff concerning his office; Com. Dig. Act. on Case, Def. D. 13; Hopwood *v.* Thorn, 8 C. B. 293; 19 L. J. C. P. 94; Griffiths *v.* Lewis, 7 Q. B. 65; Lumby *v.* Allday, 1 Cr. & J. 301; profession; Com. Dig. *supra*, D. 22; trade or business; Ib. D. 25; [Blackburn J. in Watkin *v.* Hall, L. R. 3 Q. B. 399, 400; Fitzgeral *v.* Redfield, 51 Barb. 484; Fowles *v.* Bowen, 30 N. Y. 20; Weiss *v.* Whittemore, 28 Mich. 366, 377, 378;] and is calculated to injure him in such character, as by imputing to him unfitness for the office, profession, &c. in consequence of want of skill; Redman *v.* Pyne, 1 Mod. 19; or dishonesty, but not mere immorality, unless connected with the exercise of the profession; Ayre *v.* Craven, 2 Ad. & E. 2; Lumby *v.* Allday, *supra;* [see Miller *v.* David, L. R. 9 C. P. 118;] or trade, &c.; Bryne *v.* Cooper, 5 M. & W. 249; *e. g.* by imputing to a physician want of legal qualification to practise his profession; Collins *v.* Carnegie, 1 Ad. & E. 695; Southee *v.* Denny, 1 Ex. 196; [Jones *v.* Diver, 22 Ind. 184; Carrol *v.* White, 33 Barb. 615;] or to an attorney, misconduct in his profession; Boydell *v.* Jones, 4 M. & W. 446; Doyley *v.* Roberts, 3 Bing. N. C. 835; and see Hearne *v.* Stowell 12 Ad. & E. 719; or to a tradesman, insolvency, &c. in trade; Eaton *v.* Jones, 1 Dowl. N. S. 602; Jones *v.* Littler, 7 M. & W. 423; as to say falsely and maliciously, "he is indebted to me, and if he does not come and make terms with me, I will make a bankrupt of him and ruin him," even without special damage; Brown *v.* Smith, 22 L. J. C. P. 151; 13 C. B. 599; or to a ship-owner, that his ship was not seaworthy; Ingram *v.* Lawson, 6 Bing. N. C. 212; or to a tradesman, that he sells goods that he knows to be bad. Evans *v.* Harlow, 5 Q. B. 633. As to imputations upon clergymen, see Pemberton *v.* Colls, 11 Q. B. 461; 16 L. J. Q. B. 403; Gallwey *v.* Marshall, 9 Ex. 295; 23 L. J. Ex. 28; [Walker *v.* Brogden, 19 C. B. N. S. 65. As to the mode of declaring in such cases, see 1 Chitty Pl. 415 *et seq.;* Dicken *v.* Shepherd, 22 Md. 399.]

Verbal slander is actionable, *with* special damage.

3. If the words themselves be of a disparaging nature, such as "swindler," "rogue," &c.; Kelly *v.* Partington, 5 B. & Ad. 645; and they be false and malicious, though they do not impute any crime, nor are spoken of the plaintiff in the way of his office, &c. see Barnett *v.* Allen, 3 H. & N. 376; 27 L. J. Ex. 412. [See Neil *v.* Allenhofen, 26 Wisc. 708. Words declaring a person to be a villain, a rascal, and a cheater, are not actionable *per se*, but become actionable if spoken of one in reference to his trade or business. Nelson *v.* Borchenius, 52 Ill. 236. So of words imputing insolvency. Redway *v.* Gray, 31 Vt. 292. To render an oral charge of insanity actionable,

Obs. there must be an averment of special damage. Joannes *v.* Burt, 6 Allen, 236. But a statement false and malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably, under some circumstances, and at the hands of some persons, suffer damage, will not, even though damage has resulted in fact, support an action for defamation. Miller *v.* David, L. R. 9 C. P. 118.]

A *written libel* is actionable which contains imputations coming under any of the preceding heads, or which imputes conduct to the plaintiff disgraceful; Digby *v.* Thompson, 4 B. & Ad. 821; immoral; Tuam *v.* Robeson, 5 Bing. 17; irreligious or hypocritical; Leicester *v.* Walter, 3 Camp. 214, note; Churchhill *v.* Hunt, 2 B. & Ald. 685; [Adams *v.* Lawson, 17 Grattan, 250;] or indeed which tends in any way to degrade the plaintiff, as by averring that he had insulted a female and was guilty of gross misconduct; Clement *v.* Chivis, 9 B. & C. 172; or to write of a man that he is an infernal villain; Bell *v.* Stone, 1 B. & P. 331; or that a landlord was colluding with an insolvent tenant; Haire *v.* Wilson, 9 B. & C. 645; or to disparage; Cheese *v.* Scales, 10 M. & W. 488; [Fray *v.* Fray, 17 C. B. N. S. 603; Brown *v.* Remington, 7 Wisc. 462;] as being insolvent; Metropolitan Omnibus Co. *v.* Hawkins, 4 H. & N. 146; see Hoare *v.* Silverlock, 12 Q. B. 624; Greville *v.* Chapman, 5 Q. B. 744; or even to ridicule him; Cook *v.* Ward, 6 Bing. 409; Villers *v.* Mousley, 2 Wils. 403; Digby *v.* Thompson, 4 B. & Ad. 821; [Adams *v.* Lawson, 17 Grattan, 250; Lansing *v.* Carpenter, 9 Wisc. 540; or state that he is insane. Perkins *v.* Mitchell, 31 Barb. 461.] As to libels on public characters, Parmiter *v.* Coupland, 6 M. & W. 105.

The libel or words must be *false*, and the declaration always charges their falsity, but probably the word wrongfully or maliciously would be sufficient, at least if there were no demurrer. See 1 Saund. 242 *a*, note (2); Rowe *v.* Roach, 1 M. & S. 304.

The charge must be malicious in fact or in law; but it seems that any equivalent expressions, as "wrongfully and falsely," &c. published, &c. would suffice. 1 Saund. 242 *a*, note (2); Com. Dig. Act. for Def. G. 5; De Medina *v.* Groves, 15 L. J. Q. B. 284; 10 Q. B. 168. [See Keesling *v.* McCall, 36 Ind. 321.] The malice is implied from the falsity; O'Brien *v.* Clement, 15 M. & W. 437; 15 L. J. 285, Ex. per Parke B.; but where the occasion on which the words complained of are spoken or written, is privileged, the law will not infer malice, but malice *in fact* must be found. [See Hagan *v.* Hendry, 18 Md. 177; Garrett *v.* Dickerson, 19 Md. 418.] As to proof of express malice, see Bromage *v.* Prosser, 4 B. & C. 256; [Fowles *v.* Bowen, 30 N. Y. 20.] A subsequent libel, though itself actionable, may be given in evidence to prove malice. Pearson *v.* Le Maitre, 5 M. & G. 700; and see Barnwell *v.* Adkins, 1 M. & G. 807; Barrett *v.* Long, 3 H. L. Cas. 395; Darby *v.* Ouseley, 1 H. & N. 1; 25 L. J. Ex. 227; [Baldwin *v.* Soule, 6 Gray, 321; Robbins *v.* Fletcher, 101 Mass. 115; Markham *v.* Russell, 12 Allen, 573; Clark *v.* Brown, 116 Mass. 504, 508; Schrimper *v.* Heilman, 24 Iowa, 505; Smith *v.* Lovelace, 1 Duvall, 215; Fry *v.* Bennett, 28 N. Y. 324; Garrett *v.* Dickerson, 19 Md. 418; Taylor *v.* Moran, 4 Met. (Ky.) 127; Parmer *v.* Anderson, 33 Ala. 78. And it is no objection to a recovery for slanderous words charged, that the utterance of the same slanderous words has been proved against the defendant in a former action for the purpose of proving malice in the utterance of other slanderous words charged in such former suit. Nor, on the other hand, is it any objection to the proof of slanderous words not charged in the declaration, for the purpose of showing malice in the utterance of those charged, that the same slanderous words have been proved and recovered for in a former action of slander between the parties. Swift *v.* Dickerman, 31 Conn. 285.]

As to when the alleged libel and slander is privileged, see *post*, pleas, "Libel and Slander."

By 6 & 7 Vict. c. 96, in an action against a newspaper for libel, the defendant may plead that it was inserted without malice, and without gross negligence, and that, before the commencement of the action, a full apology was inserted in the newspaper; and this must be accompanied by payment of money into court. If the case proceed to trial, and the plaintiff recovers less than the sum paid in, the defendant is entitled to the balance. See Lafone *v.* Smith, 3 H. & N. 735; 28 L. J. Ex. 33; and 8 & 9 Vict. c. 75.

Obs. *The Declaration.* — No inducement is now necessary since the common law procedure act, 1852 (15 & 16 Vict. c. 76), which, by s. 61, enacts, "In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and when the words or matter set forth with or without the alleged meaning show a cause of action the declaration shall be sufficient." It is not now necessary that there should be any *colloquium*, but the plaintiff may set out the words and put any construction he pleases upon them. Hemmings *v.* Gasson, 27 L. J. Q. B. 222; [1 El., Bl. & El. 346; Watkin *v.* Hall, L. R. 3 Q. B. 396, 401, 402. Under the New York Code (§ 164), it is provided that in an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose.]

A statement that the libel was *composed* and published, or the slander *spoken* and published, "of and concerning the plaintiff," is essential, although it be averred that defendant published "with intent" to impute the offence, &c. to the plaintiff. See 1 Saund. 242 *b*, note (3); Baker *v.* Wilkinson, 1 Car. & M. 400; O'Brien *v.* Clement, [16 M. & W. 159;] 16 L. J. Ex. 77; 4 D. & L. 563. And a declaration which stated that defendant published a libel, containing the false and scandalous matter following, without alleging that such matter was "of and concerning the plaintiff," and then set out the libel, which did not on the face of it relate to the plaintiff, and did not connect him with it by innuendo, was held bad on a writ of error. Clement *v.* Fisher, 7 B. & C. 459; [Baldwin *v.* Hildreth, 14 Gray, 221; 1 Chitty Pl. 418, 419.]

The Statement of the Scandalous Matter. — It is a rule that in an action for defamation, the *libel* or *slander* must be set out *in hæc verba*. The very words must be stated, in order that the court may see that the charge be actionable as a libel or slander. [Taylor *v.* Moran, 4 Met. (Ky.) 127; 1 Chitty Pl. 419.] "If it were sufficient to state merely the effect of the words, any person would be at *liberty* to *swear* as to the *effect* of the words, without stating any precise words; and even if the witness did state precise words, the *jury* would have to judge of their *legal* effect, whereas that is generally to be decided by the court. Words innocent in themselves might by the witness be perverted from their true meaning, or be by the jury so interpreted as to make a defendant clearly liable at law. It is not expedient to blend questions of law and fact together; the most useful object of all systems of pleading is to separate them; it ought therefore to appear to the court upon the face of the declartion, by the words or signs themselves, that they are sufficient to support such innuendoes or averments as may be necessary to apply to the subject; that they may bear the interpretation put on them, and present the injury which is charged to have resulted from them;" per Lord Abinger C. B. in Gutsole *v.* Mathers, 1 M. & W. 495. Therefore, in that case, although the words were actionable only in respect of special damage, the court arrested the judgment after verdict, because the declaration only charged that the defendant "falsely and maliciously *asserted and represented* in the presence, &c. that the tulips were stolen property." And see Harrison *v.* Bevington, 8 C. & P. 708; and Solomon *v.* Lawson, 8 Q. B. 823. A declaration is also bad if it state that the defendant published libellous matters "in *substance* as follows," setting out the libel; Wright *v.* Clements, 3 B. & Ald. 503; or "*purporting*" that, &c. Wood *v.* Brown, 6 Taunt. 169. So a declaration for slander, that defendant falsely and maliciously "charged and *asserted* and *accused* plaintiff of being in insolvent circumstances," is bad. Cook *v.* Cox, 3 M. & S. 110. See Blizard *v.* Kelly, 2 B. & C. 283. The judge may amend a variance at the trial, or direct the precise words to be indorsed on the record. Smith *v.* Knoweldson, 2 M. & G. 565; 9 Dowl. 402. As to setting out part of a sentence, Rutherford *v.* Evans, 6 Bing. 451; 4 C. & P. 74. As to setting out continuously sentences which are divided by others in the libel, see 1 Stark. Sla. 2d ed. 380; 2 Chit. Pl. 7th ed. 465, note. Defamation in a foreign language should be set out in that language; Zenobio *v.* Axtell, 6 T. R. 162; 1 Saund. 242 *a*, note; 1 Chit. Pl. 7th ed.

Obs. 421; Jenkins *v.* Phillips, 9 C. & P. 766; with an averment "that the words aforesaid signified and meant, and were then understood to mean, in the English language, as follows, that is to say, &c." and there must be an averment that the hearers understood the language. Amann *v.* Damm, 8 C. B. N. S. 597; 1 Wm. Saund. 242, note (1). In action for words casting imputations on professional men, it must be averred and proved that the plaintiff carried on such profession at the time of the slander. Bellamy *v.* Burch, 16 M. & W. 590. [In Massachusetts the declaration in slander need only set forth the substance of the language in which the imputation was made; and only the substance of the alleged words importing the offence stated need be proved. Robbins *v.* Fletcher, 101 Mass. 115. See Lukehart *v.* Byerly, 53 Penn. St. 418. But there must be no substantial variance between the words alleged and those proved. Doherty *v.* Brown, 10 Gray, 250; Payson *v.* Macomber, 3 Allen, 69. The words must be proved substantially as laid. Merrill *v.* Peaslee, 17 N. H. 540; Taylor *v.* Moran, 4 Met. (Ky.) 127. See Baker *v.* Young, 44 Ill. 42; Swartzel *v.* Dey, 3 Kansas, 244; Wilborn *v.* Odell, 29 Ill. 456; Coghill *v.* Chandler, 33 Miss. 115; 1 Chitty Pl. 420; Smith *v.* Hollister, 32 Vt. 695; Burford *v.* Wible, 32 Penn. St. 95. Enough of the words alleged to constitute the slanderous charge must be proved. It is not enough to prove other and equivalent words. Tucker *v.* Call, 45 Ind. 31.]

Where the scandal is susceptible of one of two meanings, as fraud or felony, an innuendo, which adopts one meaning and gives a specific character to the slander, and which innuendo is not therefore on the face of the declaration a bad one, becomes a material part of the issue, and cannot be rejected. Smith *v.* Camden, 3 Camp. 461; Day *v.* Robinson, 1 Ad. & E. 554; Williams *v.* Stott, 1 Cr. & M. 687; Harvey *v.* French, 1 Cr. & M. 11; May *v.* Brown, 3 B. & C. 128; and see Hughes *v.* Rees, 4 M. & W. 204.

An innuendo is very frequently used without occasion. Where there is an allegation that the words were spoken "of and concerning the plaintiff," and the words as set out either state his name or mention him thus, "you" or "he," and the slanderous matter is charged absolutely and affirmatively, an innuendo, *as* ("meaning the plaintiff") would seem to be unnecessary. [See Carson *v.* Mills, 69 N. Car. 122.] Where the words import a charge of crime, and the action is for that charge, an innuendo explaining their meaning is not necessary: as "he is a thief," or "he robbed me;" Tomlinson *v.* Brittlebank, 4 B. & Ad. 630; or, "you have done an act for which I can transport you." Curtis *v.* Curtis, 10 Bing. 447; Harvey *v.* French, 1 Cr. & M. 11. See Homer *v.* Taunton, [5 H. & N. 661;] 29 L. J. Ex. 318. The innuendo must not introduce new facts quite distinct from the words charged to have been spoken, or it will be bad. See Day *v.* Robinson, 1 Ad. & E. 554; Griffiths *v.* Lewis, 15 L. J. Q. B. 249; [1 Chitty Pl. 422.] But where the words are put interrogatively, as "who stole the horse?" an innuendo applying them to the plaintiff, and stating that defendant meant that *he* stole the horse, is essential. Jackson *v.* Adams, 2 Bing. N. C. 408. Where in an action for a libel, containing matters and criticisms of a general nature evidently not alluding to the plaintiff, and also a specific charge against him, the plaintiff, in his declaration, set out the general matter, and introduced in so doing a great variety of superfluous innuendoes, by which the plaintiff applied such matter to himself, though evidently not meant to refer to him; Denman C. J. at the trial refused to strike out such innuendoes, and the jury gave a general verdict negativing the latter innuendoes. Prudhomme *v.* Fraser, 1 M. & R. 435. The court, however, afterwards allowed the plaintiff to retain his verdict for that *part* of the libel which related specifically to him, and which was capable of separation from the rest, but gave the defendant costs as to the part negatived by the jury. Prudhomme *v.* Frazer, 2 Ad. & E. 645.

The Damage. — Where particular damage is the gist of the action, it must be specially laid, and, if traversed, proved as charged, the general or common statement of injury in the declaration will not suffice. See Bul. N. P. 6; Giere *v.* Britton, Bul. N. P. 7; 1 Saund. 243, note (5); [Joannes *v.* Burt, 6 Allen, 236; Wier *v.* Allen, 51 N. H. 177; Bassil *v.* Elmore, 65 Barb. 627; McQueen *v.* Fulgham, 27 Texas, 463; 1 Chitty Pl. 423, and note (o^1); Weiss *v.* Whittemore, 28 Mich. 366; Roberts *v.* Roberts, 5 B. & S. 384. The declaration must specify how the alleged special damages resulted to the plaintiff

Obs. from the defendant's slanderous words. Cook *v.* Cook, 100 Mass. 194; Swan *v.* Tappan, 5 Cush. 104; Snell *v.* Snow, 13 Met. 278.] Thus, if the injury be that certain persons declined to deal with the plaintiff, their names must be stated, and the loss of customers not named cannot be proved at the trial. Ib.; Hartley *v.* Herring, 8 T. R. 130; Malachy *v.* Soper, 3 Bing. N. C. 371; and see Guy *v.* Gregory, 9 C. & P. 584. But where the statement of special damage with great particularity would, from the nature of the case, be attended with difficulty and prolixity, a more general allegation is allowed. Thus, where a declaration for slander, imputing incontinence to the plaintiff, stated that he was a preacher in a chapel, and derived profit from his preaching, and by reason of the slander "the said persons frequenting his chapel had refused to permit him to preach there, and had discontinued giving him the gains which they usually had and otherwise would have given," it was held sufficient without saying who those persons were. Hartley *v.* Herring, 8 T. R. 130. Where the declaration stated that in consequence of the libel the plaintiff lost the profits of certain performances at the theatre, it was held that the boxkeeper might be asked whether the receipts of the house had not diminished, but not whether particular persons had not in consequence given up their boxes. Ashley *v.* Harrison, 1 Esp. 48; Delegal *v.* Highley, 8 C. & P. 444. And where there is a general allegation of loss of business, it is competent to the plaintiff to prove a general loss or decrease of trade, although the declaration alleges the loss of particular customers, which is not proved. Evans *v.* Harries, 1 H. & N. 251; 26 L. J. Ex. 31; [Foster J. in Weir *v.* Allen, 51 N. H. 183; Weiss *v.* Whittemore, 28 Mich. 366; Trenton &c. Ins. Co. *v.* Perrine, 3 Zabr. 402.]

Special damage must be the direct or immediate consequence of the defendant's act, and it seems must arise *wholly* therefrom. See King *v.* Watts, 8 C. & P. 614; [Foster J. in Weir *v.* Allen, 51 N. H. 183; Olmsted *v.* Brown, 12 Barb. 657; Dixon *v.* Smith, 5 H. & N. 450.] Where the plaintiff's master discharged him partly in consequence of the defendant's scandal, and partly on account of his having been dismissed by a former master, it seems the action does not lie. An allegation that by reason of the words one D. refused to trust the plaintiff, is not supported by evidence that defendant spoke the words to E., who repeated them to D. as the defendant's words. Ward *v.* Weeks, 7 Bing. 211. An averment that "by reason of the premises, persons who would otherwise have retained and employed the plaintiff, declined to do so," is not proved by showing that other persons would have *recommended* the plaintiff, and that the persons named in the declaration would have employed plaintiff *on such recommendation*. Sterry *v.* Foreman, 2 C. & P. 592. The declaration should have laid the loss of the recommendation also. It is not essential in these cases that the party refusing to deal with or trust the plaintiff, or dismissing him in consequence of the slander, should *believe* that it is true. Knight *v.* Gibbs, 1 Ad. & E. 43; [Cate *v.* Cate, 50 N. H. 148.] It is necessary to call such party, and not sufficient to prove merely his declarations as to the cause of his declining to deal, &c. 1 Saund. 243, note; Tilk *v.* Parsons, 2 C. & P. 201. It has been decided that if the damage arising from the slander be the *wrongful* act of a third person, as his dismissal of the plaintiff before the expiration of the term for which he was engaged, or other wrongful breach of contract, &c. such act is not a sufficient ground of action against the utterer of the slander, it not being the natural and legal consequence of the words. Vicars *v.* Wilcocks, 8 East, 1; Morris *v.* Langdale, 2 B. & P. 284; [Cate *v.* Cate, 50 N. H. 148.] But this doctrine seems doubtful. Newman *v.* Zachary, Aleyn R. 3; Green *v.* Button, 2 Cr., M. & R. 707.

1. *For a Libel.* (*x*)

For that the defendant falsely and maliciously printed and published (*y*) of the plaintiff [in relation to his "trade," *or* "profession," *or* "office," *as the case may be*, of a "butcher," which he then exercised and carried on] in a certain

(*x*) See form, Common Law Procedure Act, 1852, sch. B.

(*y*) See 1 Saund. 242, note (*l*); 1 Chit. Pl. 7th ed. 456, note (*b*). Although the plea admits the publication, the plaintiff may prove the manner of the publication with a view to the amount of damages. Vines *v.* Serell, 7 C. & P. 163.

newspaper (*z*) called "The Times," the words following, that is to say, (*a*) "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious. [*If there was a subsequent libel, add:*] (*b*) And in a certain other number of the said newspaper the defendant falsely, &c. [*If there be any special damage, here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance:*] (*c*) whereby the plaintiff lost his situation as gamekeeper, in the employ of A. [*or* "whereby A. B. and C. D. (*d*) refused to deal with or recommend the plaintiff in the way of his trade as a butcher," *or* "refused to lend him a sum of money," *or* "to sell him goods on credit," *or* "to take him into their service as clerk."] [See Tighe *v.* Cooper, 7 El. & Bl. 639; Hemmings *v.* Gasson, El., Bl. & El. 346.]

[1*a*. *Count for a Libel in a Foreign Language.*

That the defendant falsely and maliciously wrote and published of the plaintiff, in the Welsh language, the words following, that is to say [*here set out the libel verbatim in the Welsh language*], which said words being translated into the English language, have, and were understood by the persons to whom they were so published to have, the meaning and effect following, that is to say [*here set out a literal translation of the libel in the English language, and add any innuendo which may be necessary, as in the preceding form*]. See Zenobio *v.* Axtell, 6 T. R. 162; Jenkins *v.* Phillips, 9 C. & P. 766.

1*b*. *Count for Libel imputing Felony to the Plaintiff.*

That the defendant falsely and maliciously wrote and published of the plaintiff the words following, that is to say, "He is the person who took my horse," the defendant meaning thereby that the plaintiff feloniously stole a horse of the defendant.

1*c*. *Forms prescribed by Mass. Prac. Act.*

Slander. — And the plaintiff says that the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of perjury, by words spoken of

(*z*) As to proof of libels in newspapers, 6 & 7 W. 4, c. 76; Baker *v.* Wilkinson, 1 C. & Marsh. 400; Holcroft *v.* Hoggins, 2 C. B. 488. It cannot be shown in mitigation of damages that the libel was communicated by a correspondent; Talbutt *v.* Clarke, 2 M. & Rob. 312; [see 1 Chitty Pl. 523;] but it is a good defence that the libel was a fair report of judicial proceedings. Hoare *v.* Silverlock, 2 C. B. 20; 19 L. J. C. P. 215; Lewis *v.* Levy, 27 L. J. Q. B. 282; As to proceedings against the sureties of newspaper proprietors, Ex parte Duke of Brunswick, 6 Ex. 22.

(*a*) See Boydell *v.* Jones, 4 M. & W. 447, for the mode of setting out an ironical libel; 2 Ch. Pl. 7th ed. 480.

(*b*) A declaration, after setting out a libel, went on thus: "And the defendant further contriving as aforesaid, afterwards, to wit, on &c." "in a certain other number of the said newspaper called &c." Held, that this was a separate count. Hughes *v.* Rees, 4 M. & W. 204; and see Griffiths *v.* Lewis, 15 L. J. Q. B. 249. Unless, however, a *different date* of the time of speaking the words which follow the statement that the defendant "further contrived, &c." be assigned, the whole will be taken as one count. Alfred *v.* Farlow, 15 L. J. Q. B. 259.

(*c*) No allegation or proof of damage is *necessary* where the words are actionable of themselves, and not in respect only of special damage. Tripp *v.* Thomas, 3 B. & C. 427; Malachy *v.* Soper, 3 Bing. N. C. 382, per Tindal C. J. As to special damage, see *ante*, 543, Obs. The general statement of damage will not be sufficient to let in evidence of *special* damage, and will not aid even after verdict where special damage is necessary. Ayre *v.* Craven, 2 Ad. & E. 2.

(*d*) See *post*, 548, note (*m*) and (*n*).

the plaintiff substantially as follows [*here set forth the words: no innuendoes are necessary*].

(If the natural import of the words is not intelligible without further explanation, or reference to facts understood but not mentioned, or parts of the conversation not stated, in either of those cases, after setting forth the words, the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken. This rule is applicable to actions for written and printed as well as oral slander.)

Libel. — And the plaintiff says the defendant caused to be published in a newspaper [*describing it*] a false and malicious libel concerning the plaintiff, a copy of which is hereto annexed.

(Or if it be a picture, it may be described.)]

2. *Other Forms for Libel, charging Crimes.*

1. For charging a gardener with larceny in stealing plants, &c. Gardiner *v.* Williams, 2 Cr., M. & R. 78; S. C. in error, 1 M. & W. 245.

2. For a libel in a newspaper containing a report of legal proceedings; Duncan *v.* Thwaites, 3 B. & C. 556; and see Delegal *v.* Highley, 3 Bing. N. C. 950; 8 C. & P. 444; Lewis *v.* Levy, 28 L. J. Q. B. 282; [El., Bl. & El. 537.] as to the right to report legal proceedings.

3. For a libel upon the plaintiff in regard to the evidence he had given as a witness under a commission of lunacy. Roberts *v.* Brown, 10 Bing. 519; 4 M. & Sc. 407.

4. For a libel imputing forgery or fraud in obtaining a bill of exchange. Stockley *v.* Clement, 4 Bing. 162.

5. For a libel in saying plaintiff had set fire to his own property. Sweetapple *v.* Jesse, 5 B. & Ad. 27; West *v.* Smith, 4 Dowl. 703.

[6. For slander imputing bigamy to a married woman. Herring *v.* Power, 10 M. & W. 564.

7. For slander imputing unnatural practices. Thompson *v.* Nye, 16 Q. B. 175.

8. For a libel calling plaintiff a "truck master." Homer *v.* Taunton, 5 H. & N. 661.

9. For slander in calling a person a "blackleg," imputing that he cheated at cards. Barrett *v.* Allen, 3 H. & N. 376.

10. Against a railway company, for publishing a notice that the plaintiff had been convicted of an offence against their by-laws. Alexander *v.* North Eastern Ry. Co. 6 B. & S. 340.]

3. *For a Libel imputing Immorality or General Misconduct.*

For a libel charging that the plaintiff obtained money by unfair play. Digby *v.* Thompson, 4 B. & Ad. 821.

For imputing that plaintiff, by furious driving, &c. drove his carriage against another, and occasioned death, &c. Lord Churchill *v.* Hunt, 2 B. & Ald. 685.

For imputing to the plaintiff unfair practices connected with horse racing. Greville *v.* Chapman, 5 Q. B. 731.

For a libel charging that plaintiff was a "black sheep," with an innuendo. M'Gregor *v.* Gregory, 11 M. & W. 287; 2 Dowl. N. S. 769; [O'Brien *v.* Clement, 16 M. & W. 159.]

4. *For a Libel upon the Plaintiff in his Office.* (*e*)

For a libel upon plaintiff in his office of mayor, imputing peculation in regard to charity funds. Godburne *v.* Bowman, 9 Bing. 532; 2 M. & Sc. 700.

For a libel on a justice of the peace. Adams *v.* Meredew, 3 Y. & J. 219; overruling 2 Y. & J. 417.

On overseers of the poor. Cannell *v.* Curtis, 2 Bing. N. C. 228; Woodward *v.* Dowsing, 2 M. & R. 74; Cheese *v.* Scales, 10 M. & W. 488.

On churchwardens. Jackson *v.* Adams, 2 Scott, 599; 2 Bing. N. C. 402.

On an alien Turkish Dragoman. Pisani *v.* Lawson, 6 Bing. N. C. 90.

5. *For a Libel upon the Plaintiff in his Profession.* (*f*)

Upon a proctor, charging extortion. Clarkson *v.* Lawson, 6 Bing. 266.

On an attorney and vestry clerk of a parish. May *v.* Brown, 3 B. & C. 113.

On physicians, see cases cited, *ante*, Obs.

6. *For a Libel on the Plaintiff in his Trade or Occupation.* (*g*)

See general form for "Slander," *post*, 547, Form 9.

7. *For Libels on and by Companies.*

See the last edition of this work, p. 572; [*ante*, 502, 538.]

By a joint stock company. Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 89; 28 L. J. Ex. 201. Against a railway company, [for a libel published by means of a message sent through an electric telegraph.] Whitfield *v.* South Eastern Ry. Co. 27 L. J. Q. B. 229; [1 El., Bl. & El. 115.]

(*e*) See Com. Dig. and Bac. Ab. Libels; Stark. Sl. 115; Lumby *v.* Allday, 1 Cr. & J. 301; [Miller v. David, L. R. 9 C. P. 125.]

(*f*) See other cases as to libels on medical men, Smith *v.* Taylor, 1 N. R. 196; Ramadge *v.* Ryan, 9 Bing. 533; Ayre *v.* Craven, 2 Ad. & E. 2. Libel, that physician is not qualified, and evidence. Collins *v.* Carnegie, 1 Ad. & E. 695; Rosc. Ev. 6th ed. 373. Apothecary. Edsall *v.* Russell, 2 Dowl. N. S. 641; 4 M & G. 1090. What matter is actionable as a libel or slander of an attorney, see Day *v.* Buller, 3 Wils. 59; Phillips *v.* Jansen, 2 Esp. R. 624; May *v.* Brown, 3 B. & C. 113; 4 D. & R. 679; Stark. Slander, 123. See a form for accusing an attorney of "sharp practice," with innuendoes, &c. Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. 210. In order to prove that plaintiff is an attorney (if denied by plea) an entered copy of the roll of attorneys, signed by the plaintiff, is sufficient. So the book from the master's office, containing the names of all the attorneys, produced by the officer in whose custody it is kept, is good evidence, together with proof that plaintiff practised as attorney at the time of the words spoken. R. *v.* Crossley, 2 Esp. R. 526; Lewis *v.* Walter, 3 B. & C. 138; Jones *v.* Stevens, 11 Price, 251. And the stamp office certificate, countersigned by the master of Q. B. is sufficient *primâ facie* evidence of the party being an attorney of that court. Sparling *v.* Heddon, 9 Bing. 11. Where the libel itself admits plaintiff was an attorney, no other evidence thereof is requisite. As to what puts in issue the plaintiff's general professional character, Jones *v.* Stevens, 11 Price, 235. As to words of general abuse, not relating to plaintiff as attorney, Tomlinson *v.* Brittlebank, 1 H. & W. 573.

(*g*) [See Weiss *v.* Whittemore, 28 Mich. 366.] The general rule is, that any libel or slander of a tradesman, though not of the *goods* which he sells, is actionable without special damage. Evans *v.* Harlow, 5 Q. B. 624. So of a party seeking a livelihood by any occupation (though not a trader subject to the bankrupt law); Whittington *v.* Gladwin, 5 B. & C. 180; and imputing to him insolvency, want of capacity, or dishonesty in his calling, and calculated to prejudice him therein. Bac. Ab. Slander, B. 4; Stark. Sl. 2d ed.; Selw. N. P. tit. Slander; Figgins *v.* Cogswell, 2 M. & S. 349; Saville *v.* Sweeny, 4 B. & Ad. 514; Jones *v.* Littler, 7 M. & W. 423. Charge of immorality against a tradesman, *supra*. Partners in trade may join for a libel upon or slander of them in their business; Cook *v.* Batchellor, 3 B. & P. 150; or each may sue separately. Harrison *v.* Bevington, 8 C. & P. 708.

8. *Other Forms for Libels on Parties in their Business, Trade, Occupation, &c.; see post*, 548.

Upon a banking firm, charging that they had stopped payment. Forster *v.* Lawson, 3 Bing. 452; Bromage *v.* Prosser, 4 B. & C. 247. The like, by one of a firm, for a similar charge. Robinson *v.* Marchant, 7 Q. B. 918; 15 L. J. Q. B. 135.

Upon plaintiff as a stage-coach proprietor. Clement *v.* Chivis, 9 B. & C. 172.

For a libel charging that a commercial firm were a swindling concern. Clarke *v.* Taylor, 2 Bing. N. C. 654; [Taylor *v.* Church, 1 E. D. Smith, 279; S. C. 4 Selden, 452.]

Against a society for the protection of trade, for publishing the plaintiff's name in a list of persons who were deemed swindlers in trade by the society. Goldstein *v.* Foss, in error, 4 Bing. 489; Humphreys *v.* Miller, 4 C. & P. 7.

For a libel on plaintiff as surveyor, &c. to a company. Rutherford *v.* Evans, 6 Bing. 451.

For a libel on plaintiff as a civil engineer, with special damage. Brooks *v.* Blanchard, 1 Cr. & M. 779.

For a libel on plaintiff as the vendor of a medicine. Morrison *v.* Harmer, 3 Bing. N. Cr. 759.

By a servant against his late master, for a libel, whereby plaintiff lost a situation. Pattison *v.* Jones, 8 B. & C. 578.

Form for a libel in giving a governess a false character, and law, &c. Fountain *v.* Boodle, 3 Q. B. 5.

For a libel on plaintiff as a cook. Prudhomme *v.* Fraser, 1 M. & Rob. 435; 2 Ad. & E. 645.

[For libel on a certificated master of a ship, imputing that he was drunk while in command of a ship. Irwin *v.* Brandwood, 2 H. & C. 960.]

9. *For Slander.* (*h*)

For that the defendant falsely and maliciously spoke and published of the plaintiff [in relation to his "trade," *or* "profession," *or* "office," *as the case may be*, of "a butcher," which he then exercised and carried on], the words following, that is to say, (*i*) "he is a thief," *or* "he is insolvent." [*If there be any special damage*, (*k*) *here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance:*] whereby (*l*) he lost his situation as gamekeeper in the employ of A.

(*h*) See Common Law Procedure Act, 1852, *s.* 61, sch. B.

(*i*) The precise words used must be set out. Gutsole *v.* Mathers, 1 M. & W. 495. See Stannard *v.* Harper, 5 M. & R. 295; *vice versâ*, R. *v.* Berry, 4 T. R. 217. See, also, M'Pherson *v.* Daniels, 18 B. & C. 274; Bell *v* Byrne, 13 East, 554; [*ante*, 541.] Words spoken at different times may be given in evidence on one count. Charlter *v.* Barret, Peake, 32.

(*k*) Special damage, when it exists, should be alleged, whether the slander is actionable or not, otherwise the plaintiff cannot prove it, to enhance the damage. 1 Saund, 243, note (5). It is absolutely necessary to maintain the action, if the words be only of a disparaging nature, without imputing any crime, or are not spoken of the plaintiff in his office, &c. Kelly *v.* Partington, 5 B. & Ad. 645; Ayre *v.* Craven, 2 Ad. & E. 2; [Roberts *v.* Roberts, 5 B. & S. 384.]

(*l*) This means entirely from the slander, Bing *v.* Watts, 8 C. & P. 614, though A. B. may not have believed it. Knight *v.* Gibbs, 1 Ad. & E. 43; [*ante*, 543.]

[*or* "whereby A. B. and C. D. (*m*) refused to deal with or to recommend (*n*) the plaintiff in the way of his trade as a butcher," *or* "refused to send him a sum of money," *or* "to sell him goods on credit," *or* "to take him into their service as clerk"].

10. *Other Forms for Slander of Plaintiff in his Business, Trade, or Occupation; see ante*, 546, 547. (*o*)

For words imputing insolvency to bankers. Bromage *v.* Prosser, 4 B. & C. 247; Forster *v.* Lawson, 3 Bing. 452; Robinson *v.* Marchant, 7 Q. B. 918; 15 L. J. Q. B. 135.

For slander, imputing to plaintiff, a tradesman, that he had spread a report calculated to injure a public sale by another tradesman, whereby the latter refused to deal with the plaintiff. Wood *v.* Adam, 6 Bing. 481; 4 C. & P. 269.

For slanderous words spoken of plaintiff as clerk of a company. Lumby *v.* Allday, 1 Cr. & J. 301; Francis *v.* Roose, 3 M. & W. 191.

For slander of the plaintiff as chief mate of a merchant ship. Andrews *v.* Thornton, 8 Bing. 431; 1 M. & Sc. 670, S. C.

For a libel on a toll collector and treasurer. Sellers *v.* Tell, 4 B. & C. 655.

For a libel on an assistant overseer, imputing false accounts. (Cannell *v.* Curtis, 2 B. & C. 228.

For slanderous words of a coach proprietor and seller of horses, showing special damage. M'Pherson *v.* Daniels, 10 B. & C. 263.

For slandering a boarding-house keeper and his wife; Saville *v.* Sweeny, 4 B. & Ad. 514; a governess; 2 Chit. Pl. 7th ed. 473.

For slander of a journeyman in his occupation, whereby his employer discharged him. Towgood *v.* Spyring, 1 Cr., M. & R. 181.

Slander of a domestic servant. 2 Chit. Pl. 7th ed. 463; Rogers *v.* Clifton, 3 B. & P. 587; Pattison *v.* Jones, 8 B. & C. 578; Child *v.* Affleck, 9 B. & C. 403; *ante*, 547.

For slander, imputing to a pawnbroker that he had been guilty of "duffing" goods. Hickinbotham *v.* Leach, 10 M. & W. 361; 2 Dowl. N. S. 270.

For slander of a butcher in his trade, that he "used two balls to his steelyard." Griffiths *v.* Lewis, 8 Q. B. 841; 15 L. J. Q. B. 249.

By a policeman against a magistrate, for words uttered by him in the investigation of a case in which the policeman gave evidence, whereby plaintiff was dismissed. Kendillon *v.* Maltby, 1 Cr. & M. 402; 2 M. & R. 438.

[Action by copartners as joint plaintiffs for slander respecting their trade. Cook *v.* Batchellor, 3 B. & P. 150; Maitland *v.* Goldney, 2 East, 426; Forster *v.* Lawson, 3 Bing. 452.

(*m*) The names must be mentioned; Malachy *v.* Soper, 3 Bing. N. C. 382; Delegal *v.* Highley, 8 C. & P. 444; unless leading to great prolixity; and the parties themselves must be called, their declarations not being sufficient. 1 Saund. 243 *d*, note; [*ante*, 542, 543.] As to loss of trade, *ante*, Obs. "Damage."

(*n*) This is not proved by evidence, that the defendant repeated the words to A. B., who, in consequence, refused to deal with the plaintiff. Ward *v.* Weeks, 7 Bing. 211. See Sterry *v.* Foreman, 2 C. & P. 592.

(*o*) Spoken words imputing to a man misconduct in his office or trade are actionable, although the office or trade is not one of which the court can take judicial notice. Foulger *v.* Newcomb, 2 L. R. Ex. 327.

For slander imputing bankruptcy to a tradesman. Brown *v.* Smith, 13 C. B. 596.

For slander of an innkeeper, stating special damage. Evans *v.* Harries, 1 H. & N. 251.

For slander in calling a stockbroker a "lame duck." Morris *v.* Langdale, 2 B. & P. 284.

For slander of a corn dealer, imputing that he delivered goods worse than those bargained for. Thomas *v.* Jackson, 3 Bing. 104. See Babonneau *v.* Farrell, 15 C. B. 360.

For slander of a gamekeeper, imputing that he killed foxes. Foulger *v.* Newcomb, L. R. 2 Ex. 327.

11. *Counts for Slander in respect of Words not actionable in themselves, but only in Respect of the Special Damage caused thereby.*

For slander of minister, imputing incontinence, stating loss of some of his congregation. Hartley *v.* Herring, 8 T. R. 130.

For slander, imputing incontinence to the plaintiff, whereby she lost the society and hospitality of her friends. Moore *v.* Meagher, 1 Taunt. 39; Wilby *v.* Elston, 8 C. B. 142.]

FOR SLANDER OF TITLE.

See Forms, 2 Chit. Pl. 7th ed. 480; Rowe *v.* Roach, 1 M. & S. 304; Pitt *v.* Donovan, 1 M. & S. 639; Smith *v.* Spooner, 3 Taunt. 246; Millman *v.* Pratt, 2 B. & C. 486; Malachy *v.* Soper, 3 Bing. N. C. 371. The law on this subject is fully explained in the latter case: an action for either written or verbal defamation of a chattel will not lie without special damage. Ingram *v.* Lawson, 6 Bing. N. C. 212; 9 C. & P. 326; Malachy *v.* Soper, *ubi sup.* As to publishing that goods offered for sale by auction were the property of another, Carr *v.* Duckett, 5 H. & N. 783; 29 L. J. Ex. 468; see Gutsole *v.* Mathers, 1 M. & W. 495; Rowe *v.* Roach, 1 M. & S. 304. [As to saying of a cattle-dealer that he then had the cattle disease among his cows, see per Blackburn J. in Watkin *v.* Hall, 3 Q. B. 399. As to saying of a stallion kept by the owner for the use of mares that he has got the venereal disease, see Wier *v.* Allen, 51 N. H. 177.] There must be either express or implied malice; Hargrave *v.* Le Breton, 4 Burr. 2422; see Brook *v.* Rawl, 4 Ex. 524; 19 L. J. Ex. 114; Smith *v.* Spooner, 3 Taunt. 246; [Like *v.* McKinstry, 3 Abb. (N. Y.) App. Dec. 62; Stark *v.* Chitwood, 5 Kansas, 141;] but malice will not be inferred from the defendant having put a wrong construction on a complicated act of parliament. Pater *v.* Baker, 3 C. B. 868; 16 L. J. C. P. 124. The libel or the very words themselves must be set out verbatim. Gutsole *v.* Mathers, 1 M. & W. 495.

LIGHTS. See "Ancient Lights," "Injunction."

LODGING-HOUSE KEEPER.

Obs. — See *ante*, "Innkeeper." There is no duty on the part of a lodging-house keeper to take care of his lodger's goods. And therefore, in the absence of any misfeasance by him, he is not responsible for a loss arising from neglect to take such care of his house as a prudent owner would take, or for the wrongful act of a stranger, to whom, with the license of the lodger, according to the usage between landlord and tenant, he had shown the apartments for the purpose of letting them after the expiration of the lodger's tenancy. Houlder *v.* Soulby 8 C. B. N. S. 254; 29 L. J. C. P. 246; Dansey *v.* Richardson, 3 El. & Bl. 144; 23 L. J. Q. B. 217. See, also, the first resolution in Calye's case, 8 Co. R.; 1 Smith's L. Cas.

MAGISTRATE. See "Justice of the Peace."

MAINTENANCE.

Obs. — *Ante*, 307, note (*t*), 436; [2 Chitty Contr. (11th Am. ed.) 996, and note (*d*).] "Maintenance in general signifies an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right." Bac. Ab. Maintenance, where see the law and the statutes relating thereto. Being a common law wrong, the declaration need not conclude *contra formam statuti*. And it is sufficient to allege that the defendant unlawfully maintained the former action. Pechel *v.* Watson, 8 M. & W. 691; 11 L. J. Ex. 225, where see a form.

See declaration against an attorney for procuring a suit to be commenced; Flight *v.* Leman, 4 Q. B. 883; 12 L. J. Q. B. 353; where it was held that as the count was not for maintenance in its proper sense, it was necessary to aver that the action was commenced and prosecuted without reasonable or probable cause. See a count for instigating a suit, and another for maintenance. Pechell *v.* Watson, *supra*.

For the statute against maintenance, see the report of the Osborne case, 11 L. J. Ex. 227. See *ante*, pt. 1, p. 307, note (*t*).

MALICIOUS ARREST AND PROSECUTION.

Obs. — *Malicious Arrest.* — In order to maintain an action for a malicious arrest the plaintiff must show: 1, the absence of *reasonable* or *probable cause* for such arrest; 2, *malice* in instituting the former action. [Shafer *v.* Loucks, 58 Barb. 426; Deitz *v.* Langfeit, 63 Penn. St. 234; Preston *v.* Cooper, 1 Dill. 589; Fullenwider *v.* McWilliams, 7 Bush (Ky.), 389; Burnaps *v.* Albert, Taney, 244; Lindsay *v.* Larned, 17 Mass. 190; Brigham *v.* Aldrich, 105 Mass. 212, 213; Dickinson *v.* Maynard, 20 La. An. 66; Moore *v.* Sauborin, 42 Missou. 490; Ammerman *v.* Crosby, 26 Ind. 451; Cook *v.* Walker, 30 Geo. 519; Barron *v.* Mason, 31 Vt. 189;] 3, the former suit, and *arrest* or imprisonment therein by the defendant; and 4, that the former suit has been determined in the plaintiff's favor.

The absence of reasonable or probable cause must be alleged. Dimmock *v.* Bowley, 1 C. B. N. S. 542; 26 L. J. C. P. 231; [Dennehey *v.* Woodsum, 100 Mass. 195; Closson *v.* Staples, 42 Vt. 209; Given *v.* Webb, 7 Rob. (N. Y.) 65.] Whether or not there is *reasonable or probable* cause for an action or prosecution is a mixed question of fact and law; the jury have to find the facts attending, and giving a character to the prosecution, and the judge has to decide the question of law, whether or not the circumstances, when found and undisputed, afforded probable cause. Panton *v.* Williams, 2 Q. B. 169. See Douglass *v.* Corbett, 6 El. & Bl. 511. If there are not any facts in dispute, the judge alone must decide the question. Watson *v.* Whitmore, 14 L. J. Ex. 41; Hinton *v.* Heather, 14 M. & W. 131; [Bacon *v.* Towne, 4 Cush.

Obs. 217; Stone *v.* Crocker, 24 Pick. 81; Cloon *v.* Gerry, 13 Gray, 201; Kidder *v.* Parkhurst, 3 Allen, 393; Cole *v.* Curtis, 16 Minn. 182; Driggs *v.* Burton, 44 Vt. 124; Whitfield *v.* Westbrook, 40 Miss. 311; Hill *v.* Palm, 38 Missou. 13; Cooper *v.* Utterbach, 39 Md. 282; Besson *v.* Southard, 10 N. Y. 236; Center *v.* Spring, 2 Clarke (Iowa), 393; Israel *v.* Brooks, 23 Ill. 575; Ash *v.* Marlow, 20 Ohio, 119; Mitchell *v.* Wall, 111 Mass. 492; Good *v.* Trench, 115 Mass. 201.] It is incumbent on the plaintiff to adduce some evidence, though slight, and *primâ facie* testimony will suffice of the want of probable cause for the action or prosecution; [see Grant *v.* Moore, 29 Cal. 644; Cloon *v.* Gerry, 13 Gray, 201;] and then, *semble*, it will lie on the defendant to rebut malice, to show that he was ignorant of or had mistaken the facts; Mitchell *v.* Williams, 11 M. & W. 205; [Brigham *v.* Aldrich, 105 Mass. 212;] but proof of the most express malice will not *per se* establish the absence of reasonable cause for the proceeding. Taylor *v.* Willans, 2 B. & Ad. 857; Johnson *v.* Sutton, 1 T. R. 493: Turner *v.* Turner, Gow R. 20; [Mitchinson *v.* Cross, 58 Ill. 366; Morton J. in O'Brien *v.* Barry, 106 Mass. 303, 304; Casperson *v.* Sproule, 39 Missou. 39; Parker *v.* Farley, 10 Cush. 281; Stone *v.* Crocker, 24 Pick. 83; Spengler *v.* Davy, 15 Grattan, 381.] "What shall amount to such a combination of malice and want of probable cause, is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." Williams *v.* Taylor, 6 Bing. 186, per Tindal C. J. Circumstances of mere suspicion will not be sufficient. Busst *v.* Gibbons, 3 L. J. Ex. 75; Heslop *v.* Chapman, 23 L. J. Q. B. 49; [Josselyn *v.* McAllister, 25 Mich. 45. To constitute "probable cause" there must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to lead a man of ordinary caution and prudence to believe that the plaintiff was guilty, or liable to the process or proceeding against him. Mowry *v.* Whipple, 8 R. I. 360; Shafer *v.* Loucks, 58 Barb. 426; Shaul *v.* Brown, 28 Iowa, 37; Cole *v.* Curtis, 16 Minn. 182; Hays *v.* Blizzard, 30 Ind. 457; Callahan *v.* Caffarata, 39 Missou. 136; Lacy *v.* Mitchell, 23 Ind. 67; Humphries *v.* Parker, 52 Maine, 502; Ross *v.* Innis, 35 Ill. 487; Bacon *v.* Towne, 4 Cush. 217; Spengler *v.* Davy, 15 Grattan, 381; Scanlan *v.* Cowley, 2 Hilton, 489; Mitchell *v.* Wall, 111 Mass. 492. The burden of proof to show a want of probable cause, and also malice, is on the plaintiff, who is bound to allege them. Morton J. in Stone *v.* Crocker, 24 Pick. 84; Shaw C. J. in Cloon *v.* Gerry, 13 Gray, 201, 202; Grant *v.* Moore, 29 Cal. 644; Ritchey *v.* Davis, 11 Iowa, 124; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544; Wade *v.* Walden, 23 Ill. 425; Israel *v.* Brooks, 23 Ill. 575; Mitchell *v.* Wall, 111 Mass. 492; Levi *v.* Brannan, 39 Cal. 485; Good *v.* French, 115 Mass. 201.]

Malice (which is of two kinds, viz. malice in *law* and malice in *fact*, or *actual* malice) must also be proved by the plaintiff to maintain an action for an unfounded arrest or prosecution. He must prove malice in fact, independently of the act itself done by the defendant. From proof of want of probable cause the *jury may*, however, infer malice; such proof is *primâ facie* evidence of malice; but this is an inference not of *law*, but of *fact*, which the jury are not *bound* to draw, and the presenting to the jury the absence of probable cause, as conclusive evidence of legal malice, is a misdirection. Mitchell *v.* Jenkins, 5 B. & Ad. 588. See Weston *v.* Beeman, 27 L. J. Ex. 57; [Levi *v.* Brannan, 39 Cal. 485; Burnaps *v.* Albert, Taney, 244; Cloon *v.* Gerry, 13 Gray, 201; Wiggin *v.* Coffin, 3 Story. 1; Mowry *v.* Whipple, 8 R. I. 360; Straus *v.* Young, 36 Md. 246; Closson *v.* Staples, 42 Vt. 209; Ammerman *v.* Crosby, 26 Ind. 451; Scofield *v.* Ferrers, 47 Penn. St. 194; Malone *v.* Murphy, 2 Kansas, 250; Humphries *v.* Parker, 52 Maine, 502; Cecil *v.* Clarke, 17 Md. 508.]

The proceedings in the former suit must be proved, and its determination in favor of the plaintiff. Barber *v.* Lissiter, 29 L. J. C. P. 161; 7 C. B. N. S. 175; Whitworth *v.* Hall, 2 B. & Ad. 695; [Redway *v.* McAndrew, L. R. 9 Q. B. 74; Castrique *v.* Behrens, 3 El. & El. 709; Bacon *v.* Towne, 4 Cush. 217; Brown *v.* Randall, 36 Conn. 56; Meyer *v.* Walter, 64 Penn. St. 283; Olmstead *v.* Partridge, 16 Gray, 381; Driggs *v.* Burton, 44 Vt. 124; O'Brien *v.* Barry, 106 Mass. 300; Bacon *v.* Waters, 2 Allen, 400; Wheeler *v.* Nesbitt,

Ons. 24 How. (U. S.) 544; Gorrell *v.* Snow, 31 Ind. 215; Hays *v.* Blizzard, 30 Ind. 457; Grant *v.* Moore, 29 Cal. 644; Wood *v.* Laycock, 3 Met. (Ky.) 192. As to what amounts to a termination of the suit, see Bacon *v.* Towne, 4 Cush. 217; Parker *v.* Farley, 10 Cush. 279; Brown *v.* Lakeman, 12 Cush. 482; Johnson *v.* Shove, 6 Gray, 498; Stancliff *v.* Palmeter, 18 Ind. 321.] But this rule does not apply where the proceedings in respect of which the action is brought are *ex parte*, and must, of necessity, terminate unfavorably to the plaintiff. Steward *v.* Gromett, 39 L. J. C. P. 170; 7 C. B. N. S. 191. The arrest and consequent damage must also be proved. Cotterill *v.* Jones, 11 C. B. 713; 21 L. J. C. P. 2.

An action will lie against a judgment creditor for maliciously and without reasonable or probable cause indorsing a writ of *ca. sa.* issued on such judgment for a larger sum than due, and causing the plaintiff to be arrested. Gilding *v.* Eyre, 10 C. B. N. S. 592; 31 L. J. C. P. 174; Churchill *v.* Siggers, 3 El. & Bl. 929; Jenings *v.* Florence, 26 L. J. C. P. 277; 2 C. B. N. S. 467; [see Barnett *v.* Reed, 51 Penn. St. 190;] and it is not necessary to the action that the plaintiff should have been discharged by the court. A railway company, or corporation, is not liable in this action in respect of criminal proceedings instituted by their servant without their knowledge or direction. Stevens *v.* Midland Ry. Co. 23 L. J. Ex. 328; 10 Ex. 352. And see Eastern Counties Ry. Co. *v.* Broom, 6 Ex. 314; 20 L. J. Ex. 196; Roe *v.* Birkenhead Ry. Co. 7 Ex. 36; 20 L. J. Ex. 9; Goff *v.* Great Northern Ry. Co. 30 L. J. Q. B. 148. [But that a corporation may be liable in an action for malicious prosecution, see *ante*, 502.]

Special damage must be alleged and proved in an action for maliciously prosecuting civil proceedings, and extra costs, beyond the taxed costs, allowed in the suit, are not sufficient special damage. Cotterell *v.* Jones, 11 C. B. 713.

This action cannot be brought in the county courts. 9 & 10 Vict. c. 95, s. 58. See, generally, 3 Bl. C. 126; Bac. Abr. Action on the Case, H.; Com. Dig. Action upon the Case for a Conspiracy; Heywood *v.* Collinge, 9 Ad. & E. 268; Addison on Torts. [Actions of this sort are not favored. Laville *v.* Biguenaud, 15 La. An. 421; Cloon *v.* Gerry, 13 Gray, 201; Kidder *v.* Parkhurst, 3 Allen, 393.]

1. *For maliciously and without Probable Cause for believing that the Plaintiff was about to quit England, procuring a Judge's Order for a Capias (under* 1 *&* 2 *Vict. c.* 110, *s.* 3), *on which Plaintiff was arrested.* (*p*)

For that the defendant having commenced an action against the plaintiff, in the court of —— at Westminster, maliciously and falsely represented by means of a false affidavit to one of the judges of the said court, (*q*) that the plaintiff was about to quit England, unless forthwith apprehended, and thereby maliciously, (*r*) and without reasonable or probable cause, obtained from the said judge an order directing the plaintiff to be held to bail for the sum of £——. And thereupon and in pursuance of the said order, the defendant caused to be issued out of the said court, a writ of capias directed to the said sheriff of ——, whereby the said sheriff was commanded by our lady the

(*p*) See form, &c. Petrie *v.* Lamont, 3 M. & G. 702; 4 Scott N. R. 435; as to where an attorney, merely acting as such, is liable, Davies *v.* Jenkins, 11 M. & W. 745.

(*q*) There must have been some imposition, or *suggestio falsi*, practised upon the judge, to maintain this action, and the mere fact of the order for the arrest being afterwards rescinded is not sufficient, though an allegation that the defendant "falsely" procured the order, &c. was held good *after verdict*. Daniels *v.* Fielding, 16 M. & W. 200.

(*r*) If malice or falsehood be not averred the count will be bad in arrest of judgment. De Medina *v.* Groves, 15 L. J. Q. B. 284; Saxon *v.* Castle, 6 Ad. & E. 652. See, also, 1 Saund. 242 *a*, note (2); and see Pryce *v.* Belcher, 15 L. J. C. P. 305; Gibbons *v.* Maynal, 3 C. B. 181.

queen, that [*set out writ*]. (*s*) And the defendant caused the said writ to be indorsed for bail for £——, and to be delivered to the said sheriff to be executed, and caused the plaintiff to be arrested, (*t*) under and by virtue of the said writ, and to be detained for a long time until (*u*) he obtained his discharge by an order of a judge [*or* of the said court] duly made in that behalf, on the ground that he was not about to quit England, whereby the plaintiff suffered pain and anxiety of mind, and was prevented from transacting his business, and was injured in his credit and circumstances, and incurred expenses (*x*) in obtaining his release from such arrest and imprisonment.

2. *For maliciously causing Plaintiff to be arrested for a Larger Sum than was really due.* (*y*)

Jenings *v.* Florence, 26 L. J. C. P. 277; 2 C. B. N. S. 467; Churchill *v.* Siggers, 3 El. & Bl. 929; Gilding *v.* Eyre, 31 L. J. C. P. 174; 10 C. B. N. S. 592; Huffer *v.* Allen, 2 L. R. Ex. 15; 36 L. J. Ex. 17.

3. *Against the Plaintiff in a former Action, who having issued two concurrent Writs of Capias into different Counties, one of which was executed and the Debt thereupon paid, neglected to countermand the Second Writ, whereby it was executed, &c.*

Tebbut *v.* Holt, 1 Car. & K. 282. See Scheibel *v.* Fairbain, 1 B. & P. 392; Lewis *v.* Morris, 2 Cr. & M. 712. It seems that actual malice is an

(*s*) The writ and indorsement should be accurately stated. Gadd *v.* Bennett, 5 Price, 540.

(*t*) This allegation requires evidence of an *arrest* or detainer; Whalley *v.* Pepper, 7 C. & P. 506; it is not proved by showing a bail-bond without a caption. Berry *v.* Adamson, 6 B. & C. 528; 2 C. & P. 503. See Bates *v.* Pilling, 2 Cr. & M. 374; Amor *v.* Blofield, 9 Bing. 91. See form of count for maliciously holding to bail without stating arrest, Small *v.* Gray, 2 C. & P. 605.

(*u*) The above allegation does not positively require proof of bail given to support the action, and an action lies for the detention without such proof. Bristow *v.* Heywood, 4 Camp. 213; 1 Stark. R. 48.

(*x*) It seems extra costs are not recoverable as damages; Sinclair *v.* Eldred, 4 Taunt. 7; Webber *v.* Nicholas, R. & M. 419; Jenkins *v.* Biddulph, 4 Bing. 160; *sed vide* Gould *v.* Barratt, 2 M. & Rob. 171; Sandback *v.* Thomas, 1 Stark. R. 306, where Lord Ellenborough held that costs as between attorney and client may be recovered.

(*y*) A declaration can easily be framed to suit the circumstances from the last form. Golding *v.* Page, 26 L. J. C. P. 277; Jenings *v.* Florence, 2 C. B. N. S. 467; Gough *v.* Cribb, 11 M. & W. 497. See last edition of this work. [Excessive attachment, Savage *v.* Brewer, 16 Pick. 453; Spaids *v.* Barrett, 57 Ill. 289; malice must be alleged. Dauchy *v.* Salisbury, 29 Conn. 124.] The legal termination of the former suit must be alleged. See *ante*, Obs. 551. The omission to show that the suit has been determined is cured by verdict. See 1 Saund. 228 *b*. A general allegation that the suit was ended and determined, not showing how, would no doubt be sufficient after verdict, and perhaps on general demurrer, but would probably be held insufficient on special demurrer. See forms, &c. referred to 2 Chit. Pl. 7th ed. If the declaration state how the suit was determined, the particular mode alleged must, if denied, be proved. Coombe *v.* Capron, 1 M. & Rob. 398. Termination by *stet processus* by consent. Wilkinson *v.* Howell, M. & M. 495. Sufficient if by rule of court and payment of debt and costs. Brook *v.* Carpenter, 3 Bing. 297. Or by rule, &c. to discontinue. Ib. 408; Gadd *v.* Bennett, 5 Price, 540; Pierce *v.* Strut, 3 B. & Ad. 397; Bristow *v.* Heywood, 1 Stark. R. 48; 4 Camp. 213; Webb *v.* Hill, 3 C. & P. 485; M. & M. 253; Judge *v.* Morgan, 13 East, 547; Brandt *v.* Peacock, 1 B. & C. 649. *Semble*, the mode in which the original action is determined need not be such as in itself shows a want of reasonable cause. See per Patteson J. Norrish *v.* Richards, 3 Ad. & E. 733, 737; Wilkinson *v.* Howell, *supra*. If no *non pros.* &c. in the original action, the defendant therein cannot sue for a malicious arrest till the expiration of the time for declaring, the action not being otherwise determined. Ib. The writ of capias is no longer a step in the action, and therefore the plaintiff is not bound to declare before the end of the next term after the arrest. Ireland *v.* Berry, 5 Q. B. 551. Rule to discontinue sufficient proof, without producing the judgment roll. Watkins *v.* Lee, 7 Dowl. 498; S. C. 5 M. & W. 270.

essential ingredient in an action of the above nature. See form of declaration in Lewis *v.* Morris for neglecting to countermand a *ca. sa.*; and see Smith *v.* Eggington, 7 Ad. & E. 167. See a form for refusing to receive a debt and costs for which plaintiff had been taken on a *ca. sa.* and which he tendered to defendant, and for refusing to direct the sheriff to discharge the plaintiff. Crozer *v.* Pilling, 4 B. & C. 26.

4. *Other Forms for Malicious Injuries in Actions and other Civil Proceedings.*

It must be remembered that many of the under-mentioned forms were framed before the 1 & 2 Vict. c. 110, s. 3, rendered it necessary to obtain a judge's order before issuing a *capias*. The forms *supra* will enable the pleader to make the proper alterations in the following when necessary. A similar order may be obtained under the bankruptcy law consolidation act, 1849, 12 & 13 Vict. c. 106, s. 99, and the absconding debtors act, 14 & 15 Vict. c. 52.

5. *Against a Client and his Attorney for not releasing the Plaintiff after Satisfaction of Debt and Costs in an Action.*

Crozer *v.* Pilling, 4 B. & C. 26.

6. *For a Malicious Arrest, without regard to a Set-off.*

Austin *v.* Debnam, 3 B. & C. 139.

7. *For a Malicious Arrest on a Warrant of Attorney, without regard to the Defeasance.*

Saxon *v.* Castle, 6 Ad. & E. 652. (*z*)

8. *For maliciously issuing Execution on a Warrant of Attorney for a larger Sum than was really due.*

Gough *v.* Cribb, 11 M. & W. 497. (*z*)

9. *For maliciously issuing Execution on a Cognovit.*

Wentworth *v.* Bullen, 9 B. & C. 840.

10. *For a Malicious Arrest pending another Suit between the same Parties.*

Heywood *v.* Collinge, 9 Ad. & E. 268.

11. *For maliciously causing the Plaintiff to be outlawed.*

Drummond *v.* Pigou, 7 C. & P. 228; 2 Bing. N. C. 114.

12. *For maliciously causing an Extent to issue against Plaintiff's Goods.*

Craig *v.* Hassell, 4 Q. B. 481.

(*z*) The word "maliciously" must be alleged in the declaration in these forms. De Medina *v.* Grove, 15 L. J. Q. B. 284.

13. *For maliciously obtaining a Warrant to arrest the Plaintiff for Poor Rates.*

Phillips *v.* Naylor, 3 H. & N. 14; 27 L. J. Ex. 222; 28 Ib. 225.

14. *For arresting a Privileged Witness.* (*a*)

Stokes *v.* White, 1 Cr., M. & R. 223; and see Magnay *v.* Burt, 5 Q. B. 381.

15. *For maliciously issuing a Fiat in Bankruptcy.*

Whitworth *v.* Hall, 2 B. & Ad. 695; Mellor *v.* Baddeley, 2 Cr. & M. 675 Hay *v.* Weakley, 5 C. & P. 861; Atkinson *v.* Raleigh, 3 Q. B. 79; Farley *v.* Danks, 4 El. & Bl. 493. See Dimmock *v.* Bowley, 2 C. B. N. S. 42; 26 L. J. C. P. 231. Averment as to the termination of the proceedings. Kemp *v.* King, 1 Car. & Marsh. 396.

FOR MALICIOUS PROSECUTIONS OF A CRIMINAL NATURE. (*b*)

1. *For maliciously procuring a Warrant for Felony against the Plaintiff, on which he was arrested and remanded, and afterwards preferring an Indictment against him, which was ignored.* (*c*)

For that the defendant falsely and maliciously, and without reasonable or probable cause, (*d*) appeared before a justice of the peace, and charged (*e*) the plaintiff with having feloniously stolen [*describe the subject of the felony*], and upon such charge procured the said justice to grant his warrant for apprehending the plaintiff and bringing him before the said justice, to be dealt with according to law, and by virtue of the said warrant caused the plaintiff to be arrested and imprisoned, and afterwards to be conveyed in custody (*f*) before

(*a*) This action does not lie, though the arrest was made maliciously and with knowledge of the privilege, the privilege being that of the court and not of the person. See the cases cited above, and Yearsley *v.* Heane, 14 M. & W. 422; Phillips *v.* Naylor, *ubi supra*.

(*b*) As to the law upon this subject, see *ante*, Obs.; Musgrove *v.* Newell, 1 M. & W. 587 and the authorities there referred to. The county courts have no jurisdiction in this action. 9 & 10 Vict. c. 95, s. 58. To support an action for an unfounded criminal prosecution, the plaintiff must show, 1st, the prosecution, and that defendant was prosecutor, and the unfounded nature and want of probable cause for the proceeding; 2dly, malice on the part of the prosecutor; 3dly, the legal termination of the prosecution in the plaintiff's favor; 4thly, injury resulting from the prosecution, by imprisonment or expense, or (if the charge be of a nature calculated so to injure the plaintiff) prejudice to him in his reputation. *Ante*, note; Bull. N. P. 13, 14. The declaration must state all these points, and such of them as are denied by the defendant's pleas must be proved by the plaintiff at the trial. See the Obs. and notes, *ante*; and *post*, pleas, tit. "Malicious Arrest." Where an indictment contains several assignments of perjury, and an action is afterwards brought for maliciously preferring it, the action is sustainable if *some* of the assignments were preferred without probable cause. Ellis *v.* Abrahams, 8 Q. B. 709; 15 L. J. Q. B. 221.

(*c*) See forms, &c. Byne *v.* Moore, 5 Taunt. 187; Elsee *v.* Smith, 2 Chit. 304. Against railway company, Stevens *v.* Midland Ry. Co. 10 Ex. 352; 23 L. J. Ex. 328. Form for maliciously charging plaintiff with uttering threats against defendant's life, 10 Bing. 301. For obtaining a search warrant, and searching plaintiff's house, Hemsworth *v.* Fowkes, 4 B. & Ad. 449. If the warrant was not procured until after arrest, say "that defendant falsely [*&c.*], charged the plaintiff with [*&c.*], and upon such charge falsely [&c.], procured the plaintiff to be arrested and taken into custody before a justice [*&c.*], and falsely [*&c.*], accused the plaintiff of [*&c.*], before the said justice, and caused him to grant his warrant [*&c.*]," showing arrest, &c. as in the text.

(*d*) [See Spaids *v.* Barrett, 57 Ill. 289.]

(*e*) This is sufficient, and it is not necessary to state that plaintiff gave information on oath; but, if stated, it must be proved. Gregory *v.* Derby, 8 C. & P. 749.

(*f*) If before another justice, say "before one other justice [*&c.*]."

the said justice, (*g*) and procured the said justice to remand the plaintiff to prison, and to be afterwards again conveyed before the said justice, when the defendant caused the said justice to commit the plaintiff for trial and to prison. And afterwards the defendant caused a bill of indictment (*h*) to be preferred against the plaintiff at the central criminal court, Old Bailey [*as case may be*], before the grand jury, which was returned by the said grand jury not found; (*i*) and the said prosecution was so ended, and the plaintiff was discharged from custody, whereby the plaintiff has been injured in his credit and reputation, and has suffered in mind and body, and has been prevented from carrying on his business, and has incurred expenses in defending himself and obtaining his release from custody.

OTHER FORMS FOR CRIMINAL PROSECUTION.

2. *For a Malicious Prosecution for Perjury.*

Delisser *v.* Towne, 1 Q. B. 333; Ellis *v.* Abrahams, 8 Q. B. 709; Fitzjohn *v.* Mackinder, 8 C. B. N. S. 78; 29 L. J. C. P. 167.

3. *For maliciously procuring Another to make a False Charge before a Magistrate.*

Delegal *v.* Highley, 3 Bing. N. C. 951; 5 Scott, 154.

4. *For a Malicious Charge before a Justice, who discharged Plaintiff.*

Biggs *v.* Clay, 3 N. & M. 464.

5. *For maliciously procuring, &c. a Search Warrant.*

Hensworth *v.* Fowkes, 4 B. & Ad. 449; Wyatt *v.* White, 5 H. & N. 371.

6. *For maliciously procuring a Conviction before a Magistrate.*

Mellor *v.* Baddeley, 6 C. & P. 374; 2 Cr. & M. 67.

7. *For maliciously exhibiting Articles of the Peace, &c.*

Venafra *v.* Johnson, 10 Bing. 307; Steward *v.* Gromett, 29 L. J. C. P. 120; 7 C. B. N. S. 191.

8. *For a Malicious Prosecution before a Court Martial.* (*k*)

Sutton *v.* Johnstone, 1 T. R. 493, 784.

9. *By a Tenant against his Landlord, for maliciously charging him before a Magistrate under the Police Act with having (Three Months before) wilfully damaged his Premises.*

Dowell *v.* Beningfield, 1 Car. & M. 9.

(*g*) If the plaintiff was then discharged, say "and the justice having heard and considered the evidence before him touching the said supposed offence, adjudged and decided that the plaintiff was not guilty thereof, and discharged the plaintiff, fully acquitted of the same; and the defendant hath not further prosecuted the same, but the same is fully ended and determined."

(*h*) If plaintiff were indicted before the petit jury, and acquitted, see form, Dubois *v.* Keats, 11 Ad. & E. 329.

(*i*) See Byne *v.* Moore, 5 Taunt. 187; [Stanliffe *v.* Palmeter, 18 Ind. 321.]

(*k*) This was held not to be a good cause of action.

MANDAMUS, WRIT OF.

Obs. — By the common law procedure act, 1854, s. 68, "The plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested;" s. 69, "The declaration in such action shall set forth sufficient grounds upon which the claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected;" s. 70, "The pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages;" s. 71, "In case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced;" s. 72, "The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith, and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms;" s. 73, "The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the court of queen's bench, and, in case of disobedience, may be enforced by attachment."

And by the common law procedure act, 1860, 23 & 24 Vict. c. 126, s. 32, "In all cases in which a writ of mandamus is issued under the provisions of the common law procedure act, 1854, such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable." Sect. 68 only facilitates the mode of proceeding in cases in which, before the passing of this act, a writ of mandamus would have lain. Therefore, it does not extend to a duty arising out of a mere personal contract. Benson *v.* Paul, 6 El. & Bl. 273; 25 L. J. Q. B. 274. See, also, Norris *v.* The Irish Land Company, 8 El. & Bl. 512; 27 L. J. Q. B. 115, where see a form. Nor will it lie where there is any other remedy. Bush *v.* Beavan, 32 L. J. Ex. 54, where see a form. See, also, Burland *v.* Local Board of Kingston, 32 L. J. Q. B. 17; Fotherby *v.* Metropolitan Ry. Co. 36 L. J. C. P. 88. See, also, Ward *v.* South Eastern Ry. Co. 29 L. J. Q. B. 177. When a mandamus will be granted against a local board, R. *v.* Darlington, 35 L. J. Q. B. 45; Worthington *v.* Hulton, 35 L. J. Q. B. 61; [L. R. 1 Q. B. 63. Mandamus to railway company, to issue warrant to sheriff under lands clauses act. Fotherby *v.* The Metropolitan Ry. Co. L. R. 2 C. P. 188.]

A declaration for a mandamus to levy a rate to pay a debt is good, though it does not state the amount of the debt. Ward *v.* Lowndes, 29 L. J. Q. B. 40; 28 L. J. Q. B. 265, where see a form.

The commencement of the declaration is as usual. The body of the declaration must set out the grounds upon which the writ is demanded, and that the plaintiff is interested in the performance of the duty, and will be damaged by the non-performance, and that a performance has been demanded, and that there has been a refusal or neglect, and alleged performance of conditions precedent, and conclude: "and the plaintiff claims a writ of mandamus

Obs. to command the defendant," setting out what is required by the mandamus shortly and clearly. If necessary, a count may be added for a claim, besides the writ of mandamus, in the usual form, the claim at the end being only in respect of the last count. See a form, Copeland *v.* North Eastern Ry. Co. 6 El. & Bl. 277.

MARKETS.

Obs. — As to what is a market, see Com. Dig. Market. The owners of a market may bring trespass for an injury to their freehold. Mayor of Northampton *v.* Ward, 1 Wils. 107. See the markets and fairs clauses act, 10 Vict. c. 14. See forms of declaration for disturbance of a market by opening a new one, 2 Chit. on Pl. 7th ed. 626. The lord of an ancient market may by law have a right to prevent other persons from selling goods in their private houses situate within the limits of his franchise. Mosley *v.* Walker, 7 B. & C. 40, where see a form. See, also, Mayor of Devises *v.* Clark, 3 Ad. & E. 506; Bridgland *v.* Shapter, 5 M. & W. 376. But the grantee of a newly created market cannot, by virtue of such grant merely, maintain an action for disturbance against a person selling marketable articles in his own shop, within the franchise. Mayor of Macclesfield *v.* Chapman, 12 M. & W. 18. See Mayor of Macclesfield *v.* Pedley, 4 B. & Ad. 397. As to where a market may be held, see De Rutzen *v.* Lloyd, 5 Ad. & E. 456. Form, Bridgland *v.* Shapter, 5 M. & W. 375; 8 L. J. Ex. 246. See, also, Thompson *v.* Gibson, 7 M. & W. 456; 10 L. J. Ex. 330.

The venue is local.

MASTER AND SERVANT. See "Negligence," *post.*

1. *For seducing Plaintiff's Daughter and Servant.*

Obs. — As to the law upon this subject, see, generally, Bac. Ab. Master and Servant, O.; 2 Stark. Ev. 3d ed. 288, tit. Seduction.. The new county courts have no jurisdiction. 9 & 10 Vict. c. 95, s. 58. An action of this kind, founded on the supposed relationship of master and servant, is the only remedy provided by law for a parent for the seduction of his child. There must be some proof of the daughter's service of the slightest kind, or of her liability to serve, or at least that she was living with her father as part of his family, and liable to his control and command. Maunder *v.* Venn, M. & M. 324, per Littledale J.; [Terry *v.* Hutchinson, L. R. 3 Q. B. 599;] Manly *v.* Field, 7 C. B. N. S. 96; 29 L. J. C. P. 79; [Robinson *v.* Burton, 5 Harring. 335; Ellington *v.* Ellington, 47 Miss. 329; Sutton *v.* Huffman, 3 Vroom, 58; Patterson *v.* Thompson, 24 Ark. 55; 1 Chitty Pl. 69, note (*y*);] Harris *v.* Butler, 2 M. & W. 539, where see a form for seducing defendant's own apprentice. A contract to serve, or payment of wages, need not be shown; and the circumstance of the daughter being of age, or being at the time absent on a visit, is immaterial, if she intended to return home. Ib.; [Greenwood *v.* Greenwood, 28 Md. 370; Griffiths *v.* Teetgen, 15 C. B. 344; Manly *v.* Field, 7 C. B. N. S. 96. In Sutton *v.* Huffman, 3 Vroom. 58, the daughter was over twenty-one. Lipe *v.* Eisenlord, 32 N. Y. 229.] But where the daughter was in the *service* of another person at the time of her seduction; Dean *v.* Peel. 5 East, 45; or was in the defendant's service; Harris *v.* Butler, *supra;* unless he hired her for the purpose of seduction; Speight *v.* Oliviera, 2 Stark. R. 493; [Dain *v.* Wickoff, 18 N. Y. 46; S. C. 3 Selden, 191;] no action lies for seduction, though the daughter returns home and occasions expense, &c. See Davis *v.* Williams, 10 Q. B. 725; 16 L. J. Q. B. 369; Eager *v.* Grimwood, 1 Ex. 61; 16 L. J. Ex. 236; [Terry *v.* Hutchinson, *supra;*] Thompson *v.* Ross, 5 H. & N. 16; 29 L. J. Ex. 1; [Evans *v.* Walton, L. R. 2 C. P. 615. Especially where the daughter is of age and is absent from home under a contract made by her for her own benefit; Lee *v.* Hodges, 13 Grattan, 726. But see 1 Chitty Pl. 69, note (*y*);] and although she had the intention of returning to the father's service after she had quitted the defendant's. Blay-

Obs. mire *v.* Hayley, 6 M. & W. 55; [and though, during any leisure time, she had been in the habit, with the permission of her master, of assisting in the work by which her parent earned a livelihood. Thompson *v.* Ross, 5 H. & N. 16. See Hedges *v.* Tagg, 41 L. J. N. S. Ex. 169; S. C. L. R. 7 Ex. 283. But according to numerous decisions of the courts of New York, Pennsylvania, and some other of the American states, the relation of master and servant between a father and his daughter in such cases is sufficiently proved by evidence that the daughter was a minor and that the father had a right to her services. Those decisions also lay down the rule that the effect of such evidence is not impaired by the fact, that at the time of the injury, she was not living in her father's family, but was in the actual employment of another person; and they hold that such a fact would not justify the inference that the father had abandoned any of his paternal rights, unless the daughter has been actually bound out as an apprentice. In other words, the relation results constructively from his right to reclaim the custody of her person, from his responsibility for her education, and from his obligation to support her if she should become sick or disabled while so absent from home. Martin *v.* Payne, 9 John. 387; Nickleson *v.* Stryker, 10 John. 115; Clark *v.* Fitch, 2 Wend. 459; Bartley *v.* Richtmyer, 4 Comst. 38; Sargent *v.* ——, 5 Cowen, 106; Ingersoll *v.* Jones, 5 Barb. 661; Mulvehall *v.* Millward, 1 Kernan, 343; Hornketh *v.* Barr, 8 Serg. & R. 36; Van Horn *v.* Freeman, 1 Halst. 322; South *v.* Denniston, 2 Watts, 474; Boyd *v.* Byrd, 8 Blackf. 114; Bolton *v.* Miller, 6 Ind. 262; Roberts *v.* Connelly, 14 Ala. 241; Parker *v.* Meek, 3 Sneed, 34; Mercer *v.* Walmsley, 5 Harr. & J. 27; 1 Chitty Pl. 69, note (*y*). In Kennedy *v.* Shea, 110 Mass. 147, which was an action by a father for the seduction of his daughter, it appeared that she was employed by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him. It was held that the relation of master and servant existed, so that he could maintain the action. See Bist *v.* Fuax, 4 B. & S. 409.] Expense only will not suffice, the loss of service is, in law, the gist of this action. Boyle *v.* Brandon, 13 M. & W. 738; Grinnell *v.* Wells, 7 M. & G. 1033; 2 D. & L. 610. A master, though no relation, Fores *v.* Wilson, Peake R. 55, or an aunt, or person who has adopted the party seduced, may be the plaintiff. See Edmonson *v.* Machell, 2 T. R. 4; Irwin *v.* Dearman, 11 East, 23; [Ball *v.* Bruce, 21 Ill. 161. So may the widowed mother: Gray *v.* Darland, 51 N. Y. 424; Damon *v.* Moore, 5 Lansing, 454; Sargent *v.* ——, 5 Cowen, 106; Parker *v.* Meek, 3 Sneed, 34; Felkner *v.* Scarlet, 29 Ind. 194. So may a step-father. Maguinay *v.* Saudek, 5 Sneed, 146; Bracy *v.* Kibbe, 31 Barb. 273. In Iowa, by statute, the person seduced may prosecute as plaintiff, an action for her own seduction. So the father, and in certain cases the mother, may prosecute for the seduction of the daughter, and the guardian may sue for the seduction of his ward; though the daughter or ward be not living with, nor in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service; but when the action is brought by the guardian, the damages recovered shall inure to the benefit of the ward. Laws of Iowa (1860), p. 492, §§ 2790, 2791. It is not necessary that the defendant should have used any artifices or false promises to accomplish his purpose if the seduction has been accomplished, whether by deception or solicitation, the action may be maintained. Reed *v.* Williams, 5 Sneed, 580. So although it was accomplished by force, and against the consent of the seduced. Damon *v.* Moore, 5 Lansing, 454; Kennedy *v.* Shea, 110 Mass. 147; Furman *v.* Applegate, 3 Zabr. 28; but see Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.] Remoteness of damage. Boyle *v.* Brandon, *supra*. [As to damages, see further, Berry *v.* De Costa, L. R. 1 C. P. 331; Terry *v.* Hutchinson, L. R. 3 Q. B. 599.]

1. *For loss of Services caused by the Seduction of the Plaintiff's Servant.*

That the defendant debauched and carnally knew A. B., then being the [daughter and] servant (*l*) of the plaintiff, whereby she became pregnant and

(*l*) This allegation of service is sufficient. Martinez *v.* Gerber, 3 M. & G. 89.

was delivered of a child, (*m*) and the plaintiff thereby lost her services, and incurred expense in nursing and in obtaining medical assistance for her. (*n*)]

2. *For enticing away the Plaintiff's Workmen, whereby he was unable to complete an Agreement, &c.* (*o*)

For that E. F. was and is the servant of the plaintiff in his trade of ——; yet the defendant, well knowing (*p*) the same, wrongfully enticed and procured the said E. F. unlawfully, against the will of the plaintiff, to leave his said service, whereby the plaintiff has been deprived of the service of the said E. F. [*state special damage, if any, see* last *edition of this work*, p. 591, Form 2.]

3. *For enticing away the Plaintiff's Servant.*

Evans *v.* Walton, 36 L. J. C. P. 307 (*q*); [L. R. 2 C. P. 615; Cox *v.* Muncey, 6 C. B. N. S. 375.]

[3*a*. *Count for receiving and harboring the Plaintiff's Servant.* (*r*)

That G. H. was and still is the servant of the plaintiff in his business of a ——, and unlawfully and without the consent and against the will of the plaintiff departed from the service of the plaintiff; and the defendant, well knowing the premises, wrongfully and without the consent and against the will of the plaintiff, received, harbored, and detained the said G. H., and refused to deliver the said G. H. to the plaintiff, although requested by the plaintiff to do so; whereby the plaintiff lost the service of the said G. H. in his said business.]

4. *By the Master for an Injury done to his Servant.* (*s*)

By careless driving. Martinez *v.* Gerber, 3 M. & G. 89; Williams *v.* Holland, 10 Bing. 112; Hall *v.* Hollander, 4 B. & C. 660.

(*m*) [Richardson *v.* Fouts, 11 Ind. 466; Whitney *v.* Elmer, 60 Barb. 250. But there are many cases in which it has been held that it is not necessary to the support of this action that the daughter or servant should have been delivered of a child or become pregnant. Abrahams *v.* Kidney, 104 Mass. 222; Vanhorn *v.* Freeman, 1 Halst. 322; Boyce *v.* New York, 55 N. Y. 644, 646.]

(*n*) [Other like forms, Davies *v.* Williams, 10 Q. B. 725; Eager *v.* Grimwood, 1 Ex. 61; Grinnell *v.* Wells, 7 M. & G. 1033; Griffiths *v.* Teetgen, 15 C. B. 344; Thompson *v.* Ross, 5 H. & N. 16.]

(*o*) A like form, Hartley *v.* Cummings, 5 C. B. 247. See common forms for enticing away and harboring apprentices, 2 Chit. Pl. 7th ed. 485; and as to the action in general, Bac. Abr. Master and Servant, O.; 3 Bl. Com. 142. See Lumley *v.* Gye, 2 El. & Bl. 216; 23 L. J. Q. B. 112. In the case of an apprentice, there must be a valid contract of apprenticeship. Cox *v.* Muncey, 6 C. B. N. S. 374, where see a form.

(*p*) The *scienter* is a necessary averment; 3 Bl. Com. 142; Winsmore *v.* Greenbank, Willes, 582; but the *means* of enticement used need not be particularized. Willes, 577.

(*q*) [S. C. L. R. 2 C. P. 615; Stowe *v.* Heywood, 7 Allen, 118.] Service *de facto* is sufficient, and proof of contract of service is not necessary. Evans *v.* Walton, 36 L. J. C. P. 307; [S. C. L. R. 2 C. P. 615.]

(*r*) [See Blake *v.* Lanyon, 6 T. R. 221; Forbes *v.* Cochrane, 2 B. & C. 448; Sykes *v.* Dixon, 9 Ad. & E. 693.]

(*s*) [It has recently been held after full discussion in Alton *v.* The Midland Ry. Co. 19 C. B. N. S. 213, that an action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence, by his servant, whereby the master lost the benefit of the services of the servant — the contract out of which arose the duty to carry safely being a contract between the company and the servant. This decision was followed in a late case in Pennsylvania. Fairmount & Arch St. Passenger Ry. Co. *v.* Stutler, 54 Penn. St. 375. It has very recently been held otherwise in Massachusetts, in Ames *v.* The Union Ry. Co. 117 Mass. 541.

By the defendant's dog. Hodsoll *v.* Stallebrass, 9 C. & P. 63; 11 Ad. & E. 301.

By being assaulted and beaten. Newton *v.* Holford, 6 Q. B. 921; Gilbert *v.* Schwenck, 14 M. & W. 488.

By being shot. Dixon *v.* Bell, 5 M. & S. 198.

MEDICAL MAN. See "Surgeon," *post.*

MESNE PROFITS AND COSTS OF AN EJECTMENT. See "Trespass," "Realty."

MISCHIEVOUS ANIMALS.

Obs. — Any person who keeps a mischievous animal with knowledge of its mischievous and dangerous propensities is liable to an action for damage done by it. May *v.* Burdett, 9 Q. B. 110; 16 L. J. Q. B. 64. The negligence consists in the keeping of such an animal after notice. May *v.* Burdett, *supra;* 1 Chitty Pl. 93, note (u^2); Thomas *v.* Morgan, 2 Cr., M. & R. 496; Card *v.* Case, 5 C. B. 622; 17 L. J. C. P. 124; Styles *v.* The Cardiff Steam Navigation Co. 33 L. J. Q. B. 310; Smith *v.* The Great Eastern Ry. Co. 36 L. J. C. P. 22; L. R. 1 C. P. 4; Gladman *v.* Johnson, 36 L. J. C. P. 153; [Meredith *v.* Reed, 26 Ind. 334; Earl *v.* Van Alstyne, 8 Barb. 630; Goodman *v.* Gay, 15 Penn. St. 188; Dickson *v.* McCoy, 39 N. Y. 401; Smith *v.* Causey, 22 Ala. 568; Partlow *v.* Haggarty, 35 Ind. 178; Barnes *v.* Chapin, 4 Allen, 444; McCahill *v.* Kipp, 2 E. D. Smith, 413; Van Leuven *v.* Lyke, 1 Comst. 515; S. C. 4 Denio, 127; Wheeler *v.* Brant, 23 Barb. 324; Buckley *v.* Leonard, 4 Denio, 500; Scribner *v.* Kelley, 38 Barb. 14. But a declaration charging that the defendant wrongfully kept a horse accustomed to bite mankind, and that the defendant knew it, need not aver that the injury complained of was received through the defendant's negligence in keeping the horse. Popplewell *v.* Pierce, 10 Cush. 509; May *v.* Burdett, 9 Q. B. 101; Jackson *v.* Smithson, 15 M. & W. 563; Card *v.* Case, 5 M., G. & S. 622; Kelly *v.* Wade, 12 Ir. Law Rep. 424.] For the vicious acts of an animal of an ordinarily quiet nature, the owner is, generally speaking, not liable. [Fairchild *v.* Bentley, 30 Barb. 147; Van Leuven *v.* Lyke, 1 Comst. 515; Vrooman *v.* Lawyer, 13 John. 339.] For such acts as are in accordance with his ordinary nature he is liable; and he is also liable for his vicious acts if he knew that the animal was accustomed or was likely to commit any such acts. [Steel *v.* Smith, 3 E. D. Smith, 321; Dearth *v.* Baker, 22 Wis. 73; Vrooman *v.* Lawyer, 13 John. 339; Van Leuven *v.* Lyke, 1 Comst. 515; S. C. 4 Denio, 127; Auchmuty *v.* Ham, 1 Denio, 495; Smith *v.* Causey, 22 Ala. 568; Decker *v.* Gammon, 44 Maine, 322; Hewes *v.* McNamara, 106 Mass. 281; Frazer *v.* Kimler, 9 N. Y. Sup. Ct. 514; Vinton *v.* Schwab, 32 Vt. 612. As to bees, see Earl *v.* Van Alstyne, 8 Barb. 630; 1 Chitty Pl. 93, note (u^2).] For the acts of an animal ordinarily vicious the owner is liable. Cox *v.* Burbidge, 32 L. J. C. P. 89; [13 C. B. N. S. 430.] A man has a right to keep a fierce dog for the protection of his property, [Logue *v.* Link, 4 E. D. Smith, 63; Laverone *v.* Mangianti, 44 Cal. 138,] but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. He has no right to place a dog so near to the door of his house, that any person coming to ask for money, or on any other business, might be bitten. And so with respect to a footpath, though a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he can bite a person going along it. And if there is a notice, it is no defence, unless the party is in such a

Obs. situation in life as to be able to avail himself of it. Per Tindal C. J. Sarch *v.* Blackburn, 4 C. & P. 300. [If an owner of a mischievous dog permits it to be at large on his premises, and a person is bitten by him in the daytime, the owner is liable in damages notwithstanding the injured person was trespassing on his grounds by hunting in his woods without license. Loomis *v.* Terry, 17 Wend. 496; Sherfey *v.* Bartley, 4 Sneed, 58; Maule J. in Barnes *v.* Ward, 9 C. B. 420; Bird *v.* Holbrook, 4 Bing. 628; Lynch *v.* Marden, 1 Q. B. 37; Norris *v.* Litchfield, 35 N. H. 271, 278, 279.] As to plaintiff having been warned of the dog, see Curtis *v.* Mills, 5 C. & P. 489. It is not essential that the animal should be the property of the defendant. If he harbors it, or permits it to be on his premises, that is sufficient. McKone *v.* Wood, 5 C. & P. 1. [Or has charge of it. Wilkinson *v.* Parrott, 32 Cal. 102; Frammell *v.* Little, 16 Ind. 251. An agister of cattle is liable for damage done by them. Sheridan *v.* Dean, 8 Met. 284. See Barnum *v.* Vandusen, 16 Conn. 200.] The owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable if the mode he has adopted to secure it is insufficient. Blackman *v.* Simmons, 3 C. & P. 138; Charlwood *v.* Greig, 3 C. & K. 48; [McCaskill *v.* Elliott, 5 Strobh. 196; Pickering *v.* Orange, 2 Ill. 492; McManus *v.* Finan, 4 Iowa, 283; Stumps *v.* Kelly, 22 Ill. 140; Woolf *v.* Chakler, 31 Conn. 121; Koney *v.* Ward, 36 How. Pr. 255; Marsh *v.* Jones, 21 Vt. 378; Wheeler *v.* Brant, 23 Barb. 324; Kittredge *v.* Elliott, 16 N. H. 77; Arnold *v.* Norton, 25 Conn. 92; Laverone *v.* Mangianti, 44 Cal. 138; Frazer *v.* Kimler, 5 N. Y. Sup. Ct. 16.] Where a bull injured the plaintiff, who wore a red neckerchief, a declaration by the owner that he knew the bull would run at anything red, was held to be evidence of the *scienter*. Hudson *v.* Roberts, 6 Ex. 699; 20 L. J. Ex. 299. See, also, Stiles *v.* The Cardiff Steam Navigation Co. 33 L. J. Q. B. 310. As to when a man is justified in killing a ferocious dog belonging to another, see Morris *v.* Nugent, 7 C. & P. 572; 1 C. & P. 104; [1 Chitty Pl. 188, note (*l*). Or any other ferocious beast, see Williams *v.* Dixon, 65 N. C. 416. As to trespasses by cows, sheep, &c. of one person upon the land of others, see 1 Chitty Pl. 93, 202, and notes; Cate *v.* Cate, 50 N. H. 144; Lyons *v.* Merrick, 105 Mass. 71; McBride *v.* Lynd, 55 Ill. 411; Keenan *v.* Cavenaugh, 44 Vt. 268. As to injuries done by several animals of different owners, see 1 Chitty Pl. 93, note (*u*[1]); Shearman & Red. Negligence, § 198.]

A general averment in the declaration that the dog was of a ferocious and mischievous disposition, and accustomed to bite and attack men or animals, is sufficient. Hartley *v.* Harriman, 1 B. & Ald. 620; Jenkins *v.* Turner, 2 Salk. 661.

By the 28 & 29 Vict. c. 60, s. 1, the owner of a dog which does any injury to sheep or cattle is made liable in damages, without any proof of previous mischievous propensity in the dog, or of any knowledge on the part of the owner, or that the injury was attributable to the neglect of the owner. If the damages claimed do not exceed £5, they shall be recoverable summarily before a justice of the peace.

By s. 2, the occupier of any house, or part of a house or premises, where the dog was kept, or permitted to live or remain at the time of the injury, is to be deemed the owner, in the absence of any proof to the contrary.

1. *For suffering a Ferocious Dog to go at large, which injured the Plaintiff.* (*t*)

That the defendant wrongfully kept a dog of a ferocious and mischievous

(*t*) See a similar form for keeping a mischievous ram, Jackson *v.* Smithson, 15 M. & W. 563; a monkey, May *v.* Burdett, 9 Q. B. 106; 16 L. J. Q. B. 64; 15 L. J. Ex. 311; and other forms in Hartley *v.* Harriman, 1 B. & Ald. 620; Curtis *v.* Mills, 5 C. & P. 489. Where the damage done is not to cattle or sheep, the *scienter* is the gist of the action. Ib.; Thomas *v.* Morgan, 2 Cr., M. & R. 496; 28 & 29 Vict. c. 60. [Count for knowingly keeping diseased sheep which infected the sheep of the plaintiff, Cooke *v.* Waring, 2 H. & C. 332; for fraudulently selling a cow as sound, knowing it to be diseased, which infected other cows of the plaintiff, Mullett *v.* Mason, L. R. 1 C. P. 559.] As to *evidence*, see [Thomas *v.* Morgan, *supra*;] Gettring *v.* Morgan, 5 W. R. 536; Rosc. & Harr. Ind. See, further, *post*, pleas.

nature, well knowing that the said dog was accustomed to bite mankind [*or*, "knowing that the said dog was of a ferocious and mischievous nature" (*u*)] and the said dog, whilst the defendant kept the same, attacked and bit and wounded the plaintiff, and thereby the plaintiff was for a long time unable to do his business, and incurred expenses in getting cured of the said wounds.

[*A like count.* Worth *v.* Gilling, L. R. 2 C. P. 1; against a corporation, Stiles *v.* Cardiff Steam Nav. Co. 33 L. J. Q. B. 310.]

2. *Under* 28 *&* 29 *Vict. c.* 60, *for keeping a Dog which worried Plaintiff's Sheep.* (*x*)

That at the time of the committing of the grievances hereinafter mentioned the defendant was the owner of a certain dog, and injury was done to divers cattle [*or* sheep, *or* cattle and sheep] of the plaintiff by the said dog of the defendant.

3. *By a Master for an Injury done to his Apprentice by Defendant's Dog, stating Special Damage for the loss of the Apprentice's Services during the whole Time he was to serve.*

Hodsoll *v.* Stallbrass, 11 Ad. & E. 301; 9 C. & P. 63.

4. *For Injuries occasioned by Defendant's Ox running at the Plaintiff.* (*y*)

That the defendant was possessed of a wild and vicious ox, and it was unsafe and improper to drive, or permit the said ox to go through any public highway, of all which the defendant had notice; yet the defendant wrongfully and negligently, by his servants, drove the said ox, so being wild and vicious as aforesaid, in a certain public highway, whereby the said ox ran at and against the plaintiff, who was then passing in and along the said highway, and wounded and injured him [*state damage as in Form* 1].

MINES.

Obs. — The owner of a mine must not work it so as to let down the surface. See Humphries *v.* Brogden, 12 Q. B. 739; Rowbotham *v.* Wilson, 8 H. L. 360; Caledonian Ry. Co. *v.* Sprot, 2 McQ. Sc. Ap. 451; Gale on Easements, by Willes, p. 310; and see *post*, "Support." As to breaking and entering mines, see *post*, "Trespass to Realty." As to the law relating to the duties of land-owners, see Fletcher *v.* Rylands, 35 L. J. Ex. 154; L. R. 1 Ex. 265; Groucott *v.* Williams, 32 L. J. Q. B. 237. [As to the liability of railway company to pay compensation in respect of mines lying under grounds taken by them, Great Western Ry. Co. *v.* Bennett, 36 L. J. Q. B. 133.]

(*u*) See Hartley *v.* Harriman, 1 B. & Ald. 621; S. C. 2 Stark. 214.

(*x*) For forms before the 28 & 29 Vict. c. 60, Hartley *v.* Harriman, 1 B. & Ald. 620; Thomas *v.* Morgan, 2 Cr., M. & R. 496; Card *v.* Case, 5 C. B. 622.

(*y*) Where the defendant employed a licensed drover, who employed a boy to drive the ox which did the injury, it was held the defendant was not liable. Milligan *v.* Wedge, 12 Ad. & E. 737. See a form for driving a bull through a street, knowing that it ran at anything red, Hudson *v.* Roberts, 6 Ex. 697; 20 L. J. Ex. 299.

1. *For negligently working a Mine under the Land of the Plaintiff and his Tenant, whereby the Support was weakened.*

Harris *v.* Riding, 5 M. & W. 60.

2. *For injuring the Foundation of Plaintiff's House by Digging Mines, &c.*

Hilton *v.* Lord Granville, 5 Q. B. 701.

3. *By the Owner of a Mine against the Owner of an adjacent one for having removed the Seam of Coal belonging to the Plaintiff, which separated the Mines, and then neglecting his Duty to prevent Plaintiff's Mine from being Flooded.* (z)

Firmstone *v.* Wheeley, 2 D. & L. 203.

4. *For leaving a Mine uncovered, whereby Plaintiff's House fell in, &c.*

Sybray *v.* White, 1 M. & W. 435.

NEGLIGENCE.

Obs. — "The action of negligence proceeds from the idea of an obligation towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury." Per Wilde B. Swan *v.* The North British Australian Co. Limited, 7 H. & N. 603; 31 L. J. Ex. 425; 32 L. J. Ex. 273; [Collis *v.* Selden, L. R. 3 C. P. 495.] Thus, if any blame attaches to the defendant, though he be innocent of an intention to injure, he is liable to answer in damages; Wakeman *v.* Robinson, 1 Bing. 213; but if the injury arises from unavoidable accident, no action will lie. Ib.; Aston *v.* Heaven, 2 Esp. 533; Crofts *v.* Waterhouse, 3 Bing. 319; [Brown *v.* Kendall, 6 Cush. 292; Calkins *v.* Barger, 44 Barb. 424; Lawler *v.* The Baring Boom Co. 56 Maine, 443; Boland *v.* Missouri R. R. Co. 36 Missou. 484; McGrew *v.* Stone, 53 Penn. St. 436; Harding *v.* Fahey, 1 Greene, 377; Garris *v.* Portsmouth &c. R. R. Co. 2 Ired. (Law) 324; Livingston *v.* Adams, 8 Cowen, 175; Romney *v.* Trinity House, L. R. 6 Ex. 204; S. C. L. R. 7 Ex. 247. Where the defendant's horses, while driven by him with due care on a highway near a railroad, were frightened by a locomotive, and becoming unmanageable, ran away on to the plaintiff's land and did damage, it was held that the defendant was not liable. Brown *v.* Collins, 53 N. H. 442.] So the law requires of persons having in their custody instruments of danger, as a loaded gun, that they should keep them with the utmost care. Dixon *v.* Bell, 5 M. & S. 198. See, also, North *v.* Smith, 10 C. B. N. S.; [Morgan *v.* Cox, 22 Missou. 373.]

Evidence of Negligence. — The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant. Hammack *v.* White, 11 C. B. N. S. 588; 31 L. J. C. P. 129; Cotton *v.* Wood, 8 C. B. N. S. 568; 29 L. J. C. P. 333; Bird *v.* Great Northern Ry. Co. 29 L. J. Ex. 3; [Cornman *v.* The Eastern Counties Ry. Co. 4 H. & N. 781; Holbrook *v.* Utica &c. R. R. Co. 12 N. Y. 236; Curtis *v.* Rochester &c. R. R. Co. 18 N. Y. 534; Mitchell *v.* Western R. R. Co. 30 Geo. 22; Daniel *v.* Metropolitan Ry. Co. L. R. 3 C. P. 216.] But accidents may be of such a nature that negligence may be presumed from the mere fact of the accident, the presumption depending upon the nature of the accident. Byrne *v.* Boadle, 33 L. J.

(z) See Shaw *v.* Stenton, 2 H. & N. 858; 27 L. J. Ex. 253.

Obs. Ex. 13; [2 H. & C. 722;] Fletcher *v.* Rylands, 35 L. J. Ex. 154; [3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330.] Thus, where the plaintiff, a custom officer, was injured while on the defendant's premises in the course of his duty, by goods falling on him from a crane fixed over a door through which he was passing, it was held that as the accident was such as did not, in the course of ordinary things, happen where those who have the management of machinery use proper care, there was reasonable evidence of negligence in the absence of any explanation by the defendants. Scott *v.* The London Dock Co. 34 L. J. Ex. 17, 220; [3 H. & C. 296,] where see the cases collected. See Briggs *v.* Oliver, 35 L. J. Ex. 163; [4 H. & C. 403.] "Where the evidence is equally consistent with either negligence or no negligence, it is not competent for the judge to leave it to the jury to find either alternative, but it must be taken to amount to no proof at all." Per Williams J. Cotton *v.* Wood, 29 L. J. C. P. 335; 8 C. B. N. S. 568; [Smith *v* First National Bank in Westfield, 99 Mass. 605; Toomey *v.* Brighton & London &c. Ry. Co. 3 C. B. N. S. 146. The question of negligence is a mixed question of law and fact; and where the facts are in dispute it is the duty of the court to instruct the jury what will constitute negligence. Trow *v.* Vermont Central R. R. 24 Vt. 487; Briggs *v.* Taylor, 28 Vt. 180; Wright *v.* Malden & Melrose R. R. Co. 4 Allen, 289; Bell J. in Norris *v.* Litchfield, 35 N. H. 277; Rice *v.* Montpelier, 19 Vt. 470; Murch *v.* Concord R. R. 29 N. H. 43; Burr *v* Housatonic R. R. 19 Conn. 566; Ernst *v.* Hudson River R. R. Co. 35 N. Y. 9; Delafield *v.* Union Ferry Co. 5 Rob. 207; Catawissa R. R. Co. *v.* Armstrong, 52 Penn. St. 282; Bernhardt *v.* Rensselear &c. R. R. Co. 32 Barb. 165; Smith *v.* East River Ferry Co. 5 N. Y. Sup. Ct. 689; Vinton *v.* Schwab, 32 Vt. 612; Baltimore *v.* Holmes, 39 Md. 243; McVee *v.* Bidwell, 74 Penn. St. 218, and cases cited in it. If the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injury, it is the duty of the court to instruct the jury that he cannot recover, or to direct a nonsuit, where the court has power to do so. Gavett *v.* Manchester &c. R. R. Co. 16 Gray, 501; Lucas *v.* New Bedford &c. R. R. 6 Gray, 64; Todd *v.* Old Colony & Fall River R. R. 3 Allen, 21; Bigelow J. in Wright *v.* Malden & Melrose R. R. Co. 4 Allen, 289; Beisiegal *v.* N. Y. Central R. R. Co. 40 N. Y. 9; Stubley *v.* North Western Ry. Co. L. R. 1 Ex. 13; Pittsburgh &c. R. R. Co. *v.* McClurg, 56 Penn. St. 294; Glassey *v.* Hestonville &c. R. Co. 57 Penn. St. 172; Crafter *v.* Metropolitan Ry. Co. L. R. 1 C. P. 300; Biles *v.* Holmes, 11 Ired. (Law) 16; Gilman *v.* Deerfield, 15 Gray, 577. "A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." Williams J. in Toomey *v.* London &c. Ry. Co. 3 C. B. N. S. 146, 150; Avery *v.* Bowden, 6 El. & Bl. 953; Mellors *v.* Shaw, 1 B. & S. 443; Cornman *v.* The Eastern Counties Ry. Co. 4 H. & N. 781; Maule J. in Peachey *v.* Rowland, 13 C. B. 186; Wittkowsky *v.* Wasson, 71 N. Car. 451, 454, 455; Ryder *v.* Woombwell, L. R. 4 Ex. 32; Beaulieu *v.* Portland Co. 48 Maine, 291, 296. As to what this *scintilla* is and means, see the explanation given by Chapman J. in Denny *v.* Williams, 5 Allen, 5.] It has been held that the breaking down of a coach is presumptive evidence of the unskilfulness of the driver, or the insufficiency of the coach. Christie *v.* Griggs, 2 Camp. 78; Curtis *v.* Drinkwater, 2 B. & Ad. 169; Israel *v.* Clark, 4 Esp. 259. In actions against railway companies for negligence, for not safely carrying, the *onus* may be upon the defendants to explain the cause of the occurrence. Carpue *v.* London & Brighton Ry. Co. 5 Q. B. 571; 13 L. J. Q. B. 133. Thus, a collision between trains of the same company is *primâ facie* evidence of negligence. Skinner *v.* London & Brighton Ry. Co. 5 Ex. 787. [See Brehm *v.* Great Western R. R. Co. 34 Barb. 256. For other causes of accidents which create presumptive evidence of negligence in carriers of passengers, see Ware *v.* Gay, 11 Pick. 106; Edgerton *v.* Harlem R. R. Co. 39 N. Y. 227; S. C. 35 Barb. 38; Yonge *v.* Kenney, 28 Geo. 111; Stockton *v.* Frey, 4 Gill, 406; McKinney *v.* Neil, 1 McLean, 540; Fairchild *v.* California Stage Co. 13 Cal. 599; Farish *v.* Reigle, 11 Grattan, 697; Sullivan *v.* Reading R. R. Co. 30 Penn. St. 234;

Obs. Chicago, B. & Q. R. R. Co. *v.* George, 19 Ill. 510.] If a railway company carries passengers to a place beyond their own line, they are liable for the negligence of those who own the line over which they pass. Great Western Ry. Co. *v.* Blake, 7 H. & N. 991; 31 L. J. Ex. 346; [Birkett *v.* Whitehaven Ry. Co. 4 H. & N. 730; Thomas *v.* Rhymney Ry. Co. L. R. 5 Q. B. 226; S. C. L. R. 6 Q. B. 266; Buxton *v.* North Eastern Ry. Co. L. R. 3 Q. B. 549; Candee *v.* Penn. R. R. Co. 21 Wisc. 582; Wheeler *v.* San Francisco, &c. R. R. Co. 31 Cal. 46; Illinois Central R. R. Co. *v.* Copeland, 24 Ill. 332. See, as to Massachusetts, Vermont, and Connecticut, Nutting *v.* Connecticut River R. R. Co. 1 Gray, 502; Farmers' &c. Bank *v.* Champlain Transp. Co. 23 Vt. 186; Hood *v.* New Haven R. R. Co. 22 Conn. 1. As to New York, Mississippi, and Georgia, see Southern Express Co. *v.* Thornton, 41 Miss. 216; Southern Express Co. *v.* Shea, 58 Geo. 519; Carey *v.* Cleveland &c. R. R. Co. 29 Barb. 35; Buffit *v.* Troy & Boston R. R. Co. 36 Barb. 420; Quimby *v.* Vanderbilt, 17 N. Y. 306; Williams *v.* Vanderbilt, 28 N. Y. 217.] But negligence is rebutted by proving that the accident arose through the wilful and wrongful act of a stranger. Latch *v.* Rumner Ry. Co. 27 L. J. Ex. 155. [So if it appears that it was caused by *vis major* and not by the negligence of the defendant. Nichols *v.* Marsland, Ex. 2 Central L. J. 523.] A railway company are bound, in the formation of their line, to construct their works in such a manner as to be capable of resisting all violence of weather which in the climate of the country through which the line runs, might be expected, although, perhaps, rarely, to occur; and where the accident is alleged to have happened in consequence of improper construction, the fact of giving way will amount to *primâ facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. Great Western Ry. of Canada *v.* Fawcett or Braid, 1 Moo. P. C. N. S. 103; 9 Jur. N. S. 339. See Withers *v.* North Kent Ry. Co. 27 L. J. Ex. 417; [3 H. & N. 969. See Virginia &c. R. R. Co. *v.* Sanger, 15 Grattan, 230; Louisville &c. R. R. Co. *v.* Hodge, 6 Bush, 141;] and see per Bramwell B. Ruck *v.* Williams, 3 H. & N. 318; 27 L. J. Ex. 357. And in making the line the company must employ proper and competent engineers and workmen. Grote *v.* The Chester & Holyhead Ry. Co. 2 Ex. 251.

As the law at present stands, railway companies do not, by their contract to carry, impliedly warrant that their carriages are roadworthy, and if an injury is caused by a hidden defect in their carriage, which no amount of care or skill could discover, they are not liable to a passenger for an injury. Readhead *v.* The Midland Ry. Co. 36 L. J. Q. B. 181; L. R. 2 Q. B. 412; [L. R. 4 Q. B. 379,] where see all the cases. Blackburn J. however, in this case, differed from the court, and held that a company is bound, at its peril, to supply its passengers with carriages reasonably sufficient for the journey, and is liable for an injury resulting from a latent defect. [In Ingalls *v.* Bills, 9 Met. 1, where a passenger in a coach received an injury solely by reason of the breaking of one of the iron axle-trees, in which there was a very small flaw, entirely surrounded by sound iron one fourth of an inch thick, and which could not be discovered by the most careful examination externally, it was held that the proprietors of the coach were not responsible for the injury thus received. See Grote *v.* Chester &c. Ry. Co. 2 Ex. 255; Simmons *v.* New Bedford &c. Stage Co. 97 Mass. 361; Farish *v.* Reigle, 11 Grattan, 697; Edwards *v.* Lord, 49 Maine, 279; Flint *v.* Norwich & N. Y. T. Co. 34 Conn. 554; Maverick *v.* Eighth Avenue R. R. 36 N. Y. 378; Brown *v.* New York Central R. R. Co. 34 N. Y. 404; Sawyer *v.* Hannibal & St. Joseph R. R. 37 Missou. 240; Meier *v.* Penn. R. R. 64 Penn. St. 225; Francis *v.* Cockrell, L. R. 5 C. P. 184; John *v.* Bacon, L. R. 5 C. P. 437; Remington *v.* Sheldon, 10 R. I. 218.]

As to negligence connected with level crossings, see Lunn *v.* London & North Western Ry. Co. 35 L. J. Q. B. 105; S. C. *nom.* Lunt *v.* London & North Western Ry. L. R. 1 Q. B. 277; Bilbee *v.* London, Brighton, & South Coast Ry. Co. 34 L. J. C. P. 182; [18 C. B. N. S. 584;] Stubley *v.* London & North Western Ry. Co. 35 L. J. Ex. 3; L. R. 1 Ex. 13; Stapley *v.* London & North Western Ry. Co. 35 L. J. Ex. 7; L. R. 1 Ex. 21; Skelton *v.* London & North Western Ry. Co. 36 L. J. C. P. 249; [L. R. 2 C. P. 631; North Eastern Ry. Co. *v.* Wanless, L. R. 7 H. L. 12; Oliver *v.* North Eastern Ry. Co. L. R. 9

Obs. Q. B 409; Ellis *v.* Great Western Ry. Co. L. R. 9 C. P. 551; Williams *v.* Great Western Ry. Co. L. R. 9 Ex. 157.]

The mere fact of a man driving on the wrong side of the road is no evidence of negligence in an action for running over a person who was crossing the road. Lloyd *v.* Ogleby, 5 C. B. N. S. 667; [Smith *v.* Gardner, 11 Gray, 418; Lovejoy *v.* Dolan, 10 Cush. 495.] But if the defendant does not keep on his right side, he must use more care and keep a better look-out than would be necessary if he were on his right side. Pluckwell *v.* Wilson, 5 C. & P. 375. [The driver of a team which is on the wrong side of the road in violation of the law of the road, may nevertheless maintain an action for an injury sustained by him from a collision with another team, the driver of which in meeting him carelessly and recklessly runs into him. Spofford *v.* Harlow, 3 Allen, 176; Kennard *v.* Burton, 25 Maine, 39, 49, 50; Davies *v.* Mann, 10 M. & W. 546.]

A land-owner who keeps, or causes to exist, within his own land anything of such a nature that if it escapes on to his neighbor's land, it will cause damage thereon, has an absolute duty imposed upon him to prevent such escape. Fletcher *v.* Rylands, 35 L. J. Ex. 154; [3 H. & C. 774;] L. R. 1 Ex. 265; [L. R. 3 H. L. 330. But see Nichols *v.* Marsland, Ex. 2 Central L. J. 523; and see Brown *v.* Collins, 53 N. H. 442.]

[The law regards proximate and not remote causes — proximate and not remote acts of negligence. As in case of injury from a defect in a highway, the law regards the existence of the defect, and not the cause of it. See Rogers *v.* Newport, 62 Maine. 101, 104; Lake *v.* Milliken, 62 Maine, 240, 242, 243; Lund *v.* Tyngsborough, 11 Cush. 563; Stickney *v.* Maidstone, 30 Vt. 738; McGrew *v.* Stone, 53 Penn. St. 436; State *v.* Manchester & Lawrence R. R. 52 N. H. 528, 552, where it is said that "the practical construction of 'proximate cause' by the courts has now come to be the cause which naturally led to, and which might have been expected to be directly instrumental in producing the result." Marble *v.* Worcester, 4 Gray, 395, 410 *et seq.*: Bennett *v.* Lockwood, 20 Wend. 223; McGrew *v.* Stone, 53 Penn. St. 436; Ryan *v.* New York Central R. R. Co. 25 N. Y. 210; Oil Creek & Alleghany River Ry. Co. *v.* Keighron, 74 Penn. St. 316; Pennsylvania R. R. Co. *v.* Kerr, 62 Penn. St. 353; Bellefontaine &c. R. R. Co. *v.* Snyder, 18 Ohio St. 399; Conn. Life Ins. Co. *v.* New Haven R. R. Co. 25 Conn. 265; Harrison *v.* Berkley, 1 Strobh. 525, 549; Ricker *v.* Freeman, 50 N. H. 420. As to fire caused by one of the engines of a railroad company, see Annapolis & Elkridge R. R. Co. 39 Md. 115, 141 *et seq.* and cases cited; Philadelphia &c. R. R. Co. *v.* Constable, 39 Md. 149; Baltimore & Ohio R. R. Co. *v.* Shipley, 39 Md. 251.]

Who liable. — Parties jointly interested in the carriage causing the damage are liable, notwithstanding a private arrangement between them that one should manage for one distance of road and the other for another. Waland *v.* Elkins, 1 Stark. 272; Fromont *v.* Coupland, 2 Bing. 170; Moreton *v.* Hardern, 4 B. & C. 223. The owner of a carriage who hires of a stable-keeper a pair of horses to draw it for the day, is not liable for an injury occasioned by the negligent driving of a person provided by the owner of the horses as a driver; Quarman *v.* Burnett, 6 M. & W. 499; Laugher *v.* Pointer, 5 B. & C. 547; [2 Chitty Contr. (11th Am. ed.) 864, 865, and note (k^{10})]; unless he assent to the act which caused the accident. McLaughlin *v.* Pryor, 4 M. & G. 48; [*post*, 574, note (*b*).] And where the defendant's cart was under the care of his servant, it was decided that the defendant was responsible, although the servant, being in the carriage, had, at the time of the collision, intrusted the reins to a stranger, who was riding with the servant. Booth *v.* Mister, 7 C. & P. 66. The defendant may be charged as a trespasser himself, or as a trespasser by the negligence of his servant; but in the latter case, if the damage be the result of a wilful act, the master is not liable. Wells *v.* Odey, 1 M. & W. 462; Moreton *v.* Hardern, 4 B. & C. 223; Williams *v.* Holland, 10 Bing. 112; Day *v.* Edwards, 5 T. R. 648; Savignac *v.* Roome, 6 T. R. 125; Ogle *v.* Barnes, 8 T. R. 188. Thus, if the accident occur *entirely* by wilful and malicious act of the servant, the master is not liable. McManus *v.* Cricket, 1 East, 106. See Croft *v.* Alison, 4 B. & Ald. 590. But it would appear that where the act of the servant which caused the accident is *merely* contrary to the regulations of his master, the latter is liable. Limpus *v.* The London General Omnibus

Obs. Co. 1 H. & C. 526; 32 L. J. Ex. 34; Greenwood *v.* Seymour, 7 H. & N. 355; 30 L. J. Ex. 327; [Rounds *v.* Delaware, Lackawanna & Western R. R. Co. 5 N. Y. Sup. Ct. 475; Howe *v.* Newmarch, 12 Allen, 49; O'Brien *v.* Boston & Worcester R. R. Co. 15 Gray, 20; Moore *v.* Fitchburg R. R. Co. 4 Gray, 465; Ramsden *v.* Boston & Albany R. R. Co. 104 Mass. 117; Higgins *v.* Watervliet T. & R. R. Co. 46 N. Y. 23; Jackson *v.* Second Avenue R. R. Co. 47 N. Y. 274.] There must be blame on the part of the servant, and there is if he do not exercise a sound judgment. Jackson *v.* Tollett, 2 Stark. 39; Mayhew *v.* Boyce, 1 Stark. 423. And the servant is bound to warn the passenger of a danger of which the servant is cognizant. Dudley *v.* Smith, 1 Camp. 167. One of the questions to be left to the jury is, whether, at the time of the act complained of, the servant was driving on his master's business, and with his authority. Patten *v.* Rea, 2 C. B. N. S. 606; 26 L. J. C. P. 235.

Negligence of Fellow Servants. — But although the master is liable to third persons for the negligence of his servant, as we have seen, yet he is not liable to his servant for the negligence of a fellow servant engaged in a common employment; there is no implied promise on the part of the master not to expose his servant to extraordinary risk. Griffiths *v.* Gidlow, 3 H. & N. 648; 27 L. J. Ex. 404; Riley *v.* Baxendale, 6 H. & N. 445; 30 L. J. Ex. 87; Priestly *v.* Fowler, 3 M. & W. 1; Wigmore *v.* Jay, 5 Ex. 354; 19 L. J. Ex. 300; Wiggett *v.* Fox, 11 Ex. 832; 25 L. J. Ex. 188; Waller *v.* South Eastern Ry. Co. 32 L. J. Ex. 205, [2 H. & C. 102;] Hutchinson *v.* York &c. Ry. Co. 5 Ex. 353; 19 L. J. Ex. 296; Potter *v.* Faulkner, 31 L. J. Q. B. 30; [1 B. & S. 800, 806;] Abraham *v.* Reynolds, 5 H. & N. 143; Lovegrove *v.* London, Brighton & South Coast Ry. Co.; Gallagher *v.* Piper, 33 L. J. C. P. 329; [16 C. B. N. S. 669; Lawler *v.* Androscoggin R. R. Co. 62 Maine, 463; Tunney *v.* Midland Ry. Co. L. R. 1 C. P. 291; Morgan *v.* Vale of Neath Ry. Co. 5 B. & S. 736; S. C. L. R. 1 Q. B. 149; Beaulieu *v.* Portland Co. 48 Maine, 291; Farwell *v.* Boston & Worcester R. R. Corp. 4 Met. 49; Gillshannon *v.* Stony Brook R. R. 10 Cush. 228; Hayes *v.* Western R. R. 3 Cush. 270; Albro *v.* Agawam Canal Co. 6 Cush. 75; King *v.* Boston & Worcester R. R. 9 Cush. 112; Seaver *v.* Boston & Maine R. R. 14 Gray, 466; Couch *v.* Steel, 3 El. & Bl. 402; Brown *v.* Maxwell, 6 Hill (N. Y.), 594; Carle *v.* Bangor & Piscataquis Canal & R. R. Co. 43 Maine, 269; Cook *v.* Parham, 24 Ala. 21; Fort *v.* Union Pacific R. R. Co. 2 Dillon, 259, 268–270, and cases in note *ad finem;* S. C. 17 Wallace, 553; 2 Dillon, 64; Haskins *v.* New York &c. R. R. Co. 65 Barb. 129; Honnor *v.* Illinois Central R. R. Co. 15 Ill. 550; Ryan *v.* Cumberland Valley R. R. Co. 23 Penn. St. 384; Shields *v.* Yonge, 15 Geo. 349; Coon *v.* Syracuse & Utica R. R. Co. 6 Barb. 231; Boldt *v.* New York Central R. R. Co. 4 Smith (N. Y.), 432; Murphy *v.* Smith, 19 C. B. N. S. 361; Degg *v.* Midland Ry. Co. 1 H. & N. 773; Vose *v.* Lancashire & Yorkshire Ry. Co. 2 H. & N. 728; Searle *v.* Lindsay, 11 C. B. N. S. 429.] And the common employment embraces all cases where the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. Morgan *v.* Vale of Neath Ry. Co. 33 L. J. Q. B. 260; 35 L. J. Q. B. 23; [5 B. & S. 736; S. C. L. R. 1 Q. B. 149; Tunney *v.* The Midland Ry. Co. L. R. 1 C. P. 291. The rule of law is the same, though the servant, or employee causing the injury, is engaged in a different department of the same general service, or exercising a higher grade of authority, and the plaintiff was acting under his direction at the time of the injury. Lawler *v.* Androscoggin R. R. Co. 62 Maine, 463; Gallagher *v.* Piper, 16 C. B. N. S. 669; Feltham *v.* England, L. R. 2 Q. B. 33; Gillshannon *v.* The Stony Brook R. R. Corp. 10 Cush. 228; Cumberland Coal & Iron Co. *v.* Scally, 27 Md. 589; Hall *v.* Johnson, 3 H. & C. 589; Caldwell *v.* Brown, 53 Penn. St. 453; Carle *v.* Bangor & Piscataquis Canal & R. R. Co. 43 Maine, 269; Farwell *v.* Boston & Worcester R. R. Corp. 4 Met. 49; Hayes *v.* Western R. R. Corp. 3 Cush. 270; King *v.* Boston & Worcester R. R. Corp. 9 Cush. 112; Hard *v.* Vermont &c. R. R. Co. 32 Vt. 473; Albro *v.* Agawam Canal Co. 6 Cush. 75; Wilson *v.* Merry, L. R. 1 H. L. Sc. 326; Sherman *v.* Rochester &c. R. R. 17 N. Y. 153. See, further, as to who are to be deemed fellow servants within the

Obs. rule, Warburton *v.* Great Western Ry. Co. L. R. 2 Ex. 30; Waller *v.* South Eastern Ry. Co. 2 H. & C. 102; Coon *v.* Syracuse &c. R. R. Co. 1 Selden, 492; Rohback *v.* Pacific R. R. Co. 43 Missou. 187; Wright *v.* New York &c. R. R. Co. 25 N. Y. 562; Shanck *v.* Northern &c. R. R. Co. 25 Md. 462; Conlin *v.* Charleston, 15 Rich. (S. Car.) L. 201; Morgan *v.* Vale of Neath Ry. Co. 5 B. & S. 570, 736; S. C. L. R. 1 Q. B. 149.]

And although the servant, to exempt the master, must be a person of competent skill; Tarrant *v.* Webb, 18 C. B. 787; 25 L. J. C. P. 261; [Lawler *v.* Androscoggin R. R. Co. 62 Maine, 463, 466; Gilman *v.* Eastern R. R. Corp. 10 Allen, 233, 238, and cases cited; Warner *v.* Erie R. R. Co. 39 N. Y. 468; Wilson *v.* Merry, L. R. 1 H. L. Sc. 326; Potter *v.* Faulkner, 1 B. & S. 800, 806; Searle *v.* Lindsay, 11 C. B. N. S. 429; Illinois Central R. R. Co. *v.* Jewell, 46 Ill. 99;] yet where the accident happened through the alleged inadequacy of the number of servants, the master was not held responsible. Skipp *v.* Eastern Counties Ry. Co. 9 Ex. 223; 23 L. J. Ex. 23. But the master would be liable if he knew that the servant habitually violated his duty. Senior *v.* Ward, 28 L. J. Q. B. 139; [1 El. & El. 385; Gilman *v.* Eastern R. R. Corp. 10 Allen, 233; C. & A. R. R. Co. *v.* Sullivan, 63 Ill. 293. Where the servant undertakes to hold the master for his negligence in not procuring suitable servants, the charge of this negligence should be duly alleged in an appropriate count. Lawler *v.* Androscoggin R. R. Co. 62 Maine, 463; Harper *v.* Ind. & St. Louis R. R. Co. 47 Missou. 567; Moss *v.* Pacific R. R. 49 Missou. 167.] And where machinery is required to be fenced, and the protection is defective, the owner, having notice of the defect, is responsible to one who entered his service when the fencing was in good order, and continues in the service, reasonably expecting the defects to be repaired. Holmes *v.* Clarke, 30 L. J. Ex. 135; 36 L. J. Ex. 356; [6 H. & N. 349; S. C. 7 H. & N. 937. The principle is well established, that an employer is under an implied contract with those whom he employs, to adopt and maintain suitable tackle, machinery, instruments, means, and appliances with which to carry on the business in which he requires their services; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment; and if from any negligence in respect to these requirements damages arise to the servant, the master or employer is responsible. Coombs *v.* New Bedford Cordage Co. 102 Mass. 572, 584; Ford *v.* Fitchburg R. R. Co. 110 Mass. 240; Northcoate *v.* Bachelder, 111 Mass. 322; Huddleston *v.* Lowell Machine Shop, 106 Mass. 282; Paterson *v.* Wallace, 1 Macq. 748; Cayzer *v.* Taylor, 10 Gray, 274; Seaver *v.* Boston & Maine R. R. 14 Gray, 466; Snow *v.* Housatonic R. R. Co. 8 Allen, 441; Gilman *v.* Eastern R. R. Co. 10 Allen, 233; S. C. 13 Allen, 433; Clarke *v.* Holmes, 7 H. & N. 937; O'Byrne *v.* Burn, 16 Cas. in Ct. of Sess. (2d Series) 1025; Indermaur *v.* Dames, L. R. 2 C. P. 311; Grizzle *v.* Frost, 3 F. & Fin. 622; Hackett *v.* Middlesex Manuf. Co. 101 Mass. 101, 104; Felch *v.* Allen, 98 Mass. 572, 574; Bartonsville Coal Co. *v.* Reid, 3 Macq. 266; Mellors *v.* Shaw, 1 B. & S. 437; Ormond *v.* Holland, 1 El., Bl. & El. 102; Buzzell *v.* Laconia Manuf. Co. 48 Maine, 113; Lawler *v.* Androscoggin R. R. Co. 62 Maine, 463; Indianapolis R. R. Co. *v.* Love, 10 Ind. 554; Warner *v.* Erie R. R. Co. 39 N. Y. 468; Wright *v.* New York &c. R. R. Co. 25 N. Y. 562; Keegan *v.* Western R. R. Co. 4 Selden, 175; Hayden *v.* Smithfield Manuf. Co. 29 Conn. 548; Fifield *v.* Northern R. R. 42 N. H. 225; Mad River & Erie R. R. Co. *v.* Barber, 5 Ohio (N. S.), 541; Sizer *v.* Syracuse, Bingh. & N. Y. R. R. 7 Lansing, 67; Anderson *v.* New Jersey &c. Co. 7 Rob. (N. Y.) 611; Shanck *v.* Northern &c. R. R. Co. 25 Md. 462; Salters *v.* Delaware & Hudson Canal Co. 5 N. Y. Sup. Ct. 559, 560; Laning *v.* New York C. R. R. Co. 49 N. Y. 521; 2 Chitty Contr. (11th Am. ed.) 857, 858, note (*f*); Hofnagle *v.* New York C. & H. R. R. R. Co. 50 N. Y. 610; Ardesco Oil Co. *v.* Gibson, 63 Penn. St. 146; Johnson *v.* Bruner, 61 Penn. St. 58; Cooper *v.* Hamilton Manuf. Co. 14 Allen, 193; Harrison *v.* Central R. R. 2 Vroom. 293; McGlynn *v.* Brodie, 31 Cal. 376; Gibson *v.* Pacific R. R. Co. 46 Missou. 163; Chicago & N. W. R. R. *v.* Swett, 45 Ill. 197; Chicago & N. W. R. R. Co. *v.* Jackson, 55 Ill. 492; O'Donnell *v.* Allegany Valley R. R. 59 Penn. St. 239; Brown *v.* Accrinton Cotton Co. 3 H. & C. 511. But if the servant,

Obs. well knowing the default of his employer, as in providing defective machinery, &c. voluntarily enters upon, or continues in his employment, he assumes the risk, and, if injured, has no remedy against his employer. Buzzell *v.* Laconia Manuf. Co. 48 Maine, 113; Hayden *v.* Smithfield Manuf. Co. 29 Conn. 548; Dynen *v.* Leach, 26 L. J. 221; Devitt *v.* Pacific R. R. Co. (Missouri) 12 Am. Law Reg. N. S. 104; Chicago &c. R. R. Co. *v.* Swett, 45 Ill. 197. See Snow *v.* Housatonic R. R. Co. 8 Allen, 441. The obligation of the employer towards those in his employment, does not extend beyond the use of ordinary care and diligence. King *v.* Boston & Worcester R. R. Co. 9 Cush. 112; Ryan *v.* Cumberland Valley R. R. Co. 23 Penn. St. 384; Sherman *v.* R. R. Co. 15 Barb. 574; Walker *v.* Bolling, 22 Ala. 294. As to the liability of one servant, to another in the same employment, for negligence, see Albro *v.* Jaquith, 4 Gray, 99. In a suit for damages to an employee or servant, arising from the neglect of the employer, in the use of defective machinery or tools, the declaration should allege that the defect was unknown to the plaintiff, and was known to the defendant, and that it arose from want of proper care and diligence on the part of the defendant. Buzzell *v.* Laconia Manuf. Co. 48 Maine, 113; Noyes *v.* Smith, 28 Vt. 59; Williams *v.* Clough, 3 H. & N. 258. But in Watling *v.* Oastler, L. R. 6 Ex. 73, it was held that the servant's ignorance of the danger or defects need not be alleged in terms, but that the averment that the injury was caused "by reason of the negligence and default of the defendants" must be taken as equivalent to an averment in the old form that it was by their *mere* negligence and default. If it were not so in fact, that will be matter of defence under the general issue. Mellors *v.* Shaw, 1 B. & S. 437. To the same effect is May *v.* Princeton, 11 Met. 442; Chapman C. J. in Steele *v.* Burkhardt, 104 Mass. 59, 62, and cases cited.]

Contributory negligence prevents the plaintiff from recovering, even though the defendant is guilty of negligence. "The rule of law is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong." Per Parke B. Bridge *v.* The Grand Junction Ry. Co. 3 M. & W. 244; Davies *v.* Mann, 10 M. & W. 546; 12 L. J. Ex. 10. See Butterfield *v.* Forrester, 11 East, 60; Holden *v.* Liverpool Gas Co. 3 C. B. 1; 15 L. J. C. P. 301; Clayards *v.* Dethick, 12 Q. B. 439. If the damage is not occasioned entirely by the negligence or improper conduct of the defendant, the plaintiff is still entitled to recover if he have not so far contributed to the misfortune by his own negligence or want of proper care, that but for such negligence the misfortune could not have happened, and if the defendant could by the exercise of ordinary care and caution have avoided the consequences of the neglect or carelessness of the plaintiff. Tuff *v.* Warman, 5 C. B. N. S. 573; 27 L. J. C. P. 322; Thompson *v.* The North Eastern Ry. Co. 30 L. J. Q. B. 67; 31 L. J. Q. B. 194; Senior *v.* Ward, 28 L. J. Q. B. 139; Martin *v.* Great Northern Ry. Co. 16 C. B. 192; Wise *v.* Great Western Ry. Co. 1 H. & N. 63; 25 L. J. Ex. 261; [State *v.* Manchester & Lawrence R. R. Co. 52 N. H. 528, 554-557; Dowell *v.* Steam Navigation Co. 5 El. & Bl. 206; Scott *v.* Dublin & Wicklow Ry. Co. 11 Irish Com. Law, 377; Spofford *v.* Harlow, 3 Allen, 176; Isbell *v.* R. R. Co. 27 Conn. 393; Kerwhacker *v.* Cleveland &c. R. R. Co. 3 Ohio St. 172; Steele *v.* Burkhardt, 104 Mass. 59; Wright *v.* Brown, 4 Ind. 95; R. R. Co. *v.* Adams, 26 Ind. 76; Louisville &c. R. R. Co. *v.* Collins, 2 Duvall, 116; Morrissey *v.* Wiggins Ferry Co. 43 Missou. 380; Brown *v.* R. R. Co. 50 Missou. 461; Needham *v.* San Francisco & S. J. R. R. 37 Cal. 409; Flynn *v.* San Francisco & S. J. R. R. 40 Cal. 14; Fitch *v.* Pacific R. R. 45 Missou. 322; R. R. Co. *v.* State, 36 Md. 366; Foster *v.* Holly, 38 Ala. N. S. 76; R. R. Co. *v.* Still, 19 Ill. 499; Trow *v.* Vermont Central R. R. Co. 24 Vt. 487; Lovett *v.* Salem & South Danvers R. R. Co. 9 Allen, 557; Beers *v.* Housatonic R. R. Co. 19 Conn. 566; Johnson *v.* Hudson River R. R. Co. 20 N. Y. 65; London, Brighton & South Coast Ry. Co. *v.* Walton, 14 Law Times (N. S.), 253; Greenland *v.* Chaplin, 5 Ex. 248; Austin *v.* New Jersey Steamboat Co. 43 N. Y. 75; Aycock *v.* Wilmington &c. R. R. 6 Jones (Law), 231; Balcom *v.* Dubuque &c. R. R. Co. 21 Iowa, 102; Macon &c. R. R. Co. *v.* Davis, 18

Obs. Geo. 679; East Tenn. &c. R. R. Co. *v.* St. John, 5 Sneed, 524; Illinois Central R. R. *v.* Middlesworth, 46 Ill. 494; Robinson *v.* New York &c. R. R. Co. 65 Barb. 146; Norris *v.* Litchfield, 35 N. H. 271, 277, 278; Kennard *v.* Burton, 25 Maine, 39; Daniels *v.* Gregg, 28 Mich. 32; Platt *v.* Ferry R. R. Co. 4 N. Y. Sup. Ct. 406. In Murphy *v.* Deane, 101 Mass. 455, Mr. Justice Wells criticises the above proposition, and suggests that it does not sufficiently impose upon the plaintiff the burden of proving the necessary elements of his case: "We think," the learned judge observes, "it is manifest that the rule thus laid down in Tuff *v.* Warman, is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part. Trow *v.* Vermont Central R. R. Co. 24 Vt. 487; Birge *v.* Gardiner, 19 Conn. 507; Adams *v.* Carlisle, 21 Pick. 146; Parker *v.* Adams, 12 Met. 415; Lucas *v.* Taunton &c. R. R. 6 Gray, 64; Wilson *v.* Charlestown, 8 Allen, 138; Gaynor *v.* Old Colony & Newport Ry. Co. 100 Mass. 208, 211; Merrill *v.* Hampden, 26 Maine, 234; Dickey *v.* Maine Telegraph Co. 43 Maine, 492; Park *v.* O'Brien, 23 Conn. 339; Dyer *v.* Talcott, 16 Ill. 300; Walter *v.* Herron, 22 Texas, 55; Welling *v.* Judge, 40 Barb. 193; Owings *v.* Jones, 9 Md. 108; Northern Central R. R. Co. *v.* State, 31 Md. 357; Milwaukee &c. R. R. Co. *v.* Hunter, 11 Wisc. 160; Evansville &c. R. R. Co. *v.* Hiatt, 17 Ind. 102; Gahagan *v.* Boston & Lowell R. R. Co. 1 Allen, 190; Gilman *v.* Deerfield, 15 Gray, 577; Gavett *v.* Manchester & Lawrence R. R. Co. 16 Gray, 501; Michigan Central R. R. *v.* Coleman, 28 Mich. 440, 447, and cases cited; Kelly *v.* Hendrie, 26 Mich. 255; Mitchell *v.* New York Central &c. R. R. Co. 5 N. Y. Sup. Ct. 122, 124, and cases cited; S. C. 9 N. Y. Sup. Ct. 535, and cases cited; Davis *v.* New York Central &c. R. R. Co. 47 N. Y. 400; Pennsylvania R. R. Co. *v.* Ackerman, 74 Penn. St. 265. In some states, it is the rule that the plaintiff's negligence is matter of defence, the burden of pleading and proving which rests upon the defendant, although if the plaintiff's evidence discloses the fact he cannot recover. See Beatty *v.* Gilmore, 16 Penn. St. 463; Pennsylvania R. R. Co. *v.* McTighe, 46 Penn. St. 316; Penn. Canal Co. *v.* Bently, 66 Penn. St. 30; Durant *v.* Palmer, 5 Dutch. 544; Johnson *v.* Hudson River R. R. Co. 5 Duer, 21. Such was the rule adopted in the supreme court of the United States in R. R. Co. *v.* Gladmon, 15 Wallace, 401. It is not necessary to allege that the injured person did not contribute to the accident. Watling *v.* Oastler, L. R. 6 Ex. 73, 88; May *v.* Princeton, 11 Met. 442; *post*, 575, note (*e*).]

So also a passenger in a public conveyance, who is injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury. Thorogood *v.* Bryan, 8 C. B. 131; 18 L. J. C. P. 336; Rigby *v.* Hewitt, 5 Ex. 240; [Peck *v.* Neal, 3 McLean, 22, 26; Lockhart *v.* Lichtenthaler, 46 Penn. St. 151.]

And contributory negligence in an infant has the same effect as in the case of an adult. Abbott *v.* Macfie, 2 H. & C. 744; 33 L. J. Ex. 177. In that case the defendants placed a shutter of their cellar against the wall of a public street. The dress of the plaintiff, who was jumping off the shutter, caught the corner of it, when it fell and injured the plaintiff, and it was held, upon the above rule of law, that the plaintiff could not recover; and it was further held, that the defendant's liability for injury to another child depended upon whether the children were playing together, so as to be joint actors; and to the like effect is, Mangan *v.* Atherton, 35 L. J. Ex. 161; 1 L. R. Ex. 239; and see Waite *v.* The North Eastern Ry. Co. El., Bl. & El. 718; 27 L. J. Q. B. 417; 28 L. J. Q. B. 258. [The supreme court of the United States, in R. R. Co. *v.* Gladmon, 15 Wallace, 401, 408, maintained that the rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years, are quite different. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge.

Obs. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. This rule has been supported by great force of reason and authority. The decisions are not, however, entirely harmonious. See Robinson *v.* Cone, 22 Vt. 213; Daley *v.* Norwich &c. R. R. Co. 26 Conn. 591; North Penn. R. R. Co. *v.* Mahoney, 57 Penn. St. 187; Smith *v.* O'Connor, 48 Penn. St. 218; Bellefontaine &c. R. R. Co. *v.* Snyder, 18 Ohio St. 399; Daniels *v.* Clegg, 28 Mich. 32; Birge *v.* Gardiner, 19 Conn. 507; Kerr *v.* Forgue, 54 Ill. 482; Karr *v.* Parks, 40 Cal. 188; Sheridan *v.* Brooklyn &c. R. R. Co. 36 N. Y. 39; Mangam *v.* Brooklyn &c. R. R. Co. 36 Barb. 230; Glassey *v.* Hestonville &c. R. R. Co. 57 Penn. St. 172; Pittsburg A. & M. Pass. Ry. Co. *v.* Caldwell, 74 Penn. St. 421; Wyatt *v.* Citizen's Ry. Co. 55 Missou. 485; Cressey *v.* Hestonville &c. Ry. Co. 75 Penn. St. 83, 86, and cases cited; Philadelphia &c. R. R. Co. *v.* Long, 75 Penn. St. 259; Philadelphia &c. Ry. Co. *v.* Hassard, 75 Penn. St. 367; Chicago *v.* Starr, 42 Ill. 174; Chicago *v.* Mayor, 18 Ill. 349; Boland *v.* Missouri R. R. Co. 36 Missou. 484; Haycroft *v.* Lake Shore & Mich. Southern Ry. Co. 5 N. Y. Sup. Ct. 49; S. C. 9 N. Y. Sup. Ct. 489; McMahon *v.* North Central Ry. Co. 39 Md. 438; Lynch *v.* Smith, 104 Mass. 52; Elkins *v.* Boston & Albany R. R. 115 Mass. 190; Dowd *v.* Chicopee, 116 Mass. 93; Mulligan *v.* Curtis, 100 Mass. 512; Munn *v.* Reed, 4 Allen, 431; Chicago, Burl. & Quincy R. R. Co. *v.* Dewey, 26 Ill. 255; Leslie *v.* Lewiston, 62 Maine, 468, 472, 473; Wright *v.* Malden & Melrose R. R. Co. 4 Allen, 283; Callahan *v.* Bean, 9 Allen, 401; Lovett *v.* Salem & South Danvers R. R. Co. 9 Allen, 557; Holly *v.* Boston Gas Light Co. 8 Gray, 123; Hartfield *v.* Roper, 21 Wend. 615; Lafayette &c. R. R. Co. *v.* Hoffman, 28 Ind. 287. As to *concurring causes;* where the injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause, unless he be the plaintiff, may be equally culpable, or because the other cause was a mere accident. Lake *v.* Milliken, 62 Maine, 240; Chapman *v.* New Haven R. R. Co. 19 N. Y. 341; Ricker *v.* Freeman, 50 N. H. 420; Webster *v.* Hudson River R. R. Co. 38 N. Y. 161; Brehm *v.* Great Western R. R. Co. 34 Barb. 256; Paulmier *v.* Erie R. R. Co. 34 N. J. (Law) 151; Lockhart *v.* Lichtenthaler, 46 Penn. St. 151; Harrison *v.* Great Northern R. R. Co. 3 H. & C. 231.] The executor cannot recover, where the deceased could not, by reason of contributory negligence, have recovered. Senior *v.* Ward, 28 L. J. Q. B. 139; [1 El. & El. 385.]

Trustees of docks for public purposes, receiving tolls, but not receiving any *personal* benefit, are liable in their corporate capacity for damages caused by the default of their servants to the same extent as private individuals levying tolls for their own profit. The Mersey Docks & Harbour Board *v.* Gibbs; Same *v.* Penhallow, 35 L. J. Ex. 225; L. R. 1 H. L. 93; 7 H. & N. 329; 30 L. J. Ex. 329; Coe *v.* Wise, L. R. 1 Q. B. 711; [*ante*, 494, 495; Lyme Regis *v.* Henley, 2 Cl. & Fin. (Am. ed.) 331, note (1); Duncan *v.* Findlater, 6 Cl. & Fin. (Am. ed.) 894, note (1). See Hickok *v.* Plattsburgh, 16 N. Y. 161; Conrad *v.* Ithaca, 16 N. Y. 158; Hover *v.* Barkhoof, 44 N. Y. 113.] So, also, if the works are for trading purposes. Scott *v.* Mayor &c. of Manchester, 2 H. & N. 204; 26 L. J. Ex. 406. So statutable commissioners are liable for injuries arising from the execution of works which they order, and which are defective in proper precaution against danger. Ruck *v.* Williams, 3 H. & N. 308; 27 L. J. Ex. 357. [See Wendell *v.* Troy, 4 N. Y. Court of App. Dec. 563.] But it would appear the damage must flow from the breach of the particular duty. Brownlow *v.* The Metropolitan Board of Works, 33 L. J. C. P. 233; [S. C. 13 C. B. N. S. 768;] Walker *v.* Goe, 4 H. & N. 350; 28 L. J. Ex. 184. See Orby *v.* The Ryde Commissioners, 33 L. J. Q. B. 296. So they are liable if they personally interfere in the carrying out of the works. The Company &c. of the Southampton & Itchin Floating Bridge *v.* The Local Board of Health of Southampton, 8 El. & Bl. 801; 28 L. J. Q. B. 41.

Contractors and Sub-contractors. — A person who employs another to do a lawful act, is presumed, in the absence of evidence to the contrary, to employ

Obs. him to do it in a lawful and reasonable manner, and therefore, unless the parties stand in the position of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the act is done. Butler *v.* Hunter, 31 L. J. Ex. 214; [7 H. & N. 826;] Readie *v.* London & North Western Ry. Co. 4 Ex. 244; [2 Chitty Contr. (11th Am. ed.) 861 *et seq.* and notes and cases cited; Wright *v.* Holbrook, 52 N. H. 120, in which Sargent J. discusses this point at length; Hilliard *v.* Richardson, 3 Gray, 349; Cuff *v.* Newark & N. Y. R. R. Co. 6 Vroom, 17; Overton *v.* Freeman, 11 C. B. 867; Gayford *v.* Nicholls, 9 Ex. 702, 707; Peachey *v.* Rowland, 13 C. B. 182; Eaton *v.* European & N. A. R. R. Co. 59 Maine, 520; Brackett *v.* Lübke, 4 Allen, 138, 140; Pickard *v.* Smith, 10 C. B. N. S. 470, 480; Kellogg *v.* Payne, 21 Iowa, 575; Chicago *v.* Robbins, 2 Black, 418; Allen *v.* Willard, 57 Penn. St. 347; Schwartz *v.* Gilmore, 45 Ill. 455; Sadler *v.* Henlock, 4 El. & Bl. 570, 578; Blake *v.* Thirst, 2 H. & C. 20.] But if the thing contracted to be done of itself, and without negligence on the part of the contractor, causes the injury, the person for whom it is done is responsible. See Hole *v.* Sittingbourne &c. Ry. Co. 6 H. & N. 488; 30 L. J. Ex. 81. And if the thing to be done is an unlawful act, the employer is liable. Ellis *v.* Sheffield Gas Company, 2 El. & Bl. 767; 23 L. J. Q. B. 42; [Creed *v.* Hartmann, 29 N. Y. 591; Cuff *v.* Newark & New York R. R. Co. 6 Vroom, 17.] See, as to statutable duty, Grey *v.* Pullen, 34 L. J. Q. B. 265; [5 B. & S. 970.] As to warehousemen, see Murphy *v.* Caralli, 34 L. J. Ex. 14; [3 H. & C. 461.] As to liability of vestry, Holliday *v.* St. Leonards, 11 C. B. N. S. 192; 30 L. J. C. P. 361. [As to liability of contractor after execution of his work, see Hyams *v.* Webster, L. R. 2 Q. B. 264.]

Volunteers. — A master is not liable for injury to a person volunteering assistance to his servant; Degg *v.* The Midland Ry. Co. 1 H. & N. 773; 26 L. J. Ex. 171; even if he is invited by the servant to assist him, for the stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant. Potter *v.* Faulkner, 31 L. J. Q. B. 30; [1 B. & S. 800.] See Abraham *v.* Reynolds, 5 H. & N. 143; Blackemore *v.* Bristol & Exeter Ry. Co. 8 El. & Bl. 1035. [But where one volunteers to assist another in a piece of work, the latter being present, they will stand in the relation of master and servant, and the former will be liable for a trespass committed by the latter, through negligence or want of information. Hill *v.* Morey, 26 Vt. 178.]

"When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected by sudden giddiness, or, in the case of a horse or carriage, who might by sudden starting of a horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different." Hardcastle *v.* South Yorkshire Ry. Co. 4 H. & N. 67; 28 L. J. Ex. 139–141, per Martin B.; [Howland *v.* Vincent, 10 Met. 371; Binks *v.* South Yorkshire R. R. Co. 3 B. & S. 244; Hadley *v.* Taylor, L. R. 1 C. P. 53; Vale *v.* Bliss, 50 Barb. 358; Corby *v.* Hill, 4 C. B. N. S. 556, 568, note and cases; Stone *v.* Jackson, 16 C. B. 199.] In Barnes *v.* Ward, 9 C. B. 392; 19 L. J. C. P. 195, it was held that where an excavation is a public nuisance, an individual injury arising from it is the subject-matter of an action. And see Hounsell *v.* Smyth, 7 C. B. N. S. 731; 29 L. J. C. P. 203; [*ante*, 517.] But where land with an obstruction on it, or immediately adjoining it, is dedicated to the public as a way, the dedication is subject to the inconvenience or risk arising from the obstruction. Cornwall *v.* Metropolitan Commissioners of Sewers, 10 Ex. 771; Fisher *v.* Prowse, 31 L. J. Q. B. 212; [2 B. & S. 770;] Robbins *v.* Jones, 33 L. J. C. P. 1; [15 C. B. N. S. 221.]

If a person uses the land of another by his permission, the owner cannot be made liable for an injury arising to the person so using it, unless he does some wrongful act, such as digging a trench, or making any misrepresentation which might be equivalent to a trap. The permission is in the nature of a gift, and the general principle is that the giver in such a case is not answerable for any injury from such a gift, unless he knows at the time the dangerous character

Obs. of the thing given. Seymour *v.* Maddox, 16 Q. B. 326; 20 L. J. Q. B. 327; Southcote *v.* Stanley, 1 H. & N. 247; 25 L. J. Ex. 339; Bolch *v.* Smith, 7 H. & N. 735; 31 L. J. Ex. 201; Gautret *v.* Egerton, 36 L. J. C. P. 191; [L. R. 2 C. P. 371; Campbell *v.* Portland Sugar Co. 62 Maine, 552; Carlton *v.* Franconia Iron Co. 99 Mass. 216; Binks *v.* South Yorkshire Ry. Co. 3 B. & S. 244;] and see Blakemore *v.* Bristol & Exeter Ry. Co. 8 El. & Bl. 1035; M'Carthy *v.* Young, 30 L. J. Ex. 227; 6 H. & N. 329; Chapman *v.* Rothwell, El., Bl. & El. 168; 27 L. J. Q. B. 315; where the plaintiff was lawfully returning through the regular passage from the defendant's brewery, and fell into a cellar improperly guarded, it was held that the defendant was liable. Where the defendant, by permission of the owner, placed an obstruction in a private way, which was not properly lighted by night, he was held liable for injury to the plaintiff being lawfully there. Corby *v.* Hill, 4 C. B. N. S. 556; 27 L. J. C. P. 318. And if the plaintiff resorts to a building in the occupation of the defendant, upon the defendant's invitation, express or implied, the defendant is bound to exercise reasonable care to prevent damage happening from unusual danger, of which he has or ought to have knowledge. Indermaur *v.* Dames, 35 L. J. C. P. 184; L. R. 1 C. P. 274; [2 Ib. 311; Carlton *v.* Franconia Iron Co. 99 Mass. 216; Sweeny *v.* Old Colony & Newport R. R. Co. 10 Allen, 368; Wendell *v.* Baxter, 12 Gray, 494; Campbell *v.* Portland Sugar Co. 62 Maine, 552; Frees *v.* Cameron, 4 Rich. 228; Birge *v.* Gardiner, 19 Conn. 507; Larue *v.* Farren Hotel Co. 116 Mass. 67. Where the defendant left a trap-door open in the entrance of his shop, he was held liable for an injury to a customer falling into it. Chapman *v.* Rothwell, El., Bl. & El. 168. Where the defendant left a shoot in his sugar refinery unprotected, and the plaintiff being lawfully there on business fell down the shoot, the defendant was held liable. Indermaur *v.* Dames, L. R. 1 C. P. 274; 2 Ib. 311. But where the plaintiff fell down a staircase on defendant's premises, by reason of his moving about there in the dark, he was held not to be entitled to recover, although he was lawfully there on business. Wilkinson *v.* Fairrie, 1 H. & C. 633. The occupier of premises is not liable to servants in his employment who take the risk of the dangerous state of the premises; Seymour *v.* Maddox, 16 Q. B. 326; nor, it is said, is he liable to mere visitors. Southcóte *v.* Stanley, 1 H. & N. 247.]

As to the duty to fence mines, see the subject fully discussed and all the cases collected. Groucott *v.* Williams, 32 L. J. Q. B. 235.

The declaration must show facts on which a duty is founded, which it is incumbent on the defendant to perform. Gautret *v.* Egerton, 36 L. J. C. P. 191; [L. R. 2 C. P. 371; Collis *v.* Selden, L. R. 3 C. P. 495.]

1. *Against the Owner of a Carriage for negligent driving.* (*a*)

For that the defendant [" by his servant " (*b*)] so negligently drove his horse

(*a*) See forms, Williams *v.* Holland, 10 Bing. 112; 6 C. & P. 501; Croft *v.* Alison, 4 B. & Ald. 590; Moreton *v.* Hardern, 4 B. & C. 223; [Davies *v.* Mann, 10 M. & W. 546;] for killing a horse, Patten *v.* Rea, [2 C. B. N. S. 606;] 26 L. J. C. P. 235; and see a form by a master for an injury to his servant. Martinez *v.* Gerber, 3 Scott N. R. 86; S. C. 3 M. & G. 88. See Croft *v.* Alison, 4 B. & Ald. 590. If the plaintiff had let the carriage for an unexpired term, and was not entitled to possession, but was owner in *reversion*, the declaration should be framed accordingly. See *post*, " Reversion."

(*b*) But under an allegation that *defendant* had the care and was guilty of neglect, proof that *his servant* was the driver, &c. would be admissible. Brucher *v.* Fromont, 6 T. R. 659; M'Manus *v.* Crickett, 1 East, 110; Wheatley *v.* Patrick, 2 M. & W. 650. Evidence of this, Joyce *v.* Capel, 8 C. & P. 370 *Qui facit per alium facit per se.* In some cases it would be expedient to allege that the defendant was possessed, &c. which was under the control of his servant, &c. as in Mitchell *v.* Crassweller, 22 L. J. C. P. 100, in which case, without a special traverse of the service, it would be admitted. [Count against the hirer of a driver and horses for an injury caused by the negligence of the driver. Laugher *v.* Pointer, 5 B. & C. 547; Quarman *v.* Burnett, 6 M. & W. 499; [where the hirer was held not to be liable;] M'Laughlin *v.* Pryor, 4 M. & G. 48; [where the hirer was held to have made himself liable by personal interference.] Count against an omnibus proprietor for injuries caused by the negligence of his driver. Cotton *v.* Wood, 8 C. B. N. S. 568; Limpus *v.* London General Omnibus Co. 32 L. J. Ex. 189, 327; 1 H. & C. 526. Against a master for an injury done by a servant in the course of the

and carriage, that the same struck against the carriage and horse of the plaintiff, whereby (*c*) the plaintiff was hurt and prevented from following his business, and incurred expense in endeavoring to be cured, and the carriage and horse (*d*) of the plaintiff were damaged, and he incurred expense in repairing the said carriage, and in curing the said horse, and was obliged to hire another carriage and horse. [*State any special damage that has arisen.*]

[1*a*. *Negligence of Railroad Corporation.*

And the plaintiff says the defendants are a corporation owning a railroad between A. and B.; that plaintiff was a passenger on said railroad, and by reason of the insufficiency of an axle of the car in which he was riding the plaintiff was hurt; that the defendants did not use due care in reference to said axle, but plaintiff did use due care. (*e*)

(This form may be varied to adapt it to many cases, simply by changing the allegation as to the cause of the accident. The party is not restricted to one cause, if there are several concurrent causes.)

1*b*. *Negligence of Town respecting Highway.*

And the plaintiff says there is in the town of —— a public highway leading from —— to ——, which said defendants are bound to keep in repair; that the same was negligently suffered by defendants to be out of repair, whereby the plaintiff travelling thereon and using due care (*f*) was hurt.]

2. *For Injury to a Passenger.*

Ante, 492, Form 3.

3. *By the Executor or Administrator of Deceased Passenger.*

Ante, 492, Form 4.

[4. *For negligent driving where the Damage occurred in endeavoring to avoid a Collision.*

That at the time of committing the grievances hereinafter mentioned the plaintiff was possessed of a carriage and horses, and was driving the same along a public highway, and the defendant then so negligently and violently drove a wagon and horses along the same highway, and so unskilfully and improperly conducted the said wagon and horses that the same would then necessarily and inevitably have been driven and forced against the said car-

work which he was employed to do. Scott *v.* Mayor of Manchester, 1 H. & N. 59. Count against the owner of a public conveyance for want of care in his servant in removing the plaintiff from the conveyance for misconduct. Seymour *v.* Greenwood, 6 H. & N. 359.]

(*c*) [See Watling *v.* Oastler, L. R. 6 Ex. 73, 76.]

(*d*) Where a *horse* was damaged, held that the proper measure of damages was the keep at the farrier's, the amount of *his* bill, and the difference in value of the horse at the end of the time when he was cured and at the time of the accident, but not the hire of another horse. Hughes *v.* Quentin, 8 C. & P. 707.

(*e*) [As to this allegation, see *ante*, 570, 571; May *v.* Princeton, 11 Met. 442; Jones *v.* Andover, 10 Allen, 18, 20; Steele *v.* Burkhardt, 104 Mass. 59, 62, and cases; Mellons *v.* Shaw, 1 B. & S. 437; Smith *v.* Eastern Railroad, 35 N. H. 356.]

(*f*) [See note (*e*) above; Carey *v.* Bath, 35 N. H. 530, 548; Clark *v.* Barrington, 41 N. H. 44; Tucker *v.* Henniker, 41 N. H. 317; Michigan Central R. R. Co. *v.* Coleman, 28 Mich. 440, 447; Indianapolis &c. R. R. Co. *v.* Rutherford, 29 Ind. 82; Cunningham *v.* Lyness, 22 Wisc. 245.]

riage and horses of the plaintiff and have damaged them, if the said carriage and horses of the plaintiff had then continued and remained upon the said highway as aforesaid; wherefore the plaintiff, in a reasonable and necessary endeavor under the circumstances to avoid the said damage, reasonably and necessarily and with proper and reasonable care and skill in that behalf guided and conducted his said carriage and horses to and off one side of the said highway, and in so doing his said carriage and horses, without any negligence, unskilfulness, or default of the plaintiff, but solely and immediately in consequence of the negligence, violence, and improper conduct of the defendant as aforesaid, were upset and injured; whereby the plaintiff was put to expense in repairing his said carriage, and in curing his said horses, and was deprived of the use of his said carriage and horses for a long time, and was put to expense in hiring another carriage and other horses.

For negligence in driving a coach, whereby the plaintiff, a passenger, was obliged to jump off to avoid danger, and was injured. Jones *v.* Boyce, 1 Starkie, 493. For an injury arising from the negligence of the defendant in leaving his horses unattended. Quarman *v.* Burnett, 6 M. & W. 499. For spurring a horse while passing close to the plaintiff on a highway, whereby the plaintiff was kicked by the horse. North *v.* Smith, 10 C. B. N. S. 572.]

5. *Against a Railway Company for negligently running a Train against the Plaintiff.* (*g*)

That the defendants were possessed of a railway locomotive engine and train of carriages attached thereto, and were by their servants driving and conducting the same upon a certain railway, and the plaintiff was lawfully crossing the said railway; and the defendants by their servants so negligently drove and conducted the said engine and train that thereby the same ran and were driven against the plaintiff and severely injured him. (*h*)

6. *Against a Railway Company for neligently maintaining and keeping a Crossing.*

Lunn *v.* London & North Western Ry. Co. 35 L. J. Q. B. 105; S. C. *nom.* Lunt *v.* London & North Western Ry. Co. L. R. 1 Q. B. 275; Stubley *v.* London & North Western Ry. Co. L. R. 1 Ex. 21; 35 L. J. Ex. 3; Stapley *v.* London, Brighton, & South Coast Ry. Co. L. R. 1 Ex. 13; 35 L. J. Ex. 7; Skelton *v.* London & North Western Railway, 36 L. J. C. P. 249; [L. R. 2 C. P. 631.]

7. *For negligently keeping a Railway Station in a Dangerous Condition.*

Toomey *v.* London, Brighton, and South Coast Railway Company, 3 C. B. N. S. 146; 27 L. J. C. P. 39. (*i*)

(*g*) Form, Waite *v.* North Eastern Ry. 27 L. J. Q. B. 117; [El., Bl. & El. 718.]

(*h*) [See Smith *v.* Old Colony & Newport R. R. Co. 10 R. I. 22, 28.]

(*i*) See similar forms, Martin *v.* Great Northern Ry. Co. 24 L. J. C. P. 209; Cornman *v.* Eastern Counties Ry. Co. 29 L. J. Ex. 94; [4 H. & N. 781; Longmore *v.* Great Western Ry. Co. 19 C. B. N. S. 183; Nicholson *v.* Lancashire &c. Ry. Co. 3 H. & C. 534.]

[*7a. For negligently allowing a Dog to be on the Station, which bit Plaintiff.*

Smith *v.* Great Eastern Ry. Co. L. R. 2 C. P. 4.

7b. For negligently providing a Defective Carriage.

Readhead *v.* Midland Ry. Co. 36 L. J. Q. B. 181.

7c. For negligence in not keeping the Line in a Proper State for the Traffic.

Blake *v.* Great Western Ry. Co. 7 H. & N. 987.

7d. For not providing Proper Means for alighting from the Train.

Foy *v.* London & Brighton Ry. Co. 18 C. B. N. S. 225.

7e. For not providing Proper Means of Departure from the Train.

Nicholson *v.* Lancashire &c. Ry. Co. 3 H. & C. 534.

7f. For negligently keeping an Obstruction on the Platform of a Station, which the Plaintiff fell over.

Cornman *v.* Eastern Counties Ry. Co. 4 H. & N. 781.]

8. *Against the Owner of a House for placing Gravel on a Road, by which the Plaintiff in driving along the Road was injured.* (*k*)

Burgess *v.* Gray, 1 C. B. 578.

(*k*) See form, &c. Burgess *v.* Gray, 1 C. B. 578; and another similar form, Goldthorpe *v.* Hardman, 13 M. & W. 377; 2 D. & L. 442; the facts of the former case were, that the defendant employed a third person to make a drain for his house, and the workmen of that third person placed the gravel on the road; but inasmuch as the defendant personally superintended the work, it was held that he was responsible; though, *semble*, he would have been liable without any such superintendence. Bush *v.* Steinman, 1 B. & P. 404; and Master *v.* Temperley, 4 Q. B. 298, 5 B. & C. 560. Form against a surveyor. Davis *v.* Curling, 15 L. J. Q. B. 56. As to the liability of the occupiers of houses for accidents of this kind, see in general, Com. Dig. Act. Case; Burn's J. tit. "Nuisance." [The defendant owned a building with a roof so constructed that snow and ice collected on it from natural causes were liable to fall into the adjoining highway. He let the whole building to a tenant who covenanted to make all repairs, external and internal. A fall of snow from the roof of this building injured the plaintiff while travelling on the highway with due care, and it was held that the defendant was not liable. Leonard *v.* Storer, 115 Mass. 86; Kirby *v.* Boylston, Market Association, 14 Gray, 249. See Shipley *v.* Fifty Associates, 101 Mass. 251; S. C. 106 Mass. 194.] There seems to be a difference in the liability of the possessors of *fixed property*, and that of the owners of *goods*, in respect of their being answerable for the acts of their contractors or workmen. Per Parke B. Quarman *v.* Burnett, 6 M. & W. 499; *post*, Obs. See, also, Randleson *v.* Murray, 8 Ad. & E. 209, where the defendant, a warehouseman, was held liable for the fall of a barrel, which a master porter, whom he had engaged to hoist it to his warehouse, occasioned by his negligence; and see 1 C. B. 593, note (*a*), and 1 C. B. 585, note (*a*). The trustees under a public road act are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road. Duncan *v.* Findlater, 6 Cl. & Fin. 894; [*ante*, 494, 495, 572.] See, also, Holliday *v.* St. Leonards, 11 C. B. N. S. 192; 30 L. J. C. P. 361; Harris *v.* Baker, 4 M. & S. 27; 1 Chit. Pl. Index, "Agents" and "Trustees." Where a tenant, on quitting a house, gave notice to a gas company that he should require no more gas, and the company neglected to turn off the gas, which exploded (after the tenant had quitted), in consequence of the interior pipe having been wrongfully removed by some one, it was held the company was not responsible to the owner of the house. Holden *v.* Liverpool New Gas Co. 15 L. J. C. P. 301.

9. *Against a Public Company for negligently taking up the Pavement of a Street, and depositing the Materials so that Plaintiff was injured.*

Drew *v.* New River Company, 6 C. & P. 754. (*l*)

10. *Against a Railway Company for negligently setting fire to Stacks, &c. near which their Trains passed.* (*m*)

Aldridge *v.* Great Western Ry. Co. 3 M. & G. 515; 1 Dowl. N. S. 247; Pigott *v.* Eastern Counties Ry. Co. (*n*) 15 L. J. C. P. 235; [3 C. B. 229;] Vaughan *v.* Taff Vale Ry. Co. 28 L. J. Ex. 41; [5 H. & N. 679.]

11. *For so negligently constructing a Hay-rick on Defendant's Land, that in consequence of its Spontaneous Ignition his Neighbor's House was burnt.*

Vaughan *v.* Menlove, 3 Bing. N. C. 468; 5 C. & P. 525.

[11*a*. *For negligently lighting a Fire which spread to the Close of the Plaintiff.*

Filliter *v.* Phippard, 11 Q. B. 347.]

12. *For leaving a Cart and Horse unattended in the Street, whereby the Plaintiff (a Child), by interfering with them in Play, was injured.*

Lynch *v.* Nurdin, 1 Q. B. 29. (*o*)

13. *For negligently lowering a Barrel from a Warehouse, which fell and injured Plaintiff.*

Randleson *v.* Murray, 8 Ad. & E. 109.

14. *For so negligently tying up Defendant's Cow in a Slaughter-house, that it got loose and killed Plaintiff's Cow.*

Lloyd *v.* Walkey, 9 C. & P. 771.

15. *For negligently working a Mine under the Land of Plaintiff and his Tenant, whereby the Support was weakened.*

Harris *v.* Ryding, 5 M. & W. 60.

(*l*) When proper to sue the *contractor*, instead of the company, Allen *v.* Hayward, 15 L. J. Q. B. 99; [7 Q. B. 960.] And see *ante*, Obs. 572, 573.

(*m*) A railway company are not liable for accidental fires caused by their engines if they are not guilty of negligence, and have taken all reasonable precautions. Vaughan *v.* Taff Vale Ry. Co. 29 L. J. Ex. 247; [5 H. & N. 679;] Freemantle *v.* London & North Western Ry. Co. 31 L. J. C. P. 12; 10 C. B. N. S. 89. [See Smith *v.* Old Colony & Newport R. R. Co. 10 R. I. 22.]

(*n*) It was held that the mere fact of a fire having been caused by a spark from a steam engine, was *primâ facie* evidence of negligence; and see as to this point, Carpue *v.* London & Brighton Ry. Co. 5 Q. B. 747; cited *ante*, Obs. 564, 565.

(*o*) The form in Lynch *v.* Nurdin is still good, though the principle of contributory negligence therein laid down is overruled by Abbott *v.* Macfie, 33 L. J. Ex. 177; 2 H. & C. 744, where see a form. See, also, Mangan *v.* Atherton, 35 L. J. Ex. 161; L. R. 1 Ex. 239.

16. *For not keeping the Shaft of a Mine fenced, whereby Plaintiff's Horse fell in.*

Sybray *v.* White, 1 M. & W. 435.

[17. *By a Servant against his Master for employing him to work upon an Unsafe Scaffolding.*

That the plaintiff was employed [as a bricklayer] by the defendant to do certain work for the defendant upon a certain scaffolding constructed by the defendant for that purpose, which said scaffolding was, by the negligence and default of the defendant, constructed unsafely and with defective and improper materials, and was in an unsafe condition and unfit for the purpose aforesaid, which the defendant well knew, but of which the plaintiff was ignorant; and by reason of the premises, whilst the plaintiff was so employed [as such bricklayer] as aforesaid doing the said work upon the said scaffolding, the said scaffolding broke and gave way, and thereby the plaintiff was thrown to the ground, and his leg was broken, and he was permanently injured and rendered unfit for work, and incurred expense for medical attendance.

Like counts. Tarrant *v.* Webb, 18 C. B. 797; Roberts *v.* Smith, 2 H. & N. 213.

Like count for providing an unsafe ladder for the servant's use; Williams *v.* Clough, 3 H. & N. 258; *for employing the servant to work in an unsafe building;* Brown *v.* Accrington Cotton Spinning Co. 3 H. & C. 511.

Like count for employing the plaintiff to cut up carcases of cattle which defendant knew to be diseased, whereby plaintiff became infected with the disease. Davies *v.* England, 33 L. J. Q. B. 321.

Like count for employing the servant to work in a mine in a dangerous state. Mellors *v.* Shaw, 1 B. & S. 437; Hall *v.* Johnson, 3 H. & C. 589.

Like count for negligently keeping the machinery at the mouth of the mine in a dangerous state. Griffiths *v.* Gidlow, 3 H. & N. 648; Senior *v.* Ward, 1 El. & Bl. 385; Ashworth *v.* Stanwix, 30 L. J. Q. B. 183.

18. *For Damage to the Plaintiff's House by the Defendant negligently pulling down the Adjoining House.* (*p*)

(*Venue local.*) That the defendant so negligently and unskilfully pulled down a house, adjoining the dwelling-house of the plaintiff, that the walls, floors, and ceilings of the said dwelling-house of the plaintiff were shaken, cracked, and damaged, and bricks, tiles, wood, dust, and rubbish fell from the said house into and upon the said dwelling-house of the plaintiff, and broke the windows thereof, and damaged the furniture and goods of the plaintiff therein; whereby the plaintiff incurred expense in repairing the said walls, floors, ceilings, and windows of his said dwelling-house, and his said furniture and goods, and lost the use and enjoyment of his said dwelling-house, goods, and furniture for a long time.

(*p*) [An action may be maintained for any damage caused to the plaintiff's house by pulling down the adjoining house in a negligent and improper manner, as distinct from the damage done by the removal of the support to which the plaintiff was entitled. Dodd *v.* Holme, 1 Ad. & E. 493; Langford *v.* Woods, 7 M. & G. 625; Bradbee *v.* Christ's Hospital, 4 M. & G. 714; Trower *v.* Chadwick, 3 Bing. N. C. 334; 6 Ib. 1.]

Like counts: Dodd *v.* Holme, 1 Ad. & E. 493; Langford *v.* Woods, 7 M. & G. 625; Trower *v.* Chadwick, 3 Bing. N. C. 334; Emblen *v.* Myers, 6 H. & N. 54; Butler *v.* Hunter, 7 H. & N. 826. *A like count, with a count for injuries done to the plaintiff's house by negligently underpinning the party-wall.* Bradbee *v.* Christ's Hospital, 4 M. & G. 714. *For injuries done to the plaintiff's house by negligently constructing a sewer in the neighborhood.* Jones *v.* Bird, 5 B. & Ald. 837; Grocers' Company *v.* Doune, 3 Bing. N. C. 34; Ruck *v.* Williams, 3 H. & N. 308. *For negligently keeping a sewer on the defendant's land, whereby an overflow of the contents was discharged on the plaintiff's premises.* Alston *v.* Grant, 3 El. & Bl. 128.]

NUISANCE.

Obs. — Anything offensive erected or done, so as to render the house or land of another useless and unfit for occupation, is a private nuisance, for which an action will lie. [Smoke, noise, and smells, may severally constitute a nuisance, and be the ground for an action or for an injunction. Crump *v.* Lambert, L. R. 3 Eq. 409. A material addition to a previously existing nuisance is separately actionable. Crump *v.* Lambert, *supra.*] For a public nuisance no action will lie unless the plaintiff has sustained some particular damage more than the rest of the public. Winterbottom *v.* Lord Derby, 36 L. J. Ex. 194; L. R. 2 Ex. 316; Rickett *v.* Metropolitan Ry. Co. 36 L. J. Q. B. 205; [5 B. & S. 156;] L. R. 2 H. L. 175; Wilkes *v.* Hungerford Market Company, 2 Bing. N. C. 281; Dimes *v.* Petley, 15 Q. B. 276; 19 L. J. Q. B. 449. [See Hartshorn *v.* South Reading, 3 Allen, 501; Willard *v.* Cambridge, 3 Allen, 574; Quincy Canal *v.* Newcomb, 7 Met. 276; Brainard *v.* Connecticut River R. R. 7 Cush. 510, 511; Brightman *v.* Fairhaven, 7 Gray, 271; Harvard College *v.* Stearns, 15 Gray, 1; Stetson *v.* Faxon, 19 Pick. 147; Thayer *v.* Boston, 19 Pick. 511, 514; Smith *v.* Boston, 7 Cush. 255; Fall River Iron Works, *v.* Old Colony &c. R. R. Co. 5 Allen, 221; Water Co. *v.* Ware, 16 Wallace, 574; Griffin *v.* Sanbornton, 44 N. H. 246, 248, 249; Eastman *v.* Meredith, 36 N. H. 284; Farnum *v.* Concord, 2 N. H. 392; Lyme Regis *v.* Henley, 2 Cl. & Fin. 331. The rule was stated with some limitations and qualifications in Wesson *v.* Washburn Iron Co. 13 Allen, 95.] See, in general, 9 Co. 53 *b*, 59 *a;* Com. Dig. Action on the Case for a Nuisance; Bac. Abr. Nuisance; 3 Bl. Com.; St. Helens Smelting Company *v.* Tipping, 11 H. L. Cas. 642; 35 L. J. Q. B. 66.

How to state the injury, see Fitzsimons *v.* Englis, 5 Taunt. 534; King *v.* Williamson, 1 D. & R. 35; 1 Chit. Pl. 7th ed. 401–403.

The action may be brought either against the person who originally caused the nuisance, or against the person occupying the land and permitting the nuisance. R. *v.* Pedley, 1 Ad. & E. 822; Penruddock's case, 5 Co. Rep. 101 *a.* See Bartlett *v.* Baker, 34 L. J. Ex. 8; [3 H. & C. 153;] Salmons *v.* Bensley, Ry. & M. 189; [Angell Watercourses, §§ 402, 403; Sewall J. in Staple *v.* Spring, 10 Mass. 74; Hodges *v.* Hodges, 5 Met. 205; Curtice *v.* Thompson, 19 N. H. 471; Eastman *v.* Amoskeag Manuf. Co. 44 N. H. 143, 156; Baldwin *v.* Calkins, 10 Wend. 167; Beidelman *v.* Foulke, 5 Watts, 308; Pillsbury *v.* Moore, 44 Maine, 156; Hughes *v.* Mung, 3 H. & McHen. 441. As to notice to a purchaser, see Noyes *v.* Stillman, 24 Conn. 15; Denio J. in Brown *v.* Cayuga &c. R. R. Co. 2 Kernan, 492; Woodman *v.* Tufts, 9 N. H. 88; Eastman *v.* Amoskeag Manuf. Co. 44 N. H. 143; Johnson *v.* Lewis, 13 Conn. 303; Branch *v.* Doane, 17 Conn. 402, 418; Pillsbury *v.* Moore, 44 Maine, 156, 157. Where the nuisance is caused by real property or the use of real property, the occupier is *primâ facie* liable, and not the owner merely as owner; the latter can be charged only on some special ground of liability. Russell *v.* Shenton, 3 Q. B. 448; Chauntler *v.* Robinson, 4 Ex. 163, 169; Cheetham *v.* Hampson, 4 T. R. 318; Bishop *v.* Trustees of Bedford Charity, 1 El. & Bl. 697; Pickard *v.* Smith, 10 C. B. N. S. 470; Robbins *v.* Jones, 15 C. B. N. S. 221.

Obs. If the damage arises from the non-feasance or the misfeasance of the landlord of the premises demised, the party injured may sue him. Todd *v.* Flight, 9 C. B. N. S. 377, 389; Rosewelt *v.* Prior, 2 Salk. 460; Rex *v.* Pedley, 1 Ad. & E. 822; Rich *v.* Basterfield, 4 C. B. 783; and see Gandy *v.* Jubber, 5 B. & S. 78. Where the landlord is bound to repair and neglects to do so, he is liable for an injury occasioned by a want of repair; Payne *v.* Roberts, 2 H. Bl. 350; but not otherwise; Cheetham *v.* Hampson, 4 T. R. 318; Russell *v.* Shenton, 3 Q. B. 449. The landlord is not liable for nuisances caused by the mere use of the premises. Rich *v.* Basterfield, 4 C. B. 783.] As to the liability of a contractor, see Gray *v.* Pullen, 32 L. J. Q. B. 169, 265; [5 B. & S. 970;] Ellis *v.* The Sheffield Gas Company, 2 El. & Bl. 967; [2 Chitty Contr. (11th Am. ed.) 861 *et seq.* and notes.] As to the liability of those employing a contractor, see *ante*, Obs. 572, 573. See "Ancient Windows," "Common of Pasture," "Reversion," *post*; "Watercourses," *post*; "Ways," *post*.

1. *For obstructing a Highway.* (*q*)

That the defendant wrongfully and unlawfully dug a hole or trench in a public highway, and threw stones and earth thereon, which obstructed the same, whereby the plaintiff, who was lawfully passing thereon, was thrown down and injured.

[1*a*. *For keeping an Obstruction on a Highway unguarded, whereby the Plaintiff's Carriage was upset.*

(*Venue local.*) That the defendant wrongfully suffered certain earth and rubbish, which had been placed by him in a heap on a public highway, to remain there during the night, without any lights or means to prevent persons from driving against the same; whereby the plaintiff, whilst he was lawfully driving along the said highway in the night time, [and using due care,] drove his horse and carriage against the said earth and rubbish, and upset the said carriage and broke the same, and lamed the said horse, and the plaintiff and his wife, who were then riding in the said carriage, were thrown out and injured, and the plaintiff incurred expense for surgical and medical attendance, and for repairing the said carriage and curing the said horse, and was deprived for a long time of the use thereof, and was hindered in his business.

Like counts. Peachey *v.* Rowland, 13 C. B. 182; Burgess *v.* Gray, 1 C. B. 578; Hardwick *v.* Moss, 7 H. & N. 136.]

2. *For keeping an Area or Cellar adjoining a Public Highway in a Dangerous State.* (*r*)

That the defendants were possessed of an area ["*or* cellar"] adjoining a public highway, and wrongfully permitted the same to be unguarded and unsafe to

(*q*) Forms, Winterbottom *v.* Lord Derby, 36 L. J. Ex. 194; L. R. 2 Ex. 316; Ellis *v.* Sheffield Gas Co. 2 El. & Bl. 767; 27 L. J. Q. B. 42; [Cooper *v.* Walker, 2 B. & S. 770; Richardson *v.* Locklin, 6 B. & S. 777; Sadler *v.* Henlock, 4 El. & Bl. 570.] For leaving excavation without a light. Hardwick *v.* Moss, [7 H. & N. 136;] Newton *v.* Ellis, 5 El. & Bl. 115. Against trustees of roads. Harris *v.* Baker, 4 M. & S. 27. Surveyor of highways. Davis *v.* Curling, 8 Q. B. 286. [Against a contractor for not smoothing the surface of highway, after opening it. Hyams *v.* Webster, L. R. 2 Q. B. 264.]

(*r*) Similar forms, Bishop *v.* Bedford Charity, 28 L. J. Q. B. 215; [1 El. & El. 697;] Barnes *v.* Ward, 9 C. B. 392; 19 L. J. C. P. 195; Coupland *v.* Hardman, 3 Camp. 398; Proctor *v.* Harris, 4 C. & P. 337; Daniells *v.* Potter, 4 C. & P. 262; [Fisher *v.* Prouse, 2 B. & S. 770; Jarvis *v.* Deane, 3 Bing. 447; Stone *v.* Jackson, 16 C. B. 199; Hadley *v.* Taylor, L. R. 1 C. P. 53; Hardcastle *v.* South Yorkshire Ry. Co. 4 H. & N. 67; Cornwell *v.* Metropolitan Comm. of Sewers, 10 Ex. 771.]

persons lawfully passing along the said highway, whereby the plaintiff, while lawfully passing, fell into the said area or cellar. [*State special damage.*]

3. *For making an Excavation and leaving it unprotected.* (*s*)

Hardcastle *v.* South Yorkshire Ry. Co. 28 L. J. Ex. 139; [4 H. & N. 67.]

4. *For placing Floating Timbers on the Thames, whereby the Access to Plaintiff's Public House, which abutted on the River was obstructed.* (*t*)

Rose *v.* Groves, 5 M. & G. 613; 1 D. & G. 61.

[4*a*. *For Nuisance in a Public Navigable River, by leaving Wreck.*

White *v.* Crisp, 10 Ex. 312; Brown *v.* Mallett, 5 C. B. 599. By driving piles &c. White *v.* Phillips, 15 C. B. N. S. 245.]

5. *For obstructing a Highway so as to interfere with Plaintiff's Omnibuses.*

Green *v.* London Omnibus Co. 29 L. J. C. P. 13; [7 C. B. N. S. 290. See Tanner *v.* South Wales Ry. Co. 5 El. & Bl. 618.]

6. *For obstructing a Private Way, Plaintiff having a Right to pass along the same.*

Corby *v.* Hill, 27 L. J. C. P. 318; [4 C. B. N. S. 556; Gallagher *v.* Humphrey, 10 W. R. Q. B. 664.]

7. *For leaving a Mine uncovered, whereby Plaintiff's Horse fell in, &c.*

Sybray *v.* White, 1 M. & W. 435; Williams *v.* Groucott, 4 B. & S. 149; 32 L. J. Q. B. 237.

[7*a*. *For negligently leaving a Trap Door in a Private Passageway open.*

Chapman *v.* Rothwell, El., Bl. & El. 168.

7*b*. *For negligently keeping a Shoot in a Sugar Refinery in an unprotected state, through which Plaintiff, being lawfully on the Premises, fell.*

Indermauer *v.* Dames, L. R. 1 C. P. 274.

7*c*. *By a Guest against the Owner of a House, for Negligence in keeping a Door in a Dangerous State, whereby the Plaintiff, opening the Door, was injured.*

Southcote *v.* Stanley, 1 H. & N. 247 [held a bad count]. See Seymour *v.* Maddox, 16 Q. B. 326; Gautret *v.* Egerton, L. R. 2 C. P. 371.]

(*s*) [Against a waterworks company for keeping a fire plug uncovered in a highway, and damage in consequence. Bayley *v.* Wolverampton Waterworks Co. 6 H. & N. 241.]

(*t*) Similar forms, Wilkes *v.* Hungerford Market Co. 2 Bing. N. C. 281; Blagrove *v.* Bristol Waterworks, 1 H. & N. 369; 26 L. J. Ex. 57; [Rose *v.* Groves, 5 M. & G. 613; Davis *v.* Walton, 8 Ex. 153; Simmons *v.* Lillystone, 8 Ex. 431.]

8. *For setting Spring Guns.*

7 & 8 Geo. 4, c. 18, s. 1; Forms, Ilott *v.* Wilkes, 3 B. & Ald. 304; Bird *v.* Holbrook, 4 Bing. 628. Dog spears, &c. Deane *v.* Clayton, 7 Taunt. 489; Sears *v.* Lyon, 2 Stark. R. 317; Townshend *v.* Wathen, 9 East. 277; Jordin *v.* Crump, 8 M. & W. 752.

9. *For Injury by a Gun being intrusted to an Unfit Person.*

Dixon *v.* Bell, 5 M. & S. 198; 1 Stark. R. 287, S. C.

[9*a*. *For Negligence in lending a Machine with a Known Defect in it, in using which the Plaintiff was injured.*

Blakemore *v.* Bristol & Exeter Ry. Co. 8 El. & Bl. 1035; M'Carthy *v.* Young, 6 H. & N. 329.]

10. *For wrongfully placing Scythes in a Public Street, whereby Plaintiff was injured.*

Marriott *v.* Stanley, 1 M. & G. 568; [Hughes *v.* M'Fie, 2 H. & C. 744; Mangan *v.* Atterton, L. R. 1 Ex. 239.]

11. *For annoying Plaintiff by placing Lighted Brimstone in a Church Tower where Plaintiff was ringing the Bells.*

Evans *v.* Lisle, 7 C. & P. 562.

12. *For not repairing a Privy adjoining Plaintiff's House.*

3 Lord Raym. 324; Russell *v.* Shenton, 3 Q. B. 449. The occupier is the person *primâ facie* liable. Ib.

13. *For erecting a Mound, &c. on a Hill above Plaintiff's House, whereby it was unsafe, &c.*

Norris *v.* Daniell, 4 M. & Scott, 383; S. C. 10 Bing. 507.

14. *For erecting adjoining House so that it projected over the Plaintiff's, and the Rain, &c. fell thereon.*

Fay *v.* Prentice, 1 C. B. 828; see Thomas *v.* Thomas, 2 Cr., M. & R. 35. Similar form by a reversioner, Tucker *v.* Newman, 11 Ad. & E. 405.

[Against the landlord of the adjoining house, who had demised it with a dangerous chimney, which fell on to the plaintiff's house. Todd *v.* Flight, 9 C. B. N. S. 377.

15. *For fouling a Well.*

(*Venue local.*) That the plaintiff was possessed of certain land and of a well therein, and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water which flowed and ran into the said well to supply the same, to flow and run without being fouled or polluted; and the defendant wrongfully fouled and polluted the said well and the said water therein, and the said springs and streams of water which flowed into the said well, whereby

the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family were and are deprived of the use and benefit of the said well and water.

A like count. Hipkins *v.* Birmingham &c. Gas Co. 5 H. & N. 74; 6 H. & N. 250.]

16. *For a Nuisance to a Dwelling-house.* (*u*)

That the plaintiff was possessed of a dwelling-house in which he dwelt, and the defendant wrongfully built a brick kiln near thereto, and caused noxious and unwholesome smells, whereby the plaintiff's dwelling-house became unfit to live in.

[16*a*. *For a Nuisance in carrying on a Noxious Manufacture on Land adjoining the Plaintiff's.*

(*Venue local.*) That the defendant wrongfully caused to issue and proceed from certain smelting works, carried on by the defendant, large quantities of offensive, poisonous, and unwholesome smoke, and other vapors and noxious matter, which spread and diffused themselves over and upon certain lands of the plaintiff, and impregnated and corrupted the air, and settled and were deposited on the soil and surface of the said lands, whereby the trees, hedges, herbage, and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the said lands became unhealthy and diseased, and divers of them were poisoned and died; and by reason of the premises the plaintiff was unable to depasture the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep, and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

A like count. St. Helens Smelting Co. *v.* Tipping, 4 B. & S. 616.]

17. *For a Noisy Nuisance to a Dwelling-house in manufacturing Iron.*

Elliotson *v.* Feetham, 2 Bing. N. C. 134; Simpson *v.* Savage, 1 C. B. N. S. 347; 26 L. J. C. P. 50; Mumford *v.* Oxford, Worcester & Wolverhampton Ry. Co. 1 H. & N. 35. (*x*)

18. *For raising a Bank, whereby Water flowed over Plaintiff's Land.*

Brine *v.* Great Western Ry. Co. 31 L. J. Q. B. 101; [2 B. & S. 402.]

19. *For stopping up a Watercourse along which Plaintiff had a Right to let Water flow.*

Roberts *v.* Rose, 33 L. J. Ex. 241; [3 H. & C. 162.]

(*u*) Forms, Hole *v.* Barlow, 27 L. J. C. P. 207; 4 C. B. N. S. 334; Flight *v.* Thomas, 10 Ad. & E. 590. And see Bamford *v.* Turnley, 31 L. J. Q. B. 286; [3 B. & S. 62;] overruling, Hole *v.* Barlow, *sup.* Form with a writ of injunction, Delarue *v.* Fortescue, 26 L. J. Ex. 339; [2 H. & N. 324;] Stockport Waterworks *v.* Potter, 31 L. J. Ex. 9; [7 H. & N. 160;] Simpson *v.* Savage, 1 C. B. N. S. 347; 26 L. J. C. P. 50; Mumford *v.* Oxford, Worcester & Wolverhampton Ry. Co. 25 L. J. Ex. 265; [1 H. & N. 34;] Tipping *v.* St. Helens Smelting Company, 4 B. & S. 608.

(*x*) For a form for working a steam-engine and keeping up large fires in a building adjoining plaintiff's premises, see last ed. of this work, p. 598. For manufacturing candles. 2 Chit. Pl. 7th ed. 586. For keeping a slaughter-house. 2 Chit. Pl. 7th ed. 587.

20. *For permitting Sewer to overflow on to Plaintiff's Land.*

Alston *v.* Grant, 23 L. J. Q. B. 163; [3 El. & Bl. 128.

For allowing noxious matters from a tan-pit of defendants to flow into plaintiff's premises. Chadwick *v.* Marsden, L. R. 2 Ex. 285.]

21. *For keeping Offensive Drains.*

Russell *v.* Shenton, 3 Q. B. 449; 11 L. J. Q. B. 289.

22. *For negligently constructing a Sewer so as to be a Nuisance.*

The Company of Proprietors of the Southampton & Itchin Floating Bridge and Road *v.* The Local Board of Health of Southampton, 28 L. J. Q. B. 41; [8 El. & Bl. 801.]

PATENTS.

Obs. — A grant of a patent-right is not *ex debito justitiæ*, but an act of royal favor, conferring a privilege upon the grantee, who must be the first inventor of some new contrivance in manufacture. To confer upon any individual the exclusive right of carrying on any particular trade or manufacture amounted, at common law, to an offence called monopoly, and the first statute on the subject of patents (21 Jac. 1, c. 3, called the Statute of Monopolies), declares it to be "altogether contrary to the laws of this realm;" an exception was, however, made in favor of the authors of new inventions: "All letters-patent for the term of fourteen years or under, by which the privilege of sole working or making any new manufactures within this realm, which others, at the time of granting the letters-patent, shall not use, shall be granted to the first and true inventor thereof, so as they be not contrary to law, nor mischievous to the state, nor to the hurt of trade, nor generally inconvenient." Bl. Com.

The principal statutes relating to patents are, the Statute of Monopolies, 21 Jac. 1, c. 3; 11 & 12 Vict. c. 84; 12 & 13 Vict. c. 109; 15 & 16 Vict. c. 83; 16 & 17 Vict. c. 115; and 22 Vict. c. 13. [For the patent laws of the United States, see Rev. Sts. U. S. tit. lx. § 4883 *et seq.*]

For the law on the subject, see Com. Dig. tit. Patents; and treatises by Godson, Webster, Smith, Hindmarsh, and Lund; Har. Ind. tit. Patents; Bl. Com. vol. ii.; and *post*, pleas, tit. "Patents." [Curtis Patents; cases cited in Rev. Sts. U. S. tit. lx. § 4886; 2 Kent, 366 *et seq.* Courts of the United States have exclusive jurisdiction of controversies arising under patent laws. Rev. Sts. U. S. c. 12, p. 135, § 711.]

The subject of a patent must be a manufacture. Cornish *v.* Keene, 3 Bing. N. C. 586; Rex *v.* Wheeler, 2 B. & Ald. 345.

The manufacture must be new within this realm. Kay *v.* Marshall, 5 Bing. N. C. 492; Carpenter *v.* Smith, 9 M. & W. 300; Sellers *v.* Dickenson, 5 Ex. 312; Re Adamson's Patent, 25 L. J. Ch. 457; Heath *v.* Smith, 3 El. & Bl. 256; Oxley *v.* Holden, 8 C. B. N. S. 666; Ralston *v.* Smith, 11 H. L. C. 223; Jordan *v.* Moore, 35 L. J. C. P. 268; L. R. 1 C. P. 624; Harwood *v.* Great Northern Railway, 35 L. J. Q. B. 27; Penn *v.* Bibby, L. R. 2 Ch. Ap. 127.

The grantee must be the first and true inventor. Nickels *v.* Ross, 8 C. B. 679; Lewis *v.* Marlin, 10 B. & C. 22; Walker *v.* Congreve, Godson, 68, note, ed. 1832. [As to who is the first inventor, see 2 Kent, 369, note (*b*); Joyler *v.* Wilder, 10 How. 477; Seymour *v.* Ashorne, 11 Wallace, 516; Neilson *v.* Betts, L. R. 5 H. L. 1; L. R. 3 Ch. Ap. 429.]

The right to a patent may be assigned, and the assignment should be by writing under hand and seal, and must be perfected by registration. Chanter *v.* Leese, 5 M. & W. 700. [See Rev. Sts. U. S. tit. lx. p. 956, § 4898.] The use of a patent may also be granted by license. Chanter *v.* Dewhurst, 12 M. & W. 823. The license need not be under seal to enable the grantor to

Obs. recover royalties for the enjoyment of the patent. *Ante*, 218. There is no implied warranty of goodness in the patent. Ib. Nor can the licensee impeach the validity. Ib. A license to a person to manufacture is an authority to his vendees to vend without the consent of the patentee. Thomas v. Hunt, 17 C. B. N. S. 183.

As to what is infringement, Unwin *v.* Heath, 16 C. B. 713; Curtis *v.* Platt, 35 L. J. Ch. 852; [Brown *v.* Duchesne, 19 How. (U. S.) 183; Walton *v.* Lavater, 8 C. B. N. S. 162.] As to what constitutes user, Betts *v.* Nielson, 34 L. J. Ch. 537; [L. R. 5 H. L. 1.]

Where A. and B. were tenants in common of a patent assigned to them, and B. dies, actions for infringement survive to A., who is entitled at law to recover the whole damages. Smith *v.* London & North Western Railway, 2 El. & Bl. 69.

A count for "Exposing to sale" is bad. Winter *v.* Williams, 4 Ad. & E. 251.

By 5 & 6 W. 4, c. 83, s. 1, any person having obtained letters-patent for any invention, may enter a disclaimer of any part of his specification, or a memorandum of any alteration therein, which, when filed as therein mentioned, shall be deemed part of such specification; and that section provides that a caveat may be entered as heretofore, that the disclaimer shall not affect actions, save a proceeding by *sci. fa.*, pending at the time, and that the attorney-general may require the party to advertise his claim. See Thomas *v.* Welch, 35 L. J. C. P. 200; 1 L. R. C. P. 192. As to the object and meaning of a disclaimer, Ralston *v.* Smith, 11 H. L. C. 223. The original patentee may enter a disclaimer, though he may have assigned his right. Wallington *v.* Dale, 6 Ex. 284; 23 L. J. Ex. 49; Spilsbury *v.* Clough, 2 Q. B. 467; and see 7 & 8 Vict. c. 69, ss. 5 & 6.

The 2d section points out the mode of proceeding, where the patentee is proved not to be the real inventor, though he believed himself to be so. In Perry *v.* Skinner, 2 M. & W. 471, it was held that where a patent is originally void, but amended under this statute by filing a disclaimer of part of the invention, the act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering the disclaimer, although the infringement related to a part of the invention not disclaimed. See Stocker *v.* Warner, 1 C. B. 148.

By the 3d section, if in any action respecting an infringement of a patent, a verdict shall pass for the patentee, the judge may grant a certificate that the validity of the patent came into question, which being given in evidence in any other action touching such patent, the patentee, if he have a verdict, shall have *treble costs*, unless the judge, in such second action, shall certify he ought not to have treble costs. The 5 & 6 Vict. c. 97, s. 2, provides that, instead of such costs, a full and reasonable indemnity as to all costs, charges, and expenses, incurred in and about any action, only shall be payable — on these sections, and s. 43 of 15 & 16 Vict. c. 83. See Bovill *v.* Hadley, 17 C. B. N. S. 435; Davenport *v.* Rylands, 35 L. J. Ch. 204; L. R. 1 Eq. 302; and Gray on Costs, 181. Where the defendant consented to a verdict, no certificate was granted. Stocker *v.* Rodgers, 1 C. & K. 99; Bovill *v.* Hadley, 17 C. B. N. S. 435. See Gillett *v.* Green, 7 M. & W. 347; Gillett *v.* Wilby, 7 C. & P. 334.

The 4th section, amended and extended by 2 & 3 Vict. c. 67, and 7 & 8 Vict. c. 69, points out the mode of proceeding in case of application for the prolongation of the term of the patentee. For the conditions upon which a prolongation will be granted, see Re Markwick's Patent, 13 Moore P. C. 310; In re Trotman's Patent, L. R. 1 P. C. 119; 3 Moore's P. C. C. N. S. 588; In re Mallett's Patent, L. R. 1 P. C. 308; 4 Moore's P. C. C. N. S. 175; In re Poole's Patent, L. Q. 1 P. C. 506; In re Goucher's Patent, 2 Moore's P. C. C. N. S. 532; In re Allan's Patent, L. R. 1 P. C. 507, and the cases cited therein. An extension may be granted to an assignee; Ledsam *v.* Russell, 14 M. & W. 574; 1 H. L. C. 687; or to the assignee and patentee conjointly. In re Herbert's Patent, L. R. 1 P. C. 399; 4 Moore P. C. C. N. S. 300; 7 & 8 Vict. c. 69, s. 4.

By the 5th section, amended by 15 & 16 Vict. c. 83, s. 41, in any action for the infringement of letters-patent, particulars of the breaches must be delivered with the declaration, and particulars of objections with the pleas. Palmer *v.*

Obs. Cooper, 9 Ex. 231; Heath *v.* Unwin, 10 M. & W. 684; Leaf *v.* Topham, 10 M. & W. 146. The particulars must be precise; Fisher *v.* Dewick, 4 Bing. N. C. 706; and no evidence can be given in support of the alleged infringement or objections which is not contained in such particulars. Daw *v.* Eley, L. R. 1 Eq. 38; but see Chollett *v.* Hoffman, 7 El. & Bl. 686. For particulars of breaches, see Talbot *v.* La Roche, 15 C. B. 310; Jones *v.* Lee, 25 L. J. Ex. 241; Curtis *v.* Platt, 35 L. J. Ch. 852; Thomas *v.* Welch, L. R. 1 C. P. 192; 35 L. J. C. P. 200.

By the 7th section, a penalty is inflicted for using without authority the name of a patentee. The grant of the patent is conclusive evidence against the defendant in an action under this section. Myers *v.* Baker, 3 H. & N. 802; 28 L. J. Ex. 90.

By the 15 & 16 Vict. c. 83 (the patent law amendment act, 1852), power is given to any of the superior courts of common law in which an action for the infringement of a patent is pending, to grant orders for an injunction, inspection, or account. In the application for inspection, the plaintiff must show that it is material and for the purposes of the cause. Amies *v.* Kelsey, 22 L. J. Q. B. 34; Meadows *v.* Kirkman, 29 L. J. Ex. 205. For a form for an order to account, see Walton *v.* Lavater, 8 C. B. N. S. 191. The order should not extend to sales before action until after final judgment. Vidi *v.* Smith, 3 El. & Bl. 969.

An injunction may also be granted under 17 & 18 Vict. c. 129, s. 82. Gittins *v.* Symes, 24 L. J. C. P. 48. See, also, Day's C. L. P. A. 240. Proceedings for an injunction should be taken without delay. Bovill *v.* Crate, L. R. 1 Eq. 388. In seeking for an injunction, an inclusive licensee has a right to use the name of the patentee. Renard *v.* Levinstein, 2 H. & M. 628.

The 8th and 9th sections refer to depositing provisional and complete specifications of the invention with the law officer of the crown; a form of specification is contained in the schedule to the act. See Thomas *v.* Welch, 35 L. J. C. P. 200. A provisional specification, if allowed by the law officer of the crown, cannot be impeached as too general. Penn *v.* Bibby, L. R. 2 Ch. Ap. 127. The filing of a provisional specification is not a publication within the statute. Oxbey *v.* Holden, *supra*.

A grant of letters-patent to a subject does not exclude the crown from using the invention without the license of the patentee. Feather *v.* Reg. 35 L. J. Q. B. 200.

If the plaintiff in an action for infringement is successful, he is entitled to an account of sales. Trotman *v.* Wood, 16 C. B. N. S. 479. An assignee is entitled to an account of profits from the time his title was completed. Elwood *v.* Christy, 34 L. J. C. P. 130. As to rights of co-patentees to profits, see Mathew *v.* Green, 35 L. J. Ch. 1. As to damages in a suit to restrain, Betts *v.* De Vitre, 34 L. J. Ch. 289. As to damages, Penn *v.* Bibby, L. R. 3 Eq. 308.

See *ante*, part 1, pp. 219, 443, "Patents," and *post*, pleas, "Patents."

1. *For Infringement of a Patent (Common Law Procedure Act*, 1852, *Schedule B*, 31). (*y*)

That the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of certain improvements in the manufacture of sulphuric acid, "and thereupon her majesty Queen Victoria, by letters-patent under the great seal of England, granted the plaintiff the sole privilege to make, use, exercise, and vend the said invention within England, for the term of fourteen years from the —— day of ——, A. D. ——, subject to a condition that the plaintiff should, within six calendar months next after the date of the said letters-patent cause to be enrolled in the high court of chancery, an instrument

(*y*) For other counts, see Tetley *v.* Easton, 26 L. J. C. P. 269; Muntz *v.* Forster, 6 M. & G. 734; Meyers *v.* Baker, 3 H. & N. 802; 28 L. J. Ex. 90; [Heath *v.* Unwin, 12 C. B. 522; 16 Ib. 713; Holmes *v.* London & North Western Ry. Co. 12 C. B. 831; Bovill *v.* Pimm, 11 Ex. 718; Smith *v.* London & North Western Ry. Co. 2 El. & Bl. 69.]

in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed; and the plaintiff did, within the time prescribed, fulfil the said condition,* and the defendant during the said term did infringe the said patent-right. (*z*)

2. *For Infringement; Claiming an Injunction and an Account.*

Thomas *v.* Hunt, 17 C. B. N. S. 183; [Hills *v.* London Gaslight Co. 5 H. & N. 312; Walton *v.* Lavater, 8 C. B. N. S. 162.]

3. *For Royalties under a License to use Patent.*

Oxley *v.* Holden, 8 C. B. N. S. 666; Trotman *v.* Wood, 16 C. B. N. S. 479.

4. *For Infringement of a Renewed Patent.*

Russell *v.* Ledsam, 14 M. & W. 574.

5. *By the Original Patentee and the Assignee of one Moiety, for Infringement, setting out the Assignment, and a Disclaimer of Part.*

Commence as in Form 1 *down to asterisk, putting* "plaintiff A. B." *instead of* "plaintiff," *and proceed:*] And afterwards, by deed under the hand and seal of the said A. B. (*one of the plaintiffs*), duly registered and enrolled according to the statutes in such case made and provided, the said A. B. assigned one moiety of his interest in the said letters-patent and invention to the said C. D. (*the other plaintiff*), and afterwards by leave of Sir ——, her majesty's solicitor-general, duly certified in that behalf, according to the form of the statute then in force in such case made and provided, duly entered with the clerk of the patents of England, a disclaimer or alteration under their hands and seals of certain parts of the said specification, stating the reason of such disclaimer, the same not being such an alteration as extended the exclusive right granted by the said letters-patent; and the defendant, after the making, entering, and enrolling of the said assignment and disclaimer, and during the said term of fourteen years, did infringe the said patent-right as limited by the said disclaimer.

6. *For Infringement, stating Disclaimer or Alteration of Part under Pat. Law Amend. Act*, 1852, *s.* 39.

Talbot *v.* La Roche, 15 C. B. 310.

7. *For the same, stating two Disclaimers.*

Tetley *v.* Easton, 26 L. J. C. P. 269; [2 C. B. N. S. 706.]

8. *By an Assignee, for Infringement.*

Chollet *v.* Hoffman, 7 El. & Bl. 686; 26 L. J. Q. B. 249; [Schlumberger *v.* Lister, 29 L. J. Q. B. 157.

By the assignee of a patent stating a disclaimer of part. Spilsbury *v.* Clough, 2 Q. B. 466.]

(*z*) For assignment of breaches, see Cornish *v.* Keene, 3 Bing. N. C. 570; Schlumberger *v.* Lister, 29 L. J. Q. B. 156.

9. *By an Assignee for Infringement of Renewed Patent.*
Russell *v.* Ledsam, 14 M. & W. 574.

10. *By an Assignee of Two Several Moieties of a Patent for its Infringement.*
Walton *v.* Lavater, 29 L. J. C. P. 275; [8 C. B. N. S. 162.]

11. *By an Assignee of a Separate and Distinct Part.*
Dunnecliffe *v.* Mallett, 29 L. J. C. P. 70.

12. *By the Survivor of Two Tenants in common for Infringement during the Lifetime of Deceased Tenant.*
Smith *v.* London & North Western Ry. Co. 2 El. & Bl. 69.

13. *By the Holder of an Undivided Moiety of a Patent, and the Assignee of the other Moiety, jointly, for an Infringement.*
Cornish *v.* Keene, 3 Bing. N. C. 570.

14. *Count on an Agreement for an Assignment of a Patent.*
Lewin *v.* Brown, 14 W. R. 640.

15. *For imitating Plaintiff's Trade-mark.*
See *ante*, "Fraud;" and *post*, "Trade-marks."

16. *Form for Particulars of Breaches under* 15 & 16 *Vict. c.* 83, *s.* 41, *in an Action for Infringement of Letters-patent.* (*a*)

In the queen's bench [common pleas, *or* exchequer of pleas].

Between A. B., plaintiff,
and C. D., defendant.

The following are the particulars of the breaches of the letters-patent, for the infringement of which this action is brought, viz. [that the defendant, on or about the —— day of ——, A. D. ——, at his factory, at ——, in the county of ——, used the same machinery in the manufacture of ——, as is described in the specification of the letters-patent granted to —— and mentioned in the declaration].

Yours,
E. F., plaintiff's attorney [*or* agent].

Dated.

To Mr. ——, defendant's attorney [*or* agent].

PEWS.

Obs. — The right to a pew in a parish church is an easement. See Gale on Easements, by Willes; [Washburn Easements, &c. (2d ed.) 604, [515].] But it must be annexed to a house, and not merely allotted to a parishioner by the

(*a*) See *ante*, Obs., and Jones *v.* Berger, 5 M. & G. 208; Talbot *v.* De la Roche, 15 C. B. 317.

OBS. churchwardens; Mainwaring *v.* Giles, 5 B. & Ald. 356; see Cross *v.* Salter, 3 T. R. 369; nor, it would seem, to one residing out of the parish. Byerly *v.* Windus, 5 B. & C. 1. As to the mode of proving this right, see Hawkins *v.* Compeigne, 3 Phill. Ec. R. 15. As to the length of time sufficient to support the claim to a pew, see Griffith *v.* Matthews, 5 T. R. 296; Morgan *v.* Curtis, 3 M. & R. 389; Kenrick *v.* Taylor, 1 Wils. 326. As to the effect of proof of repairing a pew as evidence of the support of the right, see Pettman *v.* Bridger, 1 Phill. Ec. R. 325. The subdivision of a house may entitle several to a single pew. Harris *v.* Drewe, 2 B. & Ad. 167.

It does not appear to be settled that the 2 & 3 W. 4, c. 71 (the prescription act) applies to pews. But see s. 5 (*ante*, 479) of that act as to the mode of pleading. See, also, Gale on Easements, by Willes, as to who may bring the action (p. 525); and as to the pleadings generally (p. 537 *et seq.*) But a pew in the body of a church may be prescribed for as appurtenant to a house out of the parish. Lousley *v.* Hayward, 1 Y. & J. 583. Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title; and it appears doubtful whether they can establish such a claim, even by such proof. Byerly *v.* Windus, 5 B. & C. 1. As to proving prescriptive right, see Stocks *v.* Booth, 1 T. R. 428. A right to sit in a pew may be apportioned. Harris *v.* Drewe, 2 B. & Ad. 164, where see a form for disturbance. See another form, Adams *v.* Andrews, 15 Q. B. 284; 20 L. J. Q. B. 33. As to who can sue for breaking and entering a parochial chapelry and destroying the pews, see Jones *v.* Ellis, 2 Y. & J. 265. See a form for disturbance of pews, 2 Chit. Pl. 625, 7th ed.

See forms of declarations for disturbing plaintiffs in the enjoyment of pews in churches, 2 Chit. Pl. 7th ed. 625; Mainwaring *v.* Giles, 5 B. & Ald. 556; Lousley *v.* Hayward, 1 Y. & J. 583. Law, &c. 2 Stark. Ev. tit. Pews. For pulling down part of a pew, Harris *v.* Drewe, 2 B. & Ad. 164; Jones *v.* Ellis, 2 Y. & J. 265. See Stocks *v.* Booth, 1 T. R. 428.

The venue is local.

For disturbing Plaintiff in the Enjoyment of a Pew, to which he had a Right.

Adams *v.* Andrews, 15 Q. B. 284; 20 L. J. Q. B. 33; Mainwaring *v.* Giles, 5 B. & Ald. 356; Harris *v.* Drewe, 2 B. & Ad. 164.

PIRACY. See "Copyright," *ante*, p. 498.

POLICE. See *post*, "Trespass to Person — False Imprisonment."

POUND BREACH AND RESCUE.

OBS. — See forms for pound breach and rescue on distresses, 2 Chit. Pl. 7th ed. 549; Parrett Nav. Co. *v.* Stower, 6 M. & W. 569; law, &c. Turner *v.* Ford, 15 M. & W. 212; 15 L. J. Ex. 215. By 5 & 6 W. 4, c. 59, s. 5, persons may enter pounds to feed cattle impounded therein. See Machell *v.* Ellis, 1 C. & K. 682.

PUBLIC COMPANY. (*b*)

1. *By the Managing Committee of an Intended Railway against an Engineer for not preparing proper Plans, &c. in time to be deposited to enable them to apply to Parliament for an Act.*

See a form in the last edition of this work, p. 606.

2. *Against the Secretary for not delivering to Plaintiff a Certificate of Shares purchased by him.*

Daly *v.* Thompson, 10 M. & W. 309.

3. *For not paying Money to the Plaintiff which a Statute rendered it a Duty to pay.* (*c*)

Cane *v.* Chapman, 5 Ad. & E. 647; and see Pardoe *v.* Price, 11 M. & W. 429.

RECTOR.

Obs. — By the common law, an incumbent of a living is bound to keep the parsonage house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless necessary to preserve exposed timber from decay), and whitwashing, and papering. Wise *v.* Metcalfe, 10 B. & C. 299; Radcliffe *v.* D'Oyley, 2 T. R. 630–637. But he is not liable for pulling down old buildings, and erecting new ones more convenient and beneficial to the living. Huntley *v.* Russell, 13 Q. B. 572; 18 L. J. Q. B. 239.

An action is maintainable by the executors of a deceased incumbent against the executors of his predecessor for dilapidations which occurred during the incumbency of the predecessor. Bunbury *v.* Hewson, 3 Ex. 558; 18 L. J. Ex. 258; Bird *v.* Ralph, 2 Ad. & E. 773. But the claim in respect of dilapidations is to be postponed in the distribution of assets to the payment of specialty and simple contract debts. Bryan *v.* Clay, 1 El. & Bl. 38; 22 L. J. Q. B. 23. Upon an exchange of living, an agreement to forego a claim for dilapidations is valid, and may be pleaded. Goldham *v.* Edwards, 25 L. J. C. P. 223; 24 L. J. C. P. 189; Downes *v.* Craig, 9 M. & W. 166; 11 L. J. Ex. 239. A lay rector cannot maintain an action of trespass against the vicar for removing a lock placed by the rector upon a door leading into the chancel. Griffin *v.* Deighton, 5 B. & S. 108; 33 L. J. Q. B. 181. See Williams on Executors; 2 Saund. 235. See forms in the cases cited above, and 2 Chit. Pl. 7th ed. 597.

The venue is local.

REPLEVIN.

Obs. — See, in general, Bacon's Abr. Replevin; 2 Saund. 194 *a*, 283, 310.

[The action of replevin lies, it is said, wherever goods have been unlawfully taken out of the possession of the owner. Com. Dig. Pl. 3 K. 1; Galloway *v.* Bird, 4 Bing. 299; Mellor *v.* Leather, 1 El. & Bl. 619; George *v.* Chambers, 11 M. & W. 149; Allen *v.* Sharp, 2 Ex. 352; Gay *v.* Matthews, 4 B. & S. 425. But it is not usual to have recourse to this remedy, except in cases of goods unlawfully distrained; and it has been questioned whether it was ever applicable in any other case. Mennie *v.* Blake, 6 El. & Bl. 842.

Replevin consists in the redelivery of the goods taken to the owner. This was

(*b*) See *ante*, "Corporation," p. 501. (*c*) See *ante*, "Mandamus."

Obs. formerly made by the sheriff, who took the goods from the distrainor, and redelivered them to the owner upon the execution of a replevin bond by the owner and two sureties, conditioned to prosecute his suit with effect and without delay against the distrainor, and to return the goods if a return should be awarded. Stat. Marlbridge, 52 Hen. 3, c. 21; Stat. Westm. 2d, 13 Edw. 1, c. 2; 11 Geo. 2, c. 12, s. 23. By the act 19 & 20 Vict. c. 108, ss. 63–66, the powers and responsibilities of the sheriff with respect to replevin bonds and replevins were taken away; and the same or similar powers were transferred to the registrar of the county court, who now grants replevin upon security being given for prosecuting the suit, under §§ 64, 65, and 66 of the above act.

Formerly the action of replevin could not be commenced in the superior courts. It was commenced in the old county courts, from which it might be removed by either party into the superior court. The law in respect to the jurisdiction and practice in replevin has been considerably changed by stats. 9 & 10 Vict. c. 95, s. 119, and 19 & 20 Vict. c. 108.]

An action of replevin cannot be joined with any other form of action. Common Law Procedure Act, 1852, s. 41.

The plaintiff must, as in trover (*post*), be the general owner or a special owner, and must have the possessory right. See, in general, 3 Bl. Com. 147; Wilkinson on Replevin; 1 Saund. 347 *b*, note (2); 1 Chit. Pl. Ind. Replevin; 2 Stark. Ev. Replevin; Selw. N. P. tit. Replevin. Replevin is the proper form to recover possession of a specific chattel; Dore *v.* Wilkinson, 2 Stark. R. 288; and it lies for goods taken by distress under a magistrate's warrant; George *v.* Chambers, 11 M. & W. 149; Mellor *v.* Leather, 1 El. & Bl. 619; 22 L. J. Q. B. 169; see Allen *v.* Sharpe, 2 Ex. 352; 17 L. J. Ex. 209; also, for an *illegal taking* in the first instance, or for an *unlawful detention* after a *legal* taking. Evans *v.* Elliott, 5 Ad. & E. 142. But there must be an unlawful taking. Galloway *v.* Bird, 4 Bing. 299. As also a taking out of the possession of the owner. Mennie *v.* Blake, 6 El. & Bl. 842; 25 L. J. Q. B. 399. See *post*, pleas.

As to judgment, damages, and costs in replevin, see 2 Chit. Arch. Ind. *in voc.* [As to the cases in which replevin may be maintained in the American states, and the practice therein, see 1 Chitty Pl. 181, note (a^1), and cases cited.]

1. *Declaration in the Superior Court.*

Venue local. (*d*)] That the defendant in a certain *dwelling-house* [*or* "in a certain close," *or* "common"], called ——, (*e*) took the ["cattle"] goods and chattels of the plaintiff, that is to say, ten tables, (*f*) and unjustly detained the same against sureties and pledges, until [*&c.*], whereby the plaintiff has sustained damage to the amount of £——. (*g*)

(*d*) The venue may be in the county where the distress was originally taken, or in a county in which the goods were in the defendant's custody upon the occasion. Wilson *v.* Kersop, 2 Wils. 354; 1 Saund. 347.

(*e*) The place, as whether it was a house, yard, or close, must be stated accurately; and it seems the names or abuttals of the close should be specified; 1 Saund. 347, note (1); Potten *v.* Bradley, 2 M. & P. 78; or the declaration would formerly have been demurrable. Banks *v.* Angell, 7 Ad. & E. 855. The caption may be stated to be in the place where the original seizure was, or in a close or place wherein the distrainor afterwards led or had the goods or cattle in the way to the pound. 1 Saund. 347, note (1); Walton *v.* Kersop, 2 Wils. 354. Where different effects are taken in various places the form should be "in a certain dwelling-house there took the goods, to wit, ——, and in a certain yard [*or* 'close'], there took other the goods, to wit, ——," *or* "the cattle, to wit, ——," &c. Com. Dig. Pleader, 3 K. 10. The plea of *non cepit* disputes the correctness of the declaration as to the place of seizure.

(*f*) The goods, &c. must be described with at least as much certainty as in *trover*. See 3 Saund. 74 *b*: Banks *v.* Angell, 7 Ad. & E. 855. [What is a sufficient description of goods in replevin, see Litchman *v.* Potter, 116 Mass. 371. The value of the goods replevied need not be stated in the writ. Blake *v.* Darling, 116 Mass. 300; Litchman *v.* Potter, 116 Mass. 371.] The following form describes the seizure of *standing* corn under 11 G. 2, c. 19, s. 8, "in a certain close there called ——, took the corn of the plaintiff, to wit, —— acres of standing *wheat* there then growing." Replevin does not lie for fixtures *qua* fixtures. Niblet *v.* Smith, 4 T. R. 504; Amos Fix. 252, 257.

(*g*) A sum covering the real damage.

REVERSION.

Obs. — A landlord or person having the immediate reversionary interest in premises, may maintain an action against a party who commits any injury to the premises of so *permanent a nature* that the reversionary estate is prejudiced; and the wrong-doer is also liable to the tenant to the extent of the damage he sustains in reference to his possessory right and limited interest. A reversioner may sue for an injury to the land, &c. arising from an obstruction by a building to ancient lights or privileged windows belonging to the estate; Jesser *v.* Gifford, 4 Bur. 2141, where the earlier authorities are collected; or from the stopping up a right of way attached to the premises, see 8 Went. 550; 2 Chit. Pl. 7th ed, 589, note (*n*); 1 Saund. 322 *b*, note; or the substantial obstruction, &c. of a watercourse running thereto. Wright *v.* Williams, 1 M. & W. 77; Greenslade *v.* Halliday, 6 Bing. 379; Kedgell *v.* Moor, 19 L. J. C. P. 177; Palk *v.* Skinner, 18 Q. B. 568; 22 L. J. Q. B. 27. And in an action against a tenant for opening a door in a wall, to the prejudice of the plaintiff's reversion, although actual damage to the *house* was disproved, the court held that the jury ought to have been directed to inquire whether the *reversionary interest* had or had not been injured, which might have been the case by destroying evidence of title, &c. although the *house* was not injured. Young *v.* Spencer, 10 B. & C. 145. A reversioner may sue for a nuisance affecting his reversionary interest, although no other present injury accrue, and the nuisance be such that it is capable of removal before the reversioner comes into possession. Shadwell *v.* Hutchinson, M. & M. 350; 4 C. & P. 333; Tucker *v.* Newman, 11 Ad. & E. 405. He may sue a stranger inflicting the injury, though the tenant concurred in committing it and be also liable; Egremont *v.* Pulman, M. & M. 404; and the mortgagee of a lessee may sue the assignee of the tenant. Hitchman *v.* Waltman, 4 M. & W. 409. As to proof of the tenancy laid in the declaration, see *ante*, 508, note (*o*). Plaintiff having demised a cottage without exception of mines, it was held that he might sue in case for an injury occasioned to the cottage by a stranger, who had excavated coal, though it was not clear under whose premises the excavations were. Raine *v.* Alderson, 4 Bing. N. C. 702. See a form for working a mine under a house in which the plaintiff had a reversionary interest, and thereby injuring the foundations, Hinton *v.* Lord Granville, 5 Q. B. 701. The declaration must allege the act to have been done to the damage of the plaintiff's reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion, otherwise the judgment will be arrested after verdict. Mumford *v.* Oxford, Worcester & Wolverhampton Ry. Co. 25 L. J. Ex. 265; [1 H. & N. 34;] Simpson *v.* Savage, 26 L. J. C. P. 50; [1 C. B. N. S. 347.] Therefore, a reversioner cannot sue for the obstruction of a right of way, unless it be such as permanently to injure his estate, or operates in denial of the right. Hopwood *v.* Scofield, 2 M. & Rob. 34; and see Baxter *v.* Taylor, 4 B. & Ad. 72. And where the plaintiff declared as reversioner of a yard and part of a wall occupied by his tenant, and that defendant wrongfully placed bricks, &c. on the said part of the wall, and raised its height, and placed timber thereon overhanging the yard, whereby plaintiff lost the use of the wall, and rain, &c. flowed into the yard, and the wall and yard, were injured, to plaintiff's damage, &c. without stating that the reversion was injured, the court arrested the judgment. Jackson *v.* Pesked, 1 M. & Sel. 234. In Hare *v.* Horton, 5 B. & Ad. 715, the declaration stated that a foundry, messuages and cranes, boilers and other machinery, &c. which were described, were in the possession of the plaintiff's tenant, the reversion belonging to plaintiff; and that the defendant, contriving to injure plaintiff in his reversionary interest, broke and entered the foundry, machinery, &c. and messuages with the appurtenants, cranes, &c. tore up, broke down, and prostrated the same, seized, carried away, and converted the machinery, &c. and the cranes, &c. affixed to plaintiff's reversionary interest, and scattered and spread the same with rubbish, greatly injuring the said reversionary estate. Plea, not guilty. At the trial it appeared that the plaintiff had no right to the fixtures; held, nevertheless, that enough appeared on this declaration

Obs. to support a verdict for the plaintiff for unnecessary damage done in removing the fixtures, of which proof had been given.

See "Landlord and Tenant," *ante*, 535. Gale on Easements, by Willes.

1. *For an Injury to the Plaintiff's Reversion in a Dwelling-house.* (*k*)

Venue local.] That A. B. was tenant to the plaintiff of a dwelling-house [*or* "land," *as the case may be*], the reversion thereof being the plaintiff's; and the defendant wrongfully injured the plaintiff's said reversion by pulling down a portion of the said house [*according to the fact*].

2. *For Injury to the Plaintiff's Reversion by digging Holes in the Sand for quarrying.*

Rogers *v.* Taylor, 26 L. J. Ex. 203; 1 H. & N. 706.

3. *For Injury to the Plaintiff's Reversion by cutting off the Eaves of a Building belonging to him, and erecting a Wall with a Drip over his Premises.* (*i*)

Bathishill *v.* Reed, 18 C. B. 696; 25 L. J. C. P. 290.

4. *For Injury to Plaintiff's Reversion by obstructing Ancient Lights.*

The Metropolitan Association, &c. *v.* Petch, 5 C. B. N. S. 504; 27 L. J. C. P. 330.

5. *For Injury to Plaintiff's Reversion by obstructing a Right of Way by locking a Gate.*

Kidgill *v.* Moor, 19 L. J. C. P. 177; (*k*) [9 C. B. 364.]

6. *By a Landlord for Injury to his Reversion by erecting a Raised Footpath, Posts, &c. through Fields occupied by his Tenants, in order to exercise a Pretended Public Right of Way.* (*l*)

See form in the last edition of this work, p. 609.

7. *By the Owner of Goods in Reversion for injuring them, &c.* (*m*)

That the plaintiff was the owner of goods, that is to say [*describe them*], let

(*h*) Form for opening a new door, and thereby weakening the building. Young *v.* Spencer, 10 B. & C. 145. For cutting and carrying away branches of trees. Cotterill *v.* Hobby, 4 B. & C. 465.

(*i*) Similar form. Tucker *v.* Newman, 11 Ad. & E. 40.

(*k*) This action cannot, in general, be brought by a reversioner unless the disturbance be of a permanent character. See, also, Polk *v.* Skinner, 18 Q. B. 568; 22 L. J. Q. B. 27; Bell *v.* Midland Ry. Co. 30 L. J. C. P. 273.

(*l*) This form was used in a case in which the plaintiff had a verdict.

(*m*) See forms, Jenkins *v.* Cooke, 1 Ad. & E. 372; Hare *v.* Horton, 5 B. & Ad. 715; Lancashire Wagon Company *v.* Fitzhugh, 30 L. J. Ex. 231; [6 H. & N. 502;] Tancred *v.* Allgood, 4 H. & N. 438; 28 L. J. Ex. 362. The owner can sue for a permanent injury; Mears *v.* London & South Western Ry. Co. 31 L. J. C. P. 220; [11 C. B. N. S. 850,] where see the cases collected. It is a rule that in order to maintain *trover* for an injury to or conversion or detention of goods, the plaintiff must have had at the time the cause of action accrued the actual possession of, or the right to the immediate possession of the goods, and he must have *once* had possession of the goods, the *right* to obtain the custody only is not sufficient. Addison *v.* Round, 4 Ad. & E. 803; 1 Ch. Pl. 170, 7th ed. If he be the general owner, but has only a title or interest *in reversion*, and the *possessory right* is vested in another person by virtue of a letting to hire, &c. a special action on the case in the above form for an injury to the reversion must be brought See Gouldon *v.*

on hire to A. B. for a time unexpired, the reversion of the same being in the plaintiff; and the defendant wrongfully injured the plaintiff's said reversion by breaking and damaging the said goods.

SEAMAN.

Obs. — There is no implied obligation on the part of the owner of a ship towards a seaman on board, that the ship is in a fit state to perform the voyage; and therefore, without an *express warranty*, or a *knowledge of the defect* causing damage or *personal blame* on the part of a ship-owner, a seaman cannot maintain an action for injury. Couch *v.* Steel, 3 El. & Bl. 402; 23 L. J. Q. B. 121.

See "Negligence," "Ship."

SEDUCTION.

See *ante*, "Master and Servant."

SERVANT.

See "Master and Servant."

SHERIFFS.

Obs. — Actions for breach of duty of the office of sheriff must be brought against the high sheriff, though the under sheriff or bailiff be in fact the wrong-doer or defaulter. Cameron *v.* Reynolds, Cowp. 403; Woodgate *v.* Knatchbull, 2 T. R. 149. The sheriff is liable for the act of his officer acting under color of his warrant. Anon. Lofft, 81; Jones *v.* Parchard, 2 Esp. R. 507. As where his officers *arrest* under color of a *fi. fa.* Smart *v.* Hutton, 8 Ad. & E. 568. It has also been considered that he is responsible on an engagement made by an acknowledged town agent employed by the under sheriff in the country. Thomas *v.* Hearce, 5 Price, 578. See Gibbons *v.* Sheriff of Essex, 2 Camp. 189. So where the debtor paid the debt to an assistant bailiff, it was held good as against the sheriff. Gregory *v.* Cotterell, 5 El. & Bl. 571; 25 L. J. Q. B. 33.

So also the high bailiff of a county court is liable in the same way. Burton *v.* Le Gros, 34 L. J. Q. B. 91. But the sheriff is not liable for the act of his officer not within the scope (as knowingly arresting a privileged person, Magnay *v.* Burt, 5 Q. B. 381), or having the color of the authority and power delegated to the latter, and not afterwards sanctioned or recognized by the sheriff; Underhill *v.* Wilson, 6 Bing. 697; Cook *v.* Palmer, 6 B. & C. 739;

Harper, 7 T. R. 9; Paine *v.* Sheriff of Middlesex, R. & M. 99; 1 Chit. Pl. 7th ed. 394. After the death of a tenant for life of plate, the remainderman may maintain trover against a person to whom the tenant for life had pawned it without notice of the limited right of the pawner. Hoare *v.* Parker, 2 T. R. 376. Trover by a landlord for trees cut down during a lease, &c. 1 Saund. 322, note (5); 1 Chit. Pl. 7th ed. 152. If it were merely a gratuitous loan the owner might sue in trover. 1 Chit. Pl. 7th ed. 152. Where the goods have not been *injured*, but defendant has converted them to his own use by a sale, &c. to another, &c. this allegation would seem to be proper; and see the form, Jenkins *v.* Cooke, 1 Ad. & E. 372. A mere sale not in market overt, which is tortious and void against the general owner, is not an injury to the reversioner, enabling him to sue during the existence of the special interest of the hirer, &c. See Owen *v.* Leigh, 3 B. & Ald. 471, 473; Farrar *v.* Beswick, 1 M. & W. 685, 688; Tancred *v.* Allgood, 4 H. & N. 438; 28 L. J. Ex. 362; The Lancashire Wagon Company *v.* Fitzhugh, 30 L. J. Ex. 231; [6 H. & N. 502.] But an absolute sale and delivery of the chattel under the sale to a purchaser and a user, by the purchaser, causing damage to the chattel, constitutes a cause of action. The Lancashire Wagon Company *v.* Fitzhugh, *ubi sup.*

VARIOUS FORMS AGAINST SHERIFFS FOR NEGLECT OF DUTY.

See *ante*, "Escapes."

3. *For falsely returning that the Goods remained in the Plaintiff's Hands for want of Buyers, after a Seizure.*

See forms, &c. Pitcher *v.* King, 9 Ad. & E. 288; 5 Q. B. 758; Roue *v.* Ames, 6 M. & W. 747; 8 Dowl. 750; Wylie *v.* Birch, 4 Q. B. 566; and a form for not selling goods within a reasonable time after seizure, with special damage that the creditor became bankrupt, and thus the plaintiff lost the proceeds of his execution, Gore *v.* Lloyd, 12 M. & W. 463. See, also, Jacobs *v.* Humphrey, 2 Cr. & M. 413; Aireton *v.* Davis, 9 Bing. 740; Carlile *v.* Perkins, 3 Stark. 163.

4. *For seizing Goods equal in Value to the Moneys indorsed on the Writ, and levying only a Portion.*

Slade *v.* Hawley, 13 M. & W. 757; 2 D. & L. 700.

5. *For taking Insufficient Bail where the Capias was issued against Defendant in a Wrong Name, (u) and Plea.*

Brunskill *v.* Robertson, 9 Ad. & E. 840.

6. *For not arresting on the Earliest Opportunity. (x)*

Brown *v.* Jarvis, 1 M. & W. 704. [See Randell *v.* Wheble, 10 Ad. & E. 719.]

7. *For an Escape on Mesne Process. (y)*

That the plaintiff had a cause of action against A. B. to the amount of £20 [and upwards], (z) and the defendant had commenced an action against him for the same, and in due course of law had procured from a judge of the court of ——, at Westminster, an order directing A. B. to be held to bail for £——; and in pursuance of such order, the plaintiff sued out of the said court a writ of capias directed to the defendant as sheriff of ——, whereby [*set out writ as in* Form 1]; and the writ was duly indorsed for bail for £——, and was delivered to the defendant to be executed; and the defendant arrested the said A. B. accordingly, but, without the consent of the plaintiff, and without due cause, allowed the said A. B. to escape without putting in bail as aforesaid, whereby the plaintiff is delayed in recovering his said claim and costs, and is liable to lose the same.

(u) As to discharge on ground of copy served, varying in name from original writ, see Macdonald *v.* Mortlock, 2 D. & L. 963.

(x) See Williams *v.* Griffith, 3 Ex. 584; 18 L. J. Ex. 195. For not arresting on final process, see Hooper *v.* Lane, 27 L. J. Q. B. 75; [6 H. L. Cas. 443; Clifton *v.* Hooper, 6 Q. B. 468. What constitutes an arrest. Whitehead *v.* Keyes, 3 Allen, 495, 501; Gold *v.* Bissell, 1 Wend. 215; Emery *v.* Chesley, 18 N. H. 198; Field *v.* Ireland, 21 Ala. 240; Jones *v.* Jones, 13 Ired. (Law) 448; Cooper *v.* Adams, 2 Blackf. 294.]

(y) Form, Rogers *v.* Jones, 7 B. & C. 86; [Whitehead *v.* Keyes, 1 Allen, 350; S. C. 3 Allen, 495.] There must be an allegation of an existing suit at the time of the order. Williams *v.* Griffiths, 3 Ex. 584; 18 L. J. Ex. 195; Alexander *v.* Macaulay, 4 T. R. 611; Barnes *v.* Keane, 15 Q. B. 75; 19 L. J. Q. B. 309. Only actual damages can be recovered. Williams *v.* Mostyn, 4 M. & W. 145.

(z) See 1 & 2 Vict. c. 110, s. 3, and Chit. Arch. Pr. Mesne Process.

8. *For an Escape on Final Process.* (*a*)

Hemming *v.* Hale, 7 C. B. N. S. 487; 29 L. J. C. P. 127; Macrae *v.* Clark, 35 L. J. C. P. 247; L. R. 1 C. P. 403; [Bromfield *v.* Jones, 4 B. & C. 380; Merry *v.* Chapman, 11 Ad. & E. 966; Thomas *v.* Hudson, 14 M. & W. 353; Dignam *v.* Bayley, 37 L. J. Q. B. 71.]

9. *For not returning the Writ, whereby Plaintiff was put to Expense.*

Woodman *v.* Gist, 8 C. & P. 214.

10. *For an Excessive Levy and not selling for the Best Price under a Fieri Facias.*

Phillips *v.* Bacon, 9 East, 298. [See Gawler *v.* Chaplin, 2 Ex. 503.]

11. *For Negligence in conducting the Sale under a Fi. Fa.*

Wright *v.* Child, 35 L. J. Ex. 209; L. R. 1 Ex. 58.

12. *By a Landlord against a Sheriff on* 8 *Anne, c.* 14, *for removing Goods taken in Execution without satisfying a Year's Rent due.*

Thurgood *v.* Richardson, 7 Bing. 428; Andrews *v.* Dixon, 3 B. & Ald. 645; but be careful in using those forms. See Riseley *v.* Ryle, 10 M. & W. 101; 11 M. & W. 16; Smallman *v.* Pollard, 1 D. & L. 901; 6 M. & G. 1001; Foster *v.* Cookson, 1 Q. B. 417. (*b*)

13. *For not executing a Writ of Possession in Ejectment within a Reasonable Time.*

Mason *v.* Paynter, 1 Q. B. 974.

14. *For not discharging a Party privileged from Arrest from other Writs which were in the Sheriff's Office against him.*

Watson *v.* Carroll, 4 M. & W. 592.

15. *For refusing to take Bail.*

Milne *v.* Wood, 5 C. & P. 587.

[15*a*. *For False Imprisonment and to recover Sum paid in lieu of Bail.*

De Mesnil *v.* Dakin, L. R. 3 Q. B. 18.]

(*a*) Other forms, Jackson *v.* Hill, 10 Ad. & E. 477. Form for a wrongful discharge of a debtor. Hodges *v.* Paterson, 26 L. J. Ex. 223. A count may easily be framed from form 1, *ante*. By 5 & 6 Vict. c. 98, s. 31, "if any debtor in execution shall escape out of custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case, for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." The jury may assess the damages, according to what they consider the loss sustained. Bonafous *v.* Walker, 2 T. R. 126; Clifton *v.* Hooper, 6 Q. B. 468. As to the measure of damages, see Arden *v.* Goodacre, 11 C. B. 371; 20 L. J. C. P. 184; Hemming *v.* Hale, 7 C. B. N. S. 487; 29 L. J. C. P. 137; Macrae *v.* Clarke, 35 L. J. C. P. 247; L. R. 1 C. P. 403.

(*b*) The sheriff is not bound to levy at all, unless the execution creditor (having notice) first satisfies the landlord's rent. Cocker *v.* Musgrove, 9 Q. B. 223; 15 L. J. Q. B. 365. See 7 & 8 Vict. c. 69, s. 67.

16. *By a Sheriff against his Bailiff for refusing to replevy on a Distress for a Poor Rate.* (*c*)

Sabourin *v.* Marshall, 3 B. & Ad. 440.

17. *For Extortion.*

2 Chit. Pl. 7th ed. 635; and see form in Usher *v.* Walters, 4 Q. B. 553; [Livermore *v.* Boswell, 4 Mass. 437; Moore *v.* Boswell, 5 Mass. 306.]

18. *For taking Plaintiff to Prison on an Arrest within Twenty-four Hours, Plaintiff having consented to be carried to a House of her own Nomination.*

Silk *v.* Humfreys, 4 Ad. & E. 959.

19. *Against the High Bailiff of a County Court, for negligently selling Goods for less than they were worth.*

Burton *v.* Le Gros, 34 L. J. Q. B. 91.

20. *By Sheriff against the Execution Creditor, for deceiving him.*

Childers *v.* Wooler, 29 L. J. Q. B. 129.

SHIPS.

Obs. — The owner, as well as the master of a ship, is liable for negligent or unskilful navigation. Huggett *v.* Montgomery, 2 N. R. 446; Ogle *v.* Barnes, 8 T. R. 188; Bowcher *v.* Nordstrom, 1 Taunt. 568; Williams *v.* Holland, 10 B. 112. [Separate actions cannot be maintained against the master and owner for same cause of action. Priestly *v.* Fernie, 3 H. & C. 977.]

The action is not maintainable unless the injury arose entirely from the fault of the defendant; if both the plaintiff and defendant were in fault, and the plaintiff's carelessness or unskilfulness partly led to the collision, no action lies. See Vennall *v.* Garner, 1 Cr. & M. 21; Smith *v.* Dobson, 3 M. & G. 59; Vanderplank *v.* Miller, Moo. & M. 169; Collinson *v.* Larkins, 3 Taunt. 1; Luck *v.* Seward, 4 C. & P. 106; Luxford *v.* Large, 5 C. & P. 421; Raisin *v.* Mitchell, 9 C. & P. 613. But if the plaintiff has not so far contributed to the misfortune by his own negligence or want of ordinary care, that but for such negligence the misfortune could not have happened, and if the defendant could by the exercise of ordinary care and caution have avoided the consequences of the neglect or carelessness of the plaintiff, the plaintiff is entitled to recover. Smith *v.* Voss, 26 L. J. Ex. 233; 2 H. & N. 97; Tuff *v.* Warman, 27 L. J. C. P. 322; 2 C. B. N. S. 740; Thompson *v.* North Eastern Ry. Co. 30 L. J. Q. B. 67; 2 B. & S. 106; [Chamberlain *v.* Ward, 21 How. (U. S.) 548; Kelley *v.* Thompson, 1 Lowell, 124.] See Contributory Negligence, *ante*, "Negligence," p. 570; Chadwick *v.* Dublin Packet Co. 6 Ad. & E. 771.

By the merchant shipping amendment act, 1862, 25 & 26 Vict. c. 63, ss. 25. 26, Table C in the schedule, certain rules are laid down for preventing collision at sea: —

Preliminary.

Art. 1. In the following rules, every steam ship which is under sail, and not under steam, is to be considered a sailing ship; and every steam ship which is under steam, whether under sail or not, is to be considered a ship under steam.

(*c*) See a form by sheriff against his bailiff, Bowdon *v.* Hall, 4 Q. B. 840.

Rules concerning Lights.

OBS. Art. 2. The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

Art. 3. Sea-going steam ships, when under way, shall carry:

(*a*) *At the foremost head*, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least five miles:

(*b*) *On the starboard side*, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the starboard side, and of such character as to be visible on a dark night, with a clear atmosphere at a distance of at least two miles:

(*c*) *On the port side*, a red light, so constructed as to show an uniform unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles:

(*d*) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. Steam ships, when towing other ships shall carry two bright white mast-head lights, vertically, in addition to their side lights, so as to distinguish them from other steam ships. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steam ships are required to carry.

Art. 5. Sailing ships under weigh, or being towed, shall carry the same lights as steam ships under weigh with the exception of the white mast-head lights, which they shall never carry. (*d*)

Art. 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens. (*e*)

Art. 7. Ships, whether steam ships or sailing ships, when at anchor in roadsteads or fairways, shall, between sunrise and sunset, exhibit where it can be best seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear uniform and unbroken light, visible all round the horizon, and at a distance of at least one mile.

Art. 8. Sailing pilot vessels shall not carry the lights required by other sailing vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Art. 9. Open fishing boats, and other open boats, shall not be required to carry side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the one side, and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing vessels and open boats, when at anchor, or attached to their nets and stationary, shall exhibit a bright white light. Fishing vessels and open boats shall, however, not be prevented from using a flare-up light in addition, if considered expedient.

(*d*) The Margaret *v.* The Tuscar, 15 L. T. N. S. 86.

(*e*) The Margaret *v.* The Tuscar, 15 L. T. N. S. 86.

Rules concerning Fog Signals.

Obs. Art. 10. Whenever there is a fog, whether by day or night, the fog signals described below shall be carried, and used, and sounded at least every five minutes, viz.:

(*a*) Steam ships under weigh shall use a steam whistle placed before the funnel not less than eight feet from the deck.

(*b*) Sailing ships under weigh shall use a fog horn.

(*c*) Steam ships and sailing ships when not under weigh shall use a bell.

Steering and Sailing Rules.

Art. 11. If two sailing ships are meeting end-on, or nearly end-on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of each other.

Art. 12. When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way, but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward. (*f*)

Art. 13. If two ships under steam are meeting end-on, or nearly end-on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. (*g*)

Art. 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other. (*g*)

Art. 15. If two ships, one of which is a sailing ship, and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the other ship.

Art. 16. Every steam ship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam ship shall, when in a fog, go at a moderate speed.

Art. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.

Art. 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article:

Art. 19. In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger. (*h*)

Art. 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (*i*)

By s. 28, it is enacted that "in case any damage to person or property arises from the non-observance by any ship of any regulation made by or in pursuance of this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

But the master and owners are only liable for the negligent act of their servants, therefore, where they are *compelled* by law to take a pilot, he is not a servant

(*f*) On this article see Dean *v.* Mark, The Constitution, 2 Moore P. C. C. N. S. 453; The Spring, L. R. 1 Adm. 99.

(*g*) Onus of proof, that a departure is necessary, lies on the defendants. The Concordia, L. R. 1 Adm. 93.

(*h*) The Great Ship Company *v.* Sharples, 3 Moore P. C. C. N. S. 31; and notes (*f*) and (*g*), *supra*.

(*i*) See The Ida *v.* The Wasa of Nicolaistadt, 15 L. T. N. S. 103.

Obs. in the ordinary sense, and they are, therefore, not responsible for his default. See the Merchant Shipping Act (17 & 18 Vict. c. 104, s. 388), 25 & 26 Vict. c. 63, ss. 39–41; The Maria, 1 W. Rob. 95; Johanna Stoll, 1 Lush. 312; 30 L. J. P. M. & A. 201. It is not enough to prove that there was fault or negligence on the pilot's part, but the owner must show that there was no default upon the part of the master and crew, which might have in any degree been conducive to the damage. The Iona, L. R. 1 P. C. 626; The Velasquez, L. R. 1 C. P. 494. [On the other hand, if a pilot is injured on board of a vessel by the negligence of one of the seamen, the owners cannot defend on the ground of an implied contract between owners and the pilot whom they are compelled to employ that the pilot shall take the risk of injury from the negligence of his fellow servants. Smith *v.* Steele, L. R. 10 Q. B. 125.]

But to exempt the master and owners from liability, the act complained of must be solely that of the pilot. Hammond *v.* Rogers, 7 Moore P. C. C. 160; Rodrigues *v.* Mellish, 10 Ex. 110; 24 L. J. Ex. 26; The Carrier Dove, 1 B. & L. 113. See, also, as to compulsory pilotage under 6 Geo. 4, c. 125, and the Merchant Shipping Act, 1854, The Hanna, L. R. 1 Admt. & Ecc. 283; and The Tyne Improvement Commissioners *v.* The General Steam Navigation Company, 36 L. J. Q. B. 22; L. R. 1 Q. B. 65. And it has also been held that the act causing the damage must be within the scope of the pilot's duty. The Diana, 1 W. Rob. 135.

As to exemption, where one of the ships is foreign, The Vernon, 1 W. Rob. 316; 17 & 18 Vict. c. 104, s. 527.

As to the limitation of the money extent of liability, 25 & 26 Vict. c. 63, s. 54, and 17 & 18 Vict. c. 104, s. 506; The Obey, L. R. 1 Adm. 102.

As to liability for loss of life occasioned by collision, Glaholm *v.* Barker, L. R. 1 Ch. App. 223; 35 L. J. Ch. 259.

As to register being *primâ facie* evidence of ownership, Hibbs *v.* Ross, L. R. 1 Q. B. 534; 35 L. J. Q. B. 193.

See, generally, Lowndes on the Admiralty Laws of Collisions at Sea.

Ante, "Carriers."

1. *For negligently navigating a Ship and causing a Collision.*

That the defendant so negligently managed and directed his ship, that she ran foul of the ship of the plaintiff, whereby the said ship of the plaintiff was sunk, and the cargo of the same lost and injured, and the plaintiff incurred expense in raising and repairing the said ship and cargo, and lost the use of the said ship and the freight that he might have earned therefrom.

2. *Against the Owner of a Ship for negligently leaving a Hatchway uncovered.*

Hibbs *v.* Ross, L. R. 1 Q. B. 534; 35 L. J. Q. B. 193.

3. *Against the Owner of a Steam Vessel for causing a Dangerous Swell in the Thames, whereby the Plaintiff's Vessel was swamped.*

Luxford *v.* Large, 5 C. & P. 421.

SHOOTING.

Obs. — The venue is local. See a form for trespass for the purpose of killing game, and law, Lonsdale *v.* Rigg, 11 Ex. 654; 25 L. J. Ex. 73; Rigg *v.* Lonsdale, 1 H. & N. 923; 36 L. J. Ex. 196. See Graham *v.* Ewart, 11 Ex. 326; 25 L. J. Ex. 42; 1 H. & N. 550; 26 L. J. Ex. 97; affirmed, Ewart *v.* Graham, 7 H. L. Cas. 331; 29 L. J. Ex. 88; Bruce *v.* Helliwell, 5 H. & N. 609; 29 L. J. Ex. 297; Jeffrys *v.* Evans, 34 L. J. C. P. 261.

Obs. A person who, on his own land, shoots a pheasant on the land of another, and goes on such land to pick it up, commits a trespass of entering land in pursuit of game within 1 & 2 W. 4, c. 32, s. 30 — the shooting and picking up the bird being one transaction, but it seems doubtful whether entering land for the purpose of picking up dead game is within that act. Osbond *v.* Meadows, 31 L. J. M. C. 338; [12 C. B. N. S. 10.]

If rabbits be started and killed on the land of another, they are the property of the owner of the land on which they were killed, but there might be a difference if started on the land of A. and killed on that of B. Blades *v.* Higgs, [12 C. B. N. S. 501;] 31 L. J. C. P. 151; 32 L. J. C. P. 182; 34 L. J. C. P. 286; 11 H. L. Cas. 621.

SLANDER. See "Libel and Slander."

SLANDER OF TITLE. See "Libel and Slander."

STOCK. See *ante*, "Bank of England," also *ante*, part 1, p. 246.

STOPPAGE IN TRANSITU.

Obs. — See *post*, pleas. See a form of declaration for a wrongful stoppage in *transitu*, and pleas, Wilmhurst *v.* Bowker, 7 M. & G. 883.

SUPPORT.

Obs. — The right to support from *adjacent* or *subjacent* soil is a natural right of property apart from any question of negligence. Wyatt *v.* Harrison, 3 B. & Ad. 871; Humphries *v.* Brogden, 12 Q. B. 739; 20 L. J. Q. B. 10; Hunt *v.* Peake, 29 L. J. Ch. 787; [H. R. V. Johns. 705;] Smart *v.* Morton, 5 El. & Bl. 30; and see Bonomi *v.* Backhouse, El., Bl. & El. 655; 9 H. L. Cas. 503; Nicklin *v.* Williams, 23 L. J. Ex. 335; [10 Ex. 259; M'Guire *v.* Grant, 1 Dutch. 356, 368; Farrand *v.* Marshall, 19 Barb. 380; S. C. 21 Barb. 409, 415; Foley *v.* Wyeth, 2 Allen, 131; Napier *v.* Bulwinkle, 5 Rich. 311, 323; Beard *v.* Murphy, 37 Vt. 101; Lasala *v.* Holbrook, 4 Paige, 169; Panton *v.* Holland, 17 John. 92; Howland *v.* Vincent, 10 Met. 371, 373; Hay *v.* Cohoes Co. 2 Comst. 159; Radcliff *v.* Mayor &c. 4 Comst. 195; Richardson *v.* Vermont Central R. R. Co. 25 Vt. 465; Charless *v.* Rankin, 22 Missou. 566.]

As to how this right may be qualified or abandoned, see Rowbotham *v.* Wilson, 30 L. J. Q. B. 49; [8 El. & Bl. 123, 152.]

But if any additional weight be placed on land, the owner cannot maintain an action if his house fall by reason of the adjacent or subjacent owner digging so near that the house fell, unless he did so negligently. Dodd *v.* Holme, 1 Ad. & E. 493; Wyatt *v.* Harrison, *ubi supra*. See Gayford *v.* Nicholls, 9 Ex. 702; [Thurston *v.* Hancock, 12 Mass. 226; Lasala *v.* Holbrook, 4 Paige, 169; Richart *v.* Scott, 7 Watts, 460; Moody *v.* McClelland, 39 Ala. 45; Foley *v.* Wyeth, 2 Allen, 131, 133. The owner of two adjoining plots of land sold one to the plaintiff, and the other to the defendant, — the latter under a covenant to build according to a certain elevation. Excavations were made by the defendant so as to enable him to carry out the contract, in consequence of which the plaintiff's building fell in. It was held, that the plaintiff had no ground of action. Murchie *v.* Black, 19 C. B. N. S. 190.]

But although the weight upon the land has been increased by buildings, an action will lie, unless it be shown that the adjacent land gave way on account of such

Obs. increased weight. Hamer *v.* Knowles, Stroyan *v.* Knowles, 6 H. & N. 454; and see Wyatt *v.* Harrison, *ubi supra;* [Brown *v.* Robins, 4 H. & N. 186; Hunt *v.* Peake, H. R. V. Johns. 705.]

This right to support may also be acquired, as where houses are so built that they rest for support the one upon the other. For mutual support there is either, by a presumed grant or a presumed reservation, a right to such mutual support, which is not affected by subsequent subdivision of the property on which they were originally built. Richards *v.* Rose, 9 Ex. 218; 23 L. J. Ex. 3; but see Solomon *v.* Vintners' Company, 4 H. & N. 585; 28 L. J. Ex. 370.

So the same right to support may be gained by lapse of time. Partridge *v.* Scott, 3 M. & W. 220; see Brown *v.* Robins, 28 L. J. Ex. 250; also Rogers *v.* Taylor, 2 H. & N. 828. [A man is not prevented from draining his own land because it will dimish his neighbor's support by withdrawing the percolating water, if his doing so does not derogate from the express or implied terms of his own grant. Popplewell *v.* Hodkinson, L. R. 4 Ex. 248. See Elliot *v.* North Eastern Ry. Co. 10 H. L. Cas. 333.]

It is a good cause of action that a next neighbor conducts himself so *carelessly*, *negligently*, and *unskilfully*, in pulling down his own house, &c. as to injure thereby his neighbor's house, although the complainant may not, in respect of the latter house, have acquired any absolute right to the support of the building pulled down, or the adjoining soil. See Trower *v.* Chadwick, 3 Bing. N. C. 334; 6 Bing. N. C. 1; [Pierce *v.* Musson, 17 La. An. 389; Panton *v.* Holland, 17 John. 92; Richart *v.* Scott, 7 Watts, 460; M'Guire *v.* Grant, 1 Dutch. 356, 361; Shrieve *v.* Stokes, B. Mon. 453.] See the earlier cases upon this point, Peyton *v.* Mayor of London, 9 B. & C. 725; particularly, Dodd *v.* Holme, 1 Ad. & E. 493; Plant *v.* James, 5 B. & Ad. 791. See a form (*semble*, *too general*) in Lloyd *v.* Wigney, 6 Bing. 489. And it seems that if the defendant has been guilty of actual negligence, and thereby occasioned the injury, he is liable, although the plaintiff himself did not use those precautions he ought to have adopted against such injury. Walters *v.* Pfeil, M. & M. 362. [See Smith *v.* Hardesty, 31 Missou. 412.] In order to entitle the owner of land to succeed in an action against a neighbor for excavating near his boundary, it is necessary that appreciable damage should have been caused thereby. Smith *v.* Thakerah, 35 L. J. C. P. 276; and L. R. 1 C. P. 564. The damages should be to the amount of the plaintiff's old house thrown down by the defendant's carelessness, and not the whole expense of building a new one. Lukin *v.* Godsall, Peake Add. C. 15. See Dodd *v.* Holme, *supra*. It is not settled whether a party about to pull down his house is bound to give notice of his intention to his next door neighbor (who has not acquired a legal right to the support of the house, &c.) if he does not shore up his neighbor's house. See Peyton *v.* Mayor of London, *supra;* Massey *v.* Goyder, 4 C. & P. 161; and per Tindal C. J. in Trower *v.* Chadwick, 3 Bing. N. C. 353. In order to raise this question, the declaration should specially charge the omission to give notice, and the pulling down without shoring up. See form, 3 Bing. N. C. 337; *post*, form 3. See a form of declaration against commissioners of sewers for undermining the plaintiff's house by improperly making a sewer, The Grocers' Company *v.* Donne, 3 Bing. N. C. 34. As to the *right* to the *support* of adjoining property, see generally, Gale on Easements, by Willes.

1. *For removing Subjacent Land and depriving the Plaintiff's Land of its support.* (*k*)

That the plaintiff was possessed of land under which the defendant wrongfully excavated and mined, and deprived the plaintiff's land of natural and sufficient support, whereby the plaintiff's land gave way and fell in.

[*Like counts.* Humphries *v.* Brodgen, 12 Q. B. 740; Smart *v.* Morton, 5 El. & Bl. 30.

(*k*) Venue local. See a form, Adams *v.* Lloyd, 27 L. J. Ex. 499; [3 H. & N. 351.]

2. *For taking away the Adjacent and Subjacent Support of the Plaintiff's Land and of the Buildings thereon.*

(*Venue local.*) That the plaintiff was possessed of land with houses and other buildings erected and standing thereon, and was entitled to have the said land, houses, and buildings supported by the land adjacent thereto, and by the soil and minerals under the said land, houses, and buildings of the plaintiff; and the defendant wrongfully dug away and removed the said land adjacent to the said land, houses, and buildings of the plaintiff, and the said soil and minerals under the same, without leaving proper and sufficient support for the said land, houses, and buildings of the plaintiff; whereby the same sank and gave way, and the said houses and buildings were weakened, cracked, and injured.

Like counts. Micklin *v.* Williams, 10 Ex. 259; Rogers *v.* Taylor, 2 H. & N. 828; Richards *v.* Rose, 9 Ex. 218; Stuart *v.* Morton, 5 El. & Bl. 30; Brown *v.* Robins, 4 H. & N. 186; Richards *v.* Harper, L. R. 1 Ex. 199.

Like counts at the suit of a reversioner. Harris *v.* Ryding, 5 M. & W. 60; Hilton *v.* Granville, 5 Q. B. 701; Roberts *v.* Haines, 7 El. & Bl. 625; Bononi *v.* Backhouse, El., Bl. & El. 622; Bibby *v.* Carter, 4 H. & N. 153; Hamer *v.* Knowles, 6 H. & N. 454.

3. *For taking away from the Plaintiff's House the Support to which it was entitled from the Adjoining House.* (*l*)

(*Venue local.*) That the plaintiff was possessed of a house adjoining a certain other house and certain walls thereunto belonging, and was entitled to support for his said house from the said adjoining house and the said walls; and the defendant deprived the plaintiff of the said support for his said house from the said adjoining house and the said walls [by wrongfully taking down and removing the last mentioned house and walls without shoring or propping up, or otherwise securing or taking reasonable and proper precautions to support and secure the said house of the plaintiff]; whereby the said house of the plaintiff fell in and was destroyed, and the goods of the plaintiff then being therein were damaged and broken, and the plaintiff incurred expense in procuring another house, and in removing and repairing his said goods, and in removing the ruins of his said house, and in rebuilding the same.

Like counts. Langford *v.* Woods, 7 M. & G. 625; Brown *v.* Windsor, 1 C. & J. 20; Hide *v.* Thornborough, 2 C. & K. 250; South Metrop. Cemetery Co. *v.* Eden, 16 C. B. 42; Wyatt *v.* Harrison, 3 B. & Ad. 871; Solomon *v.* Vintners' Co. 4 H. & N. 585.]

(*l*) Venue local. See a form for injuring the foundations of plaintiff's house by digging mines, &c. Hilton *v.* Lord Granville, 5 Q. B. 701. The form in Trower *v.* Chadwick, [3 Bing. N. C. 334; 6 Ib. 1,] was held good on general demurrer. See another form, Hide *v.* Thornborough, 2 C. & Kirw. 250. Where the declaration does not show that the plaintiff's house was ancient, or that he had acquired a right to have it supported by the adjoining wall or soil, and merely charges (without laying negligence, &c. see form 1, *supra*) that defendant dug into the soil and foundation of the adjoining land *so near* the plaintiff's house that it fell, &c. it is defective; see Wyatt *v.* Harrison, 3 B. & Ad. 871; Dodd *v.* Holme, 1 Ad. & E. 493; for where a party has not acquired an absolute right to such support for his house by twenty years' uninterrupted enjoyment thereof, or other legal means, his neighbor may dig into or use his own soil to the extremity thereof, without shoring up the house, and is not liable (reasonable care and skill being used), although such house fall down. See Ib.; and Partridge *v.* Scott, 3 M. & W. 220. It is not necessary to aver in the declaration that the plaintiff had a right to have the building supported by the soil under which the defendant worked.

4. *Against Persons employed in making a Railway, for Carelessness, &c. in performing the Works, whereby Plaintiff's Land was injured.* (*m*)

SURGEON. (*n*)

Against a Surgeon or Apothecary for Neglect, &c. in his Treatment of the Plaintiff. (*o*)

For that the plaintiff, at the defendant's request, retained and employed the defendant as a surgeon and apothecary to attend upon the plaintiff and endeavor to cure him of an illness under which he then labored for reward. And the defendant accepted and entered upon the said retainer and employment; yet the defendant conducted himself in an ignorant, unskilful, and negligent manner in that behalf, whereby the plaintiff became worse, and was greatly injured in his health and constitution, and suffered pain, and was prevented from following his usual employment, and his recovery from his illness was greatly delayed.

TRADE-MARKS.

Obs. — An action may be maintained by a plaintiff who has a known and accustomed trade-mark, against a defendant who adopts a mark so closely resembling his as to be calculated to deceive and to induce people to believe that the defendant sells goods made by the plaintiff, the defendant using such mark intending to deceive, and selling the goods as of the plaintiff's manufacture. Rodgers *v.* Nowill, 5 C. B. 110. See, also, Crawshay *v.* Thompson, 4 M. & G. 386, note; Manton *v.* Bales, 1 C. B. 444; Sykes *v.* Sykes, 3 B. & C. 541; [Lord Westbury in Leather Cloth Co. *v.* American Leather Cloth Co. 4 De G., J. & S. 137, 139; S. C. 11 H. L. Cas. 523, 538.] The degree of resemblance must be such that ordinary purchasers proceeding with ordinary caution are likely to be misled. Seixo *v.* Provezende, L. R. 1 Ch. App. 192; [Merrimack Manuf. Co. *v.* Garner, 4 E. D. Smith, 343; Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Partridge *v.* Menck, 2 Sandf. Ch. 622; Shrimpton *v.* Laight, 18 Beav. 164; Edelsten *v.* Edlesten, 1 De G., J. & S. 185; Leather Cloth Co. *v.* American Leather Cloth Co. 11 H. L. Cas. 535; Lockwood *v.* Bostwick, 2 Daly, 521; Bradley *v.* Norton, 33 Conn. 157; Burnett *v.* Phalon, 3 Keyes, 594; Walton *v.* Crowley, 3 Blatchf. 440; Hostetter *v.* Vowinkle, 1 Dillon, 329; Coffeen *v.* Brunton, 4 McLean, 516; Wotherspoon *v.* Cunrie, L. R. 5 H. L. 508; Cope *v.* Evans, L. R. 18 Eq.

(*m*) See The Grocers' Company *v.* Donne, 3 Bing. N. C. 34; Brine *v.* Great Western Ry. Co. [2 B. & S. 402;] 31 L. J. Q. B. 101.

(*n*) *Ante* "Fraud," form 4, "Apothecary," *ante*, 48.

(*o*) This form was used in a case in which the defendant had a verdict. See *post*, pleas, "Surgeon." Forms and law, Slater *v.* Baker, 2 Wils. 359; Seare *v.* Prentice, 8 East, 348; Pippin *v.* Sheppard, 11 Price, 400; Hancke *v.* Hooper, 7 C. & P. 81; see Chit. jr. Contr. Ind. *in voc.* A medical man is liable for gross negligence or unskilfulness, though he act gratuitously. Ib; Schiell *v.* Blackburne, 1 H. Bl. 158. He must always use ordinary and reasonable care and skill. Lanphier *v.* Phipos, 8 C. & P. 475; [2 Chitty Contr. (11th Am. ed.) 808, and notes.] It is sufficient to aver that the defendant was a surgeon, "and was retained and employed as such" (without stating by whom), "for reward to him to treat and cure the plaintiff, and that defendant entered upon the treatment," &c. without showing any undertaking by defendant, or averring in words that it was defendant's duty to act skilfully, &c. Pippin *v.* Sheppard, 11 Price, 400; Gladwell *v.* Steggall, 5 B. & C. 733; Story *v.* Richardson, 6 Bing. N. C. 130. [See Staley *v.* Jameson, 46 Ind. 159.]

Obs. 138; Richards *v.* Williamson, 22 W. R. 765; 30 L. T. N. S. 746.] And there need not be any proof of special damage. Rodgers *v.* Nowill, *ubi supra*: Blofield *v.* Payne, 4 B. & Ad. 410. And where a plaintiff agreed with the defendant that he should make bricks for the plaintiff, and the defendant infringed the mark of a third person, who moved for an injunction against the plaintiff, who had to pay costs, it was held that there was a good cause of action. Dixon *v.* Fawcus, 30 L. J. Q. B. 137. As to the principle of the right of property in trade-marks and protection, see The Leather Cloth Co. *v.* The American Leather Cloth Co. 11 H. L. Cas. 523; 35 L. J. Ch. 53; [S. C. 4 De G., J. & S. (Am. ed.) 137, and note (1), and cases cited; Rodgers *v.* Nowill, 3 De G., M. & G. 614, 618, note (1), and cases cited; Burgess *v.* Burgess, 3 De G., M. & G. 896, and note (1), and cases cited; 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649; Taylor *v.* Carpenter, 3 Story, 458; Amoskeag Manuf. Co. *v.* Garner, 55 Barb. 151; Congress Spring Co. *v.* High Rock Spring Co. 45 N. Y. 291: Gillott *v.* Esterbrook, 48 N. Y. 375; Stonebreaker *v.* Stonebreaker, 33 Md. 252. Property in a trade-mark is the right to an exclusive use of some mark, name, or symbol, in connection with a particular manufacture or vendible commodity. Lord Westbury L. C. in Leather Cloth Co. *v.* American Leather Cloth Co. 4 De G., J. & S. 137.]

As to the fraudulent assumption of the name of a bank, see form in Lawson *v.* The Bank of London, 18 C. B. 84; 25 L. J. C. P. 188. [So, as to the right to the name of a business, see Colonial Life Ass. Co. *v.* Home & Colonial Ass. Co. 33 Beav. 548; so, as to the name of a partnership, see Banks *v.* Gibson, 34 Beav. 566; and see Ainsworth *v.* Walmsley, L. R. 1 Eq. 518.]

See an act to amend the law relating to the fraudulent marking of merchandise, 25 & 26 Vict. c. 88; *ante*, "Warranty," Obs. 259. [A recent act of Congress provides for the registration and protection of trade-marks. Rev. Sts. U. S. tit. IX. c. 2, p. 963 *et seq.* They are protected by statutes of Massachusetts. Genl. Sts. c. 56, &c. Parties are punished for forging or counterfeiting them under Genl. Sts. Mass. c. 161, § 55.] As to restraining the defendant in the common law courts, *ante*, "Injunction."

1. *For infringing the Plaintiff's Trade-mark and selling Goods marked therewith.* (*p*)

For that the plaintiff carried on business as [a shot belt and powder flask] manufacturer, and sold for profit [shot belt and powder flasks], which he was accustomed to mark [*describe the mark*], in order to denote that they were manufactured by him, and in order to distinguish them from the like articles manufactured by other persons; and the plaintiff enjoyed great reputation with the public, on account of the good quality of the said articles, and made great gains by the sale thereof. And the defendant wrongfully and fraudulently, and against the will, and without the consent of the plaintiff, made great quantities of the said articles, and caused them to be marked with the said mark of the plaintiff aforesaid, in imitation of the said mark so made and used by the plaintiff as aforesaid; and in order to denote that the said articles were of the manufacture of the plaintiff. And the defendant wrongfully and fraudulently sold the said articles so made and marked, as and for articles of the manufacture of the plaintiff, whereby the plaintiff was prevented from selling a great quantity of the said articles manufactured by himself, and was injured in his reputation in his said business, by reason of the said articles manufactured and sold by the defendant, being of inferior quality to those manufactured by the plaintiff. [*Add claim for injunction, as ante*, 531.]

(*p*) Sykes *v.* Sykes, 3 B. & C. 541; [Blofeld *v.* Payne, 4 B. & Ad. 410; Crawshay *v.* Thompson, 4 M. & G. 357; Morison *v.* Salmon, 2 M. & G. 385; Rodgers *v.* Nowill 6 C. B. 109.]

2. *For imitating the Labels which Plaintiff put on the Reels on which his Thread for Sale was wound.* (*q*)

See last edition of this work, p. 556.

TRESPASS.

Obs. — See, in general, Vin. Abr. and Bac. Abr. Com. Dig. tit. Trespass.

In trespass, for an injury to the *person* or *personal* property, the *venue* is *transitory*, except in certain actions against justices, constables, persons acting in public capacity, &c. See, as to these, 1 Chit. Pl. 7th ed. 285.

In trespass to *realty* the venue is local, and by R. 18, T. T. 1853, "In actions for trespass to land, the close or place in which, &c. must be designated in the declaration by name, or abuttals, or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the court or a judge may think reasonable." Two abuttals are in general sufficient, North *v.* Ingamells, 9 M. & W. 251, provided they are correct. Webber *v.* Richards, 1 Q. B. 439. So the description of a field by name. Brownlow *v.* Tomlinson, 1 M. & G. 484. How to describe a party wall, see Morley *v.* M'Dermott, 8 Ad. & E. 138. If there be any ambiguity in the description defendant should apply to a judge to compel the plaintiff to rectify it. North *v.* Ingamells, *ubi supra;* [1 Chitty Pl. 390, 391, and notes.]

The object of the rule was the prevention of the necessity for a new assignment by the plaintiff giving a particular description of the *locus in quo*, upon a plea of *liberum tenementum*. See 1 Saund. 299, *b*, *c*, note (6). It will be observed that the description of the close or place may be either by *name*, or *abuttals*, or *other description*. It is not correct to describe a close as abutting "towards" instead of "on" another close, &c.; a demurrer for the uncertainty would hold good; but if, instead of demurring, the defendant plead *liberum tenementum*, this mode of description could not be impeached. Lempriere *v.* Humphrey, 3 Ad. & E. 181; Banks *v.* Angell, 7 Ad. & E. 846. "The words abutting towards are perfect nonsense, the place mentioned might be thirty miles from the *locus in quo;* abutting 'upon' would be a different thing." Per Patteson J. Ib. Abuttal on "A. *or* B." Lethbridge *v.* Winter, 2 Bing. 49. Abuttals are not construed with great strictness. [1 Chitty Pl. 391, note (*b*)]. Thus Heath J. in Roberts *v.* Karr, 1 Taunt. 495, said, that if premises be described as abutting on a house to the east, it may be northeast or southeast; and it suffices to describe correctly that part of the close in which the trespass occurred. Bassett *v.* Mitchell, 2 B. & Ad. 99. If the plaintiff give an accurate description of his close by name or abuttals, he is safe, and need not new assign on a plea of *liberum tenementum*, although the defendant happen to have another close in the parish with a similar name or abuttals. Cocker *v.* Crompton, 1 B. & C. 489; Cooke *v.* Jackson, 9 D. & R. 495; Lempriere *v.* Humphrey, *ubi supra.* [See Providence *v.* Adams, 10 R. I. 184, 190.] In Walford *v.* Anthony, 8 Bing. 75, the declaration stated that defendants, A. and B., broke a close of the plaintiff abutting on a close of *defendants*, but it abutted on a close of the defendant A. only; held an ambiguity, and not a variance. Two abuttals are in general sufficient; if there be any real ambiguity the defendant may apply to a judge on affidavit. North *v.* Ingamells, 9 M. & W. 249. Where the plaintiff's close is *misdescribed*, it seems the proper course for the defendant is to traverse his possession of the close, see Patteson J. Lempriere *v.* Humphrey. Where the *locus in quo* was described as abutting on five places landwards, and seawards on the sea, and

(*q*) See other forms and law, Sykes *v.* Sykes, 3 B. & C. 541; Blofield *v.* Payne, 4 B. & Ad. 410; Crawshay *v.* Thompson, 4 M. & G. 357. For making counterfeit medicines to imitate plaintiff's. Morison *v.* Salmon. 8 M. & G. 385. Who to sue for the imitation. Singleton *v.* Bolton, 3 Doug. 293; Delondre *v.* Shaw, 2 Sim. 237. As to the principle on which equity interferes to prevent the use of trade-marks, Croft *v.* Day, 7 Beav. 84; *ante*, Obs., where the statutes will be found referred to.

was really in contact landwards with *one* only of those places, it was held that this was a substantial misdescription. Webber *v.* Richards, 1 Q. B. 439. A strip of ground recently added to a field adjoining a highway may be described by the name of the field. Brownlow *v.* Tomlinson, 1 M. & G. 484. How to describe the abuttals of a party wall. Murley *v.* M'Dermott, 8 Ad. & E. 138. In Howell *v.* Thomas, 7 C. & P. 342, Coleridge J. allowed an amendment of the record at the trial by substituting "Moor Hill" for "Clover Hill;" see, further, 3 Harr. Ind. Trespass. Though trespasses in several closes be laid, plaintiff may recover as to one only. Phythian *v.* White, 1 M. & W. 216.

I. TO THE PERSON.

OBS. — In many cases before commencing an action against a justice, constable, customs or excise officer, public company, &c. it is necessary, by statute, to give the defendant a written notice that such action will be brought. See the form, law, &c. *post*, pleas, "Notice of Action."

As to the costs in trespass, by 3 & 4 Vict. c. 24, s. 2, "If the plaintiff in any action of trespass, or trespass on the case, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards, that is, within a reasonable time (Thompson *v.* Gibson, 8 M. & W. 281; Jones *v.* Williams, 13 M. & W. 420; 14 L. J. Ex. 76), certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance, for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." This statute does not apply to a demurrer; Poole *v.* Grantham, 2 Dowl. N. S. 622; or to a writ of inquiry thereon. Taylor *v.* Rolfe, 5 Q. B. 337.

And by s. 3, where a trespass to realty has been committed after notice not to trespass, and the judge refuses to certify to give the plaintiff his costs under the above statute, it would seem that the plaintiff's course would be to enter a suggestion on the record. Daw *v.* Hole, 15 L. J. Q. B. 32; Sherwin *v.* Swindall, 12 M. & W. 783; 1 C. & K. 402; 1 D. & L. 999. And see Bourne *v.* Alcock, 4 Q. B. 621; Bowyer *v.* Cook, 4 C. B. 236.

And by 23 & 24 Vict. c. 126, s. 34, "When the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately after certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought."

And now by the county courts act, 1867, 30 & 31 Vict. c. 142, s. 5, "If any action commenced after the passing of this act (1st Jan. 1868) in any of her majesty's superior courts of record the plaintiff shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs."

And by s. 29, "Where any action or suit shall be brought in any other court than the superior courts of law, which could have been brought in a county court, and the verdict recovered is for a less sum than £10, the plaintiff shall not recover from the defendant a greater amount of costs than he would have

Ons. been allowed if the action or suit had been brought in such county court, unless the judge shall certify that the action or suit was a fit one to be brought in such other court."

Where there are several defendants in trespass, if one obtain a verdict he is entitled to his costs, whether he pleaded alone or jointly with the others, unless the judge certify that there was reasonable cause for making him defendant; 3 & 4 W. 4, c. 42, s. 32; calculation of such costs, &c. Griffiths *v.* Jones, 2 Cr., M. & R. 333; Starling *v.* Cozens, 2 Cr., M. & R. 445.

See, in general, Bac. Ab. Assault; Com. Dig. Battery; Burn's J. Assault; 1 Selw. N. P. 27; 3 Bl. Com. 120. 1. An *assault* is an *attempt* with violence to do a person some bodily harm, as by holding up a fist, striking at another with a stick which does not touch the latter, or throwing anything at a person which misses him, or by any similar act of inchoate violence, showing an intention to do injury, and the aggressor being within such a distance from the party assaulted that the intention might possibly be executed. [United States *v.* Hand, 2 Wash. 435; People *v.* Yslas, 27 Cal. 63; Johnson *v.* Tompkins, 1 Baldw. 571, 600; Richels *v.* State, 1 Sneed, 606; State *v.* Myers, 19 Iowa, 517; State *v.* Malcolm, 8 Iowa, 413; State *v.* Hampton, 63 N. Car. 13; State *v.* Davis, 1 Ired. (Law) 125; State *v.* Sims, 3 Strobh. 137; State *v.* Morgan, 3 Ired. (Law) 186; Barnes *v.* Martin, 15 Wisc. 240; State *v.* Davis, 1 Ired. (Law) 125; United States *v.* Ortega, 4 Wash. 534.] The *quo animo* is material in the case of an assault, and, therefore, where a party half drew his sword, but said, "if it were not assize time I would run you through the body," it was held there was no assault, the words negativing an intention to do violence. Tuberville *v.* Savage, 1 Mod. R. 3; Bac. Ab. Assault, A.; Blake *v.* Barnard, 9 C. & P. 626; Reg. *v.* St. George, 9 C. & P. 483; [Commonwealth *v.* Eyre, 1 Serg. & R. 347; State *v.* Crow, 1 Ired. (Law) 375; Lawson *v.* State, 30 Ala. 14; Woodruff *v.* Woodruff, 22 Geo. 237. See United States *v.* Myers, 1 Cranch C. C. 310.] The riding after a person and obliging him to run away into a garden, to avoid being beaten, is an assault. Morton *v.* Shoppee, 3 C. & P. 373. [One, who was engaged in an angry altercation with another, aimed a gun at him in an excited and threatening manner, and snapped it twice. The gun was not in fact loaded, but this was not known to the person at whom it was aimed This was held to be an assault. Beach *v.* Hancock, 27 N. H. 223; State *v.* Shepard, 10 Iowa, 126; State *v.* Cherry, 11 Ired. (Law) 475. See, further, as to assault with a gun, Higginbotham *v.* State, 23 Texas, 574; State *v.* Epperson, 27 Missou. 255; State *v.* Myerfield, Phill. (N. C.) Law, 108; United States *v.* Kierman, 3 Cranch C. C. 435.] Mere words of abuse and threats do not constitute an assault. [Smith *v.* State, 39 Miss. 521; State *v.* Mooney, Phill. (N. C.) Law, 434.] In Stephens *v.* Myers, 4 C. & P. 349, Tindal C. J. said, "It is not every threat, when there is actually no personal violence, that constitutes an assault, there must in all cases be the means of carrying the threat into effect. The question is, whether the defendant was advancing at the time in a threatening attitude to strike the chairman, so that his blow would have almost immediately reached the chairman if he had not been stopped, then, though he was not near enough at the time to have struck him, yet if he were advancing with that intent, I think it amounts to an assault in law. If he were so advancing, that within a second or two of time he would have reached the plaintiff, it seems to me an assault in law."

2. A *battery* is an unlawful *touching* another by the aggressor himself with his hand or any instrument, or by his servant by his command, or by any substance put or continued in motion by him. 1 Chit. G. P. 37. See Rawlins *v.* Till, 3 M. & W. 28; 6 Dowl. 159; [Respublica *v.* De Longchamps, 1 Dall. 114; State *v.* Davis, 1 Hill, 46; Johnson *v.* State, 17 Texas, 515; De Marentille *v.* Oliver, 2 N. J. (Law) 380.] Even throwing water upon a party amounts to a battery. Pursell *v.* Horn, 8 Ad. & E. 602. If the injury arise from *inevitable* or unavoidable accident or necessity, and there be no want of care, no action lies; as if a horse being frightened, run away with the rider and hurt the plaintiff or the injury arise from the accidental explosion of a gun, or in cutting wood with an axe, &c. Wakeman *v.* Robinson, 1 B. 213. But the act need not be *wilful* to maintain the action, nor is the degree of violence material. Leame *v.* Bray, 3 East, 602; Bac. Ab. &c. *ubi supra:*

OBS. [Welch *v.* Durand, 36 Conn. 182.] But to constitute an assault and battery the act complained of must be done with a hostile intent. Merely laying a hand on a man to call his attention to something is not an assault and battery. Coward *v.* Baddeley, 4 H. & N. 478; 28 L. J. Ex. 260. *Bruises* are where the skin is not broken.

3. A *wounding* consists in giving another a cut or even a scratch, opening the flesh; 1 Chit. G. P. 38; or breaking the skin. Moriarty *v.* Brooks, 6 C. & P. 684.

4. A *mayhem* is defined to be the deprivation of a member proper for defence in fight, and which are not only an arm, leg, finger, eye, and a fore tooth, but also some others; but not as it has been said a jaw tooth, or the ear, or a nose, because they have been supposed to be of no use in fighting. 3 Bl. Com. 121.

1. *Count for Assault, Battery, and Wounding.* (*r*)

For that the defendant assaulted and beat [and wounded] the plaintiff, (*s*) whereby he incurred expense in obtaining medical and other assistance, and was prevented from carrying on his necessary business, and had to employ and pay for assistance to enable him to do so.

2. *Count against Husband and Wife for an Assault, &c. by the Wife.*

See commencement, ante 14, Form 28.] That the defendant A. assaulted and beat the plaintiff, whereby [*as in* Form 1].

3. *By a Husband and Wife for an Assault, &c. on the Wife.* (*t*)

Commence as *ante*, 14, Form 27. That the defendant assaulted and beat the said B., whereby she became sick and ill, and suffered great pain for a long

(*r*) Upon one count for one assault, no second assault can be proved. See 1 Saund. 299, note (6); Stante *v.* Prickett, 1 Camp. 473.

(*s*) Only so much of statement of special damage should be inserted as can be proved, but if the plaintiff prove only part the defendant cannot have the verdict entered for him as to the residue. Myers *v.* Goodchild, 8 C. & P. 313. The plaintiff can recover for expenses incurred though not paid. See Richardson *v.* Chasen, 10 Q. B. 756; Pritchett *v.* Boevey, 1 Cr. & M. 775. Damages naturally arising from the act complained of and stated may be proved; Bull. N. P. 89; Holt, 699; 1 Stark. R. 98; 1 Ch. Pl. Ind. "Damages;" but not damages for costs incurred in setting aside a warrant of attorney and subsequent proceedings, under which the trespasses were committed. Holloway *v.* Turner, 6 Q. B. 928. Damages must be assessed against all the defendants equally against whom there is a verdict. Elliott *v.* Allen, 1 C. B. 18. Plaintiff may be called on to elect against which of the defendants he will go on at the close of his case. Davis *v.* Moseley, 1 Car. & K. 710; Howard *v.* Newton, 5 M. & Rob. 509, but this is in the discretion of the judge. White *v.* Hill, 2 D. & L. 537; Sewell *v.* Campion, 6 Ad. & E. 407. [One who is present at and encourages the commission of an assault and battery, may be held liable as principal, although he does not take any active part in the violence. Frantz *v.* Leahart, 56 Penn. St. 365; Little *v.* Tingle, 26 Ind. 168; United States *v.* Rickett, 1 Cranch C. C. 164. All who direct or order the commission of a trespass, or assist upon the occasion are in general liable as principals, though they may not be benefited by the act. 1 Chitty Pl. 90, and cases cited in note (*m*); Berry *v.* Fletcher, 1 Dillon, 67.]

(*t*) By s. 40 of the common law procedure act, 1852 (15 & 16 Vict. s. 76), it is provided that "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit; provided that, in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate." Damages may be recovered in the same action in respect of injuries to the husband alone, and in respect of injuries to the wife. As to consolidating separate actions of this sort, see Hempstead *v.* Phœnix Gas Co. [3 H. & C. 745.] It would seem that this section would not imply to actions of contract, *e. g.* for goods sold to the wife before marriage. France *v.* White, 1 M. & G. 731; Nurse *v.* Wills, 4 B. & A. 739; 1 Ad. & E. 65; Dengate *v.* Gardiner, 4 M. & W. 5.

time. And the plaintiff A. also sues the defendant for that, by reason of the grievances in the first count mentioned, the plaintiff A. lost the services of his said wife for a long time, and incurred expenses in medical and other attendance to cure her: and the plaintiffs claim, under the first count, £——; and the plaintiff A. claims, under the second count, £——.

[*3a. Count by a Woman for an Assault, charging a Rape.*
Wellock *v.* Constantine, 2 H. & C. 146.]

4. *For driving a Carriage against the Plaintiff's Carriage.* (*u*)

That the defendant drove a carriage, in which the defendant was, against a carriage of the plaintiff, in which the plaintiff was, and thereby greatly damaged the same, whereby [*as in* Form 1].

5. *For debauching Plaintiff's Daughter.* (*x*)

IMPRISONMENT.

Obs. — What shall be deemed a false imprisonment, see 1 Chit. G. P. 47; 3 Stark. Ev. 1113, 3d ed.; 2 Selw. N. P. tit. Imprisonment; 3 Bl. Com. 127, 138. Bare words do not in general amount to an imprisonment. There must be some act whereby the plaintiff was deprived of his freedom for some portion of time, however short; there must be a laying hold of the person, or some actual restraint or submission without force; and in this instance actual laying on the hand is not necessary. 3 Stark. Ev. 3d ed. 1112. If an officer or other person say, "You are my prisoner, &c." or state that he holds a warrant, and that the party must accompany him, and he submit, in either case there is a sufficient imprisonment. Ib. and note (*y*); Bull. N. P. 62; Pocock *v.* Moore, Ry. & M. 321; Chinn *v.* Morris, 2 C. & P. 361; Bridgett *v.* Coyney, 1 M. & Ry. 211. Where, upon a magistrate's warrant being shown to the plaintiff, he voluntarily and without compulsion attended the constable, held no imprisonment. Arrowsmith *v.* Mesurier, 2 N. R. 211. And it is not enough merely to show that the defendant at a police-office stood before the plaintiff and said, "You cannot go away till the magistrate comes," if it appear that he relinquished that attitude and went to another part of the office before the plaintiff had made any attempt to depart; Cant *v.* Parsons, 6 C. & P. 504; but if a party goes with another who *pretends* to have authority to arrest him, not voluntarily, but under the belief that the other had the power to compel, that is an arrest; Wood *v.* Lane, 6 C. & P. 774; and that is a question of fact for the jury. Ib. [As to what constitutes an arrest, see cases cited, *ante*, 598, note (*x*).]

If a man *direct* a policeman to take a party into custody, the action will lie; Wheeler *v.* Whiting, 9 C. & P. 262; but if he merely *state* the facts, leaving the policeman to act as he pleases, the action will not lie, unless he put the law in motion without reasonable and probable cause. Hopkins *v.* Crowe, 7 C. & P. 373; Barker *v.* Rollinson, 1 Cr. & M. 330; Grinham *v.* Willey, 28 L. J. Ex. 242; 4 H. & N. 496.

An imprisonment includes an *assault;* but a *mere arrest* does not constitute a *battery*. See Stark. &c. *supra;* Selw. N. P. 8th ed. 905. The forcible detention of a party in the street against his will is an imprisonment; per Thorpe C. J. 22 Ass. fol. 10, pl. 105; but not the preventing his going in a particular direction; Bird *v.* Jones, 7 Q. B. 742; 15 L. J. Q. B. 82; and see Wright *v.* Wilson, 1 Ld. Ray. 739; Jones *v.* Wylie, 1 Car. & K. 257; Reg. *v.* Mabel, 9 C. & P. 474. Trespass is the proper remedy for an illegal *detention*, though the previous imprisonment was lawful. Magnay *v.* Burt, 5 Q.

(*u*) See a form, Leame *v.* Bray, 3 East, 593. See Wakeman *v.* Bobinson, 1 B. 213; [Hall *v.* Fearnley, 3 Q. B. 919.] Evidence to fix defendant with having sanctioned the act of postilion. M'Laughlin *v.* Pryor, 1 Cr. & M. 354; 4 M. & G. 48.

(*x*) See *ante*, 558. Form and law.

Obs. B. 381. Imprisonment by military force abroad. Glynn *v.* Houston, 2 M. & G. 337. When magistrates are liable, see Harr. Ind. tit. Trespass; Rose. Ev. Trespass.

If an arrest is made under process, which is afterwards set aside for irregularity, both the attorney and the party who put it in force is liable to an action. Codrington *v.* Lloyd, 8 Ad. & E. 449; Jarmain *v.* Hooper, 6 M. & G. 827; Collett *v.* Foster, 2 H. & N. 356; 26 L. J. Ex. 412.

[6. *For Assault and False Imprisonment on a Charge of Felony.*

That the defendant assaulted the plaintiff, and gave him into custody to a policeman upon a false charge, then made by the defendant, that the plaintiff had committed a felony, and compelled him to go to a police station, and there caused him to be imprisoned, and to be kept in prison for a long time, until he was brought before a police magistrate upon the said charge, whereby (*y*) the plaintiff suffered great pain in body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business, and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment.

6*a*. *Another Form.*

And the plaintiff says the defendant made an assault upon him, and struck him on his head, and kept him imprisoned for the space of one day.]

7. *Against a Railway Company for imprisoning Plaintiff.*

Chilton *v.* London & Croydon Ry. Co. 16 M. & W. 212; Manning *v.* Eastern Counties Ry. Co. 12 M. & W. 237.

8. *For causing Plaintiff to be confined in a Lunatic Asylum.* (*z*)

Fletcher *v.* Fletcher, [1 El. & El. 420; In re Oakes, 5 Law Rep. 122; Elliot *v.* Allen, 1 C. B. 18.]

II. PERSONALTY.

Obs. — To maintain trespass *de bonis asportatis*, the goods must have been in the actual or constructive possession of the plaintiff at the time of the injury. Per Lord Abinger, Taylor *v.* Rowan, 7 C. & P. 74; Hurrell *v.* Ellis, 2 C. B. 295. See Nelson *v.* Cherrill, 8 B. 316. The property in goods is sufficient without actual possession. Smith *v.* Milles, 1 T. R. 480; Thomas *v.* Phillips, 7 C. & P. 573; Lotan *v.* Cross, 2 Camp. 464. See Turner *v.* Hardcastle, 31 L. J. C. P. 193; [S. C.; 11 C. B. N. S. 683; 1 Chitty Pl. 188-190, and notes, and cases cited.] But the merely locking goods up, so as to deprive plaintiff of access to them, is not sufficient to enable him to maintain an action of trespass. Hartley *v.* Moxham, 1 Cr. & M. 504; 3 Q. B. 701. It lies for taking privileged goods as a distress. Nargett *v.* Nias, 28 L. J. Q. B. 143; [1 El. & Bl. 439.]

(*y*) A remand being the act of the magistrate, damages for it cannot be recovered in this action; otherwise in an action for malicious prosecution. Lock *v.* Ashton, 12 Q. B. 871; Holtum *v.* Lotun, 6 Car. & P. 726. See a form for imprisonment for false pretences, Mathews *v.* Biddulph, 3 M. & G. 390. [For other forms, see Brandt *v.* Craddock, 27 L. J. Ex. 314; Huntley *v.* Simson, 2 H. & N. 600; Grinham *v.* Willey, 4 H. & N. 496. Charging handcuffing. Wright *v.* Court, 4 B. & C. 596. Count against a justice of the peace for false imprisonment. Groome *v.* Forrester, 5 M. & S. 314; Rogers *v.* Jones, 3 B. & C. 409; Davis *v.* Capper, 10 B. & C. 28; Cave *v.* Mountain, 1 M. & G. 257; Mills *v.* Collett, 6 Bing. 85.]

(*z*) [Scott *v.* Wakem, 3 Fost. & Finl. 328; Anderdon *v.* Burrows, 2 C. & P. 210; Look *v.* Dean, 108 Mass. 116.]

Obs. Other forms for chasing cattle, shooting dog, &c. see 2 Chit. Pl. 7th ed. 654. For abusing a distress, and putting it in a muddy pond, &c. Wilder *v.* Speer, 8 Ad. & E. 547.

By 3 & 4 W. 4, c. 42, s. 29, the jury may give damages in the nature of interest.

1. *De Bonis Asportatis.* (*a*)

That the defendant seized and took the goods of the plaintiff, that is to say [*describe them*], and carried away and injured and disposed of them to his own use.

2. *For cutting a Rope, whereby Plaintiff's Boat was driven on Shore and damaged.*

That the defendant cut a rope of the plaintiff, with which a boat of the plaintiff was fastened and secured to the shore, whereby the said boat floated and was driven against the shore, and was damaged and spoiled, and the plaintiff incurred great expense in and about the getting the said boat off the said shore, and in repairing and mending the said boat, and was deprived of the use of the said boat for a long time, and of the profits which he would otherwise have acquired from the use of the said boat.

3. *For removing a Tombstone and erasing the Inscription.*

Spooner *v.* Brewster, 3 Bing. 136.

4. *For taking and impounding Cattle in an Improper Place.*

Bignell *v.* Clarke, 29 L. J. Ex. 257; [S. C. 5 H. & N. 485; Gates *v.* Bayley, 2 Wils. 313; Wilder *v.* Speer, 8 Ad. & E. 547.]

REALTY.

Obs. — An unwarrantable entry on the land of another is a trespass, for which an action will lie. Selw. N. P. tit. Trespass. The action is a possessory action, and possession in the plaintiff is *primâ facie* sufficient against a wrongdoer, even though the possession be only constructive. Topham *v.* Dent, 6 Bing. 516; Graham *v.* Peat, 1 East, 246. See Jackson *v.* Courtenay, 8 El. & Bl. 8; 27 L. J. Q. B. 37; [1 Chitty Pl. 195, and notes.] But the action will not lie against a person dispossessed by a trespass. Browne *v.* Dawson, 12 Ad. & E. 624; [1 Chitty Pl. 196, 197, and notes.] An heir before entry cannot maintain this action, for he has not possession. Com. Dig. Trespass, B. 3. The owner of land on which a stranger builds a house may pull it down and eject him. Burling *v.* Read, 11 Q. B. 904; 19 L. J. Q. B. 291.

The venue is local.

1. *For Trespass to Land.* (*b*)

That the defendant broke and entered certain land of the plaintiff, called

(*a*) See a form, Brewer *v.* Dew, 11 M. & W. 625; 12 L. J. Ex. 448. See form by an administrator, Tharpe *v.* Stallwood, 1 D. & L. 24. By an executor, for injury to real property of the testator, Lockin *v.* Patterson, 1 C. & K. 271; and see 3 & 4 W. 4, c. 42, s. 2; Powell *v.* Rees, 7 Ad. & E. 426.

(*b*) This form is given by the common law procedure act, 1852 (15 & 16 Vict. c. 76), sch. B, 25. The venue is local, see *ante*, Obs. If any special damage, it should be set out. The measure of the damages is the damage actually done, not the amount of money it would take to restore the land. Jones *v.* Gooday, 8 M. & W. 146; 9 M. & W. 736; 1 Dowl. N. S. 50; and in the case of chattels, the value of them at the time of the injury. Martin *v.* Porter, 5 M. & W. 551; Wild *v.* Holt, 9 M. & W. 672; Morgan *v.* Powell, 3 Q. B. 278.

the "Big Field," (*c*) and depastured the same with cattle, and continued there a long time, and injured the fences and gates thereof, and cut down the trees and underwood, and dug holes and pits therein. (*d*)

[1*a*. *Another Form for Trespass to Land.*

For that the defendant, on [*&c.*], and on other days and times between that day and the day of the purchase of this writ, (*e*) broke and entered the plaintiff's close, situated in [*&c.; describe it, and state damage*].

1*b*. *Another Form.*

And the plaintiff says the defendant forcibly entered the plaintiff's close [*describing it*] and ploughed up the soil [*&c.*], and took and carried away the plaintiff's corn there being, and converted the same to his own use.

Count for a trespass to a growing crop of grass of the plaintiff. Crosby *v.* Wadsworth, 6 East, 602. *For a trespass to the plaintiff's exclusive right of cutting turf from a close.* Wilson *v.* Mackreth, 3 Burr. 1824. *For trespass to the subsoil of a close of the plaintiff where the possession of the surface was in another.* Cox *v.* Glue, 5 C. B. 533. *For a trespass to a close of the plaintiff over which there was a highway.* Lade *v.* Shepherd, 2 Str. 1004; 1 Chitty Pl. 194, and note (x^1). *For trespass on a piece of land inclosed from the side of a highway.* Brownlow *v.* Tomlinson, 1 M. & G. 484. *For a trespass on the tow-path of a canal.* Monmouthshire Canal & Ry. Co. *v.* Hill, 4 H. & N. 421.]

2. *For Trespass in a Dwelling-house, seizing Goods, &c.* (*f*)

That the defendant broke and entered "a messuage and dwelling-house of the plaintiff" [*or* "certain apartments of the plaintiff in a dwelling-house," *&c.* (*g*)], situate at No. 401 Piccadilly, London, and forced open the doors, and severed and removed the fixtures and panels thereof, and pulled down and injured the roof, walls, ceilings, beams, and partitions thereof, and expelled the plaintiff and his family from the possession thereof, and seized and took the plaintiff's goods, (*h*) that is to say, iron, hops, household furniture [*as the case may be*], and converted them to his own use. (*i*) [*The conversion of*

(*c*) See *ante*, Obs., as to "Abuttals."

(*d*) Under this allegation several trespasses may be proved. Percival *v.* Stamp, 23 L. J. Ex. 25; [9 Ex. 167.]

(*e*) [Count in trespass to realty, on a certain day named, and on divers other days between that day and the day of the commencement of the action. Powell *v.* Bagg, 15 Gray, 507; Pierce *v.* Pickens, 16 Mass. 470.]

(*f*) See a form, Roberts *v.* Taylor, 3 D. & L. 1; 1 C. B. 117. Form for erecting a building on plaintiff's wall, whereby the light was obstructed. Wells *v.* Oddy, 2 Cr., M. & R. 128. By an executor, *ante*. Form for pulling down a house while the plaintiff's family were within; Perry *v.* Fitzhowe, 15 L. J. Q. B. 239; that circumstances may destroy a right to pull the house down, which might otherwise exist. Ib.

(*g*) Lane *v.* Dixon, 3 C. B. 776; 16 L. J. C. P. 121, where see a form. Where the defendant got into the plaintiff's apartments whilst he was out, and refused to allow him to reënter them, this was held evidence under this count. See Twigg *v.* Potts, 1 Cr., M. & R. 89.

(*h*) Unless the goods are alleged to be the *property* of the plaintiff he is not entitled to damages for them. Pritchard *v.* Long, 9 M. & W. 666. Form of allegation of special damage, that the goods were seized under an unfounded claim for a debt, whereby plaintiff's customers thought him insolvent, and his lodgers left the house. Brewer *v.* Day, 11 M. & W. 625; 1 D. & L. 383.

(*i*) This conversion is only aggravation, and, therefore, must be newly assigned if necessary. Pratt *v.* Pratt, 17 L. J. Ex. 299; 6 D. & L. 20. So, also, a forcible entry. Davison *v.* Wilson, 11 Q. B. 890; 17 L. J. Q. B. 197.

the goods may be omitted, and a substantive count for that inserted. See post, "Trover."]

[*Count for a trespass in breaking and entering the plaintiff's apartments.* Lane *v.* Dixon, 3 C. B. 776. *For a trespass in entering the plaintiff's house and continuing therein, and hindering his business.* Mayhew *v.* Suttle, 4 El. & Bl. 347; Percival *v.* Stamp, 9 Ex. 167. *For entering the plaintiff's house to search for goods which the defendant charged the plaintiff with having stolen.* Bracegirdle *v.* Orford, 2 M. & S. 77. *For breaking and entering the plaintiff's house and pulling it down whilst he and his family were within.* Perry *v.* Fitzhowe, 8 Q. B. 757; Burling *v.* Read, 11 Q. B. 904; Jones *v.* Jones, 1 H. & C. 1. *By one tenant in common against his co-tenant, for a trespass in destroying the property.* Creswell *v.* Hedges, 1 H. & C. 421.]

3. *Trespass to a River.*

The Duke of Beaufort *v.* Vivian, 21 L. J. Ex. 204; [7 Ex. 580. See Medway Navigation Co. *v.* Earl of Romney, 9 C. B. N. S. 375.

Count for breaking and entering a landing-stage moored to a wharf on a river. Eastern Counties Ry. Co. *v.* Dorling, 5 C. B. N. S. 821. *For trespass to a bridge.* Harrison *v.* Parker, 6 East, 154. *For trespass on the shore with bathing machines.* Blundell *v.* Catterall, 5 B. & Ald. 268; Mace *v.* Philcox, 15 C. B. N. S. 600.]

4. *Trespass to a Party Wall.*

Stedman *v.* Smith, 26 L. J. Q. B. 314; [8 El. & Bl. 1; see Cubitt *v.* Porter, 8 B. & C. 257; Murly *v.* McDermott, 8 Ad. & E. 138.]

5. *Declaration for an Expulsion.*

That the defendant broke and entered a certain dwelling-house of the plaintiff, situate at ——, in the parish of ——, in the county aforesaid, and ejected and expelled (*k*) the plaintiff and his family from the possession and enjoyment of the said dwelling-house, and kept them so ejected and expelled for a long time, whereby the plaintiff during all that time lost and was deprived of the use and benefit of his said dwelling-house, and was put to great inconvenience and much expense in procuring and removing to another residence for himself and his family.

6. *For Mesne Profits and Costs of an Ejectment.* (*l*)

That the defendant broke and entered messuages [*&c.*] (*m*) of the plaintiff,

(*k*) In trespass for breaking and entering and expelling plaintiff, the expulsion is *primâ facie* mere matter of aggravation, and it suffices that defendant justify the breaking and entering only, and if plaintiff rely on the *expulsion* as a substantive trespass, and rendering defendant a trespasser *ab initio*, he must new assign it. Taylor *v.* Cole, 2 T. R. 292; 1 H. Bl. 555; but see Meriton *v.* Coombes, 9 C. B. 787; 19 L. J. C. B. 336. Trespass is the property form of action where a tenant is ejected under 1 & 2 Vict. c. 74. Darlington *v.* Pritchard, 4 M. & G. 783; 2 Dowl. N. S. 664.

(*l*) By the common law procedure act, 1852 (15 & 16 Vict. c. 76), s. 214, on the trial of an ejectment between landlord and tenant, the jury may give damages for *mesne* profits

(*m*) The premises are usually described as in the declaration in ejectment, in which judgment was obtained. But under the Pleading Rules it seems necessary to describe each *close* by name or abuttals, as *ante*, Obs., "Trespass."

situate in the parish of ——, in the county aforesaid, and ejected the plaintiff from his possession and occupation thereof, and kept him so ejected for a long time, and during that time took and received to the use of him the defendant all the issues and profits of the said tenements, (*n*) whereby the plaintiff during all the time aforesaid lost the issues and profits of the said tenements, and was deprived of the use of and of the means of repairing and cultivating the same, and necessarily incurred divers expenses (*o*) in and about recovering possession of the said tenements.

TROVER AND DETINUE.

OBS. — Trover (from *trouver*), which is a special action on the case, per Parke J. Smith *v.* Goodwin, 4 B. & Ad. 420, was originally a form of action designed as a remedy for the *loser* against the *finder* of goods, who refused to restore them on demand, and converted them to his own use. If the defendant has been guilty of a conversion, it is immaterial *how* he became possessed of the goods, whether rightfully or wrongfully, in the first instance. In this action, the plaintiff does not, as in *detinue*, claim the restoration of the goods themselves, but only *damages* for a *conversion;* and it has become the usual mode of trying a disputed question of title to goods. See 3 Bl. Com. 152; 1 Chit. Pl. 7th ed. Trover; Bac. Ab. Trover; 3 Stark. Ev. 3d ed. Trover; [Mockford *v.* Taylor, 19 C. B. N. S. 209.]

This action lies for the conversion of any kind of personal property, or the undivided part of a chattel, but it does not lie for the conversion of a *record* (which is not private property), or for fixtures *eo nomine*, *not severed* from the freehold. Minshall *v.* Lloyd, 2 M. & W. 450; Wilde *v.* Waters, 16 C. B. 637; 24 L. J. C. P. 193. But an action will lie for depriving the plaintiff of the use and possession of fixtures. London &c. Loan Company *v.* Drake, 6 C. B. N. S. 798; 28 L. J. C. P. 297. The action will not lie for money. Ortan *v.* Butler, 5 B. & Ald. 652. As to the distinction between trespass and trover, see Weeton *v.* Woodcock, 5 M. & W. 587; 7 Dowl. 853.

In order to maintain trover the plaintiff must prove, if contested by the defendant's pleas, 1st, his property in the goods; 2d, a conversion by the defendant.

1. *Property* in a chattel is either absolute or special; Mackintosh *v.* Trotter, 3 M. & W. 184; Sheen *v.* Richie, 5 M. & W. 180; either the absolute owner or the special owner (that is, a bailee, carrier, factor, &c.), may sue in trover, with this distinction, that the former must sue specially for an injury to his *reversion* (see *ante*, 593), if the conversion occur whilst a third person has an outstanding special title or interest; in such case the absolute or general owner may sue *as reversioner* for the tort, if it affect his reversionary property, and may recover damages to the extent of his loss; and the special owner may also sue separately for the damage *he* sustains. It is essential in *trover* that the

to the time of the verdict, or to some preceding day mentioned specially in the writ, provided that the landlord shall not be barred from bringing any action for the *mense* profits which shall accrue from the verdict, or the specified day down to the day of recovering possession. They need not be claimed in the writ. Smith *v.* Tett, 23 L. J. Ex. 93; [9 Ex. 307. See Genl. Sts. Mass. c. 134, § 13 *et seq.*] Trespass in the above form is the remedy by an owner of land, after a recovery in ejectment, to obtain compensation for occupation from the time the party *wrongfully* held possession until possession was regained, together with damages for any *waste* committed (if charged in the declaration), and the costs of the ejectment. Where there is judgment by default, in ejectment, the plaintiff may, in trespass for *mense* profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party. Doe *v.* Huddart, 2 Cr., M. & R. 316; [1 Chitty Pl. 215 *et seq.*] The action is to be brought against the party actually withholding possession, and it lies against a tenant for the holding over of his under-tenants, if the former identify himself with the latter. Burne *v.* Richardson, 4 Taunt. 720; Doe *v.* Harlow, 12 Ad. & E. 40. As to evidence, see Ad. Ej. 342; 2 Stark. Ev. 434, 3d ed.; Doe *v.* Huddart, 2 Cr., M. & R. 316.

(*n*) If the defendant committed waste or injury, here state it. See the preceding forms.

(*o*) Can only recover costs as between party and party. Doe *v.* Filliter, 13 M. & W. 47.

Obs. plaintiff should have the *possessory title*, that is, the right to the immediate *possession* of the goods; Addison *v.* Round, 4 Ad. & E. 803; and therefore, where a bill of sale covenanted that the assignor should retain possession of goods until default in payment of a debt, it was held that the assignee, not having demanded it, could not maintain trover for the goods against the sheriff for taking them in execution. Bradley *v.* Copley, 1 C. B. 685. But the general owner, and, it seems, the special owner, suing in trover, need not show that he was in *actual* possession at the time of the conversion, the *right* to possession is sufficient. 2 Saund. 47, notes; 1 Chit. Pl. and 3 Stark. Ev. Ind. "Trover;" [Winship *v.* Neale, 10 Gray, 382.] In the case of a simple bailment of a chattel, it may be recovered in trover either by the bailor or bailee. Nichols *v.* Bastard, 2 Cr., M. & R. 659; Gordon *v.* Harper, 7 T. R. 12; Manders *v.* Williams, 4 Ex. 339; 18 L. J. Ex. 437. See Lancashire Waggon Company *v.* Fitzhugh, 30 L. J. Ex. 231. But a mere lien on goods does not give a right to maintain trover. Legg *v.* Evans, 6 M. & W. 36; 9 L. J. Ex. 102; Milgate *v.* Kebble, 3 M. & G. 100. The declaration claims a right of possession in the plaintiff, *at the time of the conversion*. Per Patteson J. White *v.* Teal, 12 Ad. & E. 112. Possession only is sufficient as against a mere wrong-doer. Jeffries *v.* Great Western Ry. Co. 5 El. & Bl. 802; 26 L. J. Q. B. 107; Bourne *v.* Fosbrooke, 34 L. J. C. P. 164; Armory *v.* Delamirie, 1 Smith's L. C. The finder of goods has a good title as against every one but the true owner. Bridges *v.* Hawksworth, 21 L. J. Q. B. 75. See Buckley *v.* Gross, 32 L. J. Q. B. 129; [19 C. B. N. S. 566; McAvoy *v.* Medina, 11 Allen, 548; Lawrence *v.* The State, 1 Humph. 228; Kincaid *v.* Eaton, 98 Mass. 139; Wentworth *v.* Day, 3 Met. 354; Mathews *v.* Harsell, 1 E. D. Smith, 393.] The *gratuitous* bailor of goods may sue a wrong-doer, who takes them from the bailee. Nicholls *v.* Bastard, 2 Cr., M. & R. 659. This action also lies against a *mere wrong-doer* (not deriving any power or authority from the real owner) at the suit of a person who had only the actual possession of the goods at the time of the wrongful taking or conversion, as the finder or gratuitous bailee, or borrower of goods. Ib. And it lies at the suit of a bailor of goods against the innocent purchaser from the bailee. Cooper *v.* Wilmott, 1 C. B. 672; Metcalfe *v.* Lumsden, 1 C. & K. 309.

2. The *conversion* is the *gist* of this action. A conversion does not mean a destruction of the goods, nor does it necessarily import an acquisition of property in the defendant, or a total or absolute loss of the goods to the plaintiff, but it consists in any tortious act by which the defendant deprives the plaintiff of his goods, either wholly or but for a time. 2 Stark. Ev. 839; 2 Saund. 46, 47. But the merely wrongful asportation of a chattel does not amount to a conversion, unless done with *intent* to convert it to the use of defendant or another, or unless it either changes or destroys the quality of the chattel. Fouldes *v.* Willoughby, 8 M. & W. 840. So a mere refusal to allow plaintiff's servant to come on the close of the defendant to take away property of the plaintiff does not amount to a conversion. Thorowgood *v.* Robinson, 6 Q. B. 769; and see Needham *v.* Rawbone, 6 Q. B. 771, note; and Milgate *v.* Kebble, 3 M. & G. 100. A conversion may be either, 1st, by wrongfully *taking* goods; 2d, by some other illegal *assumption of ownership*, or by illegally *using* or *misusing* goods; or 3d, by a wrongful *detention*; see 1 Chit. Pl. Ind. "Trover," where these grounds of conversion are discussed; 2 Saund. 47, notes; 3 Stark. Ev. 3d ed. Trover. What act will amount to a conversion when proved is a question of *law*. Ib. The ordinary presumptive proof of a conversion consists in evidence of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, who has possession of them. A conversion is, it seems, a *presumption*, which, in point of law, a jury ought to make from such evidence, unexplained by circumstances, but it is a presumption in law and fact, and if the jury simply find the fact of a demand and refusal, the court cannot infer a conversion. This proof is always necessary where the goods came *lawfully* into the defendant's possession, as by finding, or upon a bailment, or delivery by the owner; but it is unnecessary where a tortious taking of the goods can be proved. Previous to the proof of a demand and refusal, evidence of the possession by the defendant is essential; and proof of a possession by a servant of the defendant is insufficient, unless it be proved that he was his agent for the purpose, or that

OBS. the agent was employed, and the goods delivered in the course of trade. Thus, a delivery to the servant of a pawnbroker in the shop is evidence of a delivery to a pawnbroker. 2 Stark. Ev. 3d ed. tit. Trover. The demand and refusal must be absolute and unqualified. Philpott *v.* Kelley, 3 Ad. & E. 106; Rushworth *v.* Taylor, 3 Q. B. 699. But an offer to deliver up property, accompanied by a condition which the holder has no right to impose, amounts to a conversion. Davies *v.* Vernon, 6 Q. B. 443. Refusal on account of the goods having been attached in the defendant's hands by a foreign attachment. Verrell *v.* Robinson, 2 Cr., M. & R. 495; and see Pillot *v.* Wilkinson, 32 L. J. Ex. 201; 34 Ib. 22. A refusal founded on a claim of right is evidence of a conversion, though defendant have a lien on the goods. Cannee *v.* Sparton, 8 Scott N. R. 714; Weeks *v.* Good, 6 C. B. N. S. 367. But when there is a *bonâ fide* doubt as to the title, the defendant has a reasonable time in which to clear it up. Vaughan *v.* Watt, 6 M. & W. 497; Towne *v.* Lewis, 7 C. B. 608; Pitt *v.* Wilkinson, *ubi sup.*

As to the damages generally, see Addison on Torts. The damages should be the value of the goods at the time of the conversion; Mercer *v.* Jones, 3 Camp. 477; Davis *v.* Oswell, 7 C. & P. 804; [1 Chitty Pl. 181, note (*y*); and interest; Robinson *v.* Hartridge, 13 Florida, 501; Northern Transp. Co. *v.* Sellick, 52 Ill. 249;] or, it seems, at any subsequent time, at the discretion of the jury. Greening *v.* Wilkinson, 1 C. & P. 625. The defendant cannot, on not guilty, prove title in another to mitigate damages. Finch *v.* Blount, 7 C. & P. 478. If the plaintiff claim special damages, that is, damages not necessarily consequent on the conversion, he should charge them in his declaration. Moon *v.* Raphael, 2 Bing. N. C. 310; Davis *v.* Oswell, 7 C. & P. 804; Bodley *v.* Reynolds, 15 L. J. Q. B. 219. Damages in trover by assignee of bankrupt against sheriff. Whitehouse *v.* Atkinson, 3 C. & P. 344. In trover for an unstamped guaranty, it was held that the damages should equal what might have been recovered on it if properly stamped. M'Leod *v.* M'Ghie, 2 M. & G. 326. See Turner *v.* Hardcastle, 31 L. J. C. P. 193; [11 C. B. N. S. 683;] Chinery *v.* Viall, 29 L. J. Ex. 180; [5 H. & N. 288;] Johnson *v.* Stear, 33 L. J. C. P. 130; [15 C. B. N. S. 330.]

Special damage must be stated in the declaration, if any. The jury may give interest as damages if they please. 3 & 4 W. 4, c. 42, s. 29.

1. *Wrongful Seizure or Conversion of Goods.* (*p*)

That the defendant converted (*q*) to his own use, and wrongfully deprived

(*p*) This form is given by the common law procedure act 1852, 15 & 16 Vict. c. 76, sch. B, 28, except that "or" is used instead of "and," apparently with the intention that one or other of the statements should be used. See per Willes J. in The London & Westminster Loan Co. *v.* Drake, 28 L. J. C. P. 297, 298; [6 C. B. N. S. 798;] and see Baker *v.* Gray, 17 C. B. 402. The general practice, however, is to declare as in the text. See form, &c. by husband and wife. Ayling *v.* Whicher, 6 Ad. & E. 259. Against husband and wife on a conversion by the latter. Catteral *v.* Kenyon, 3 Q. B. 310. This count is proper when the plaintiff had actual possession of the goods at the time of the conversion. Davis *v.* Danks, 3 Ex. 435; 18 L. J. 229. If he had only the *right* of possession, the form in detinue should be used. Addison *v.* Round, 4 Ad. & E. 803. If he be only a reversioner, either of real or personal property, that should be stated, and an injury to the reversion shown. *Ante*, "Reversion," p. 594; Dobson *v.* Blackman, 9 Q. B. 991; 16 L. J. Q. B. 233; Kidgill *v.* Moore, 9 C. B. 364; 19 L. J. C. P. 177. If there be any condition precedent to the plaintiff's right of possession, such as the defendants making default in payment of a debt, the above count will not lie. Bradley *v.* Copley, 1 C. B. 685; Manders *v.* Williams, 4 Ex. 339; 18 L. J. Ex. 437. Actual possession, Bridges *v.* Hawksworth, 21 L. J. Q. B. 75, even though obtained fraudulently, is sufficient against a wrong-doer; Newnham *v.* Stevenson, 20 L. J. C. P. 111; [13 C. B. 285;] and the true owner may recover goods stolen; Scattergood *v.* Sylvester, 15 Q. B. 506; 19 L. J. Q. B. 447; or illegally pledged; Cheeseman *v.* Exall, 6 Ex. 341; 20 L. J. Ex. 209; or improperly sold; Langton *v.* Higgins, 4 H. & N. 402; 28 L. J. Ex. 252. And one tenant in common may sue another who disposes of the property. Mayhew *v.* Herrick, 7 C. B. 229; 18 L. J. C. P. 179. What a conversion, see Tear *v.* Freebody, 4 C. B. N. S. 228. What is evidence of a joint conversion by several, see Atkin *v.* Slater, 1 C. & K. 356.

(*q*) That is, intentionally converted. Foulds *v.* Willoughby, 8 M. & W. 540; Powell *v.* Hoyland, 6 Ex. 67; 20 L. J. Ex. 82.

the plaintiff of the use and possession (*r*) of the plaintiff's goods, that is to say, iron, hops, household furniture [*or as the case may be*]. (*s*)

[*Count for the conversion of carpenter's tools, stating as special damage that the plaintiff was prevented from working.* Bodley *v.* Reynolds, 8 Q. B. 779. *Of a ship, tackle, stores, &c.* Reid *v.* Fairbanks, 13 C. B. 692. *Of a windmill.* Flory *v.* Denny, 7 Ex. 581. *For the conversion of dead grouse.* Lonsdale *v.* Rigg, 11 Ex. 669; 1 H. & N. 923. *Of rabbits.* Blades *v.* Higgs, 12 C. B. N. S. 501; 11 H. L. Cas. 621.

1*a*. *Another Form for same.*

And the plaintiff says the defendant has converted to his own use one horse, the property of the plaintiff [*or* "the goods mentioned in the schedule hereto annexed"].

2. *By Assignees for a Conversion before Bankruptcy.* (*t*)

That the defendant, before A. B. became bankrupt, converted to his own use, and wrongfully deprived A. B. of the use and possession of his goods, that is to say [*describe the goods according to the fact*].

3. *By Assignees for a Conversion after Bankruptcy.*

That the defendant, after A. B. became bankrupt, converted to his own use, and wrongfully deprived the plaintiffs as assignees as aforesaid, of the use and possession of the goods of the plaintiffs as such assignees, that is to say [*describe the goods*].

4. *By Executor for a Conversion in the Testator's Lifetime.* (*u*)

That the defendant, in the lifetime of the said A. B., converted to his own use, and wrongfully deprived the said A. B. of the use and possession of his goods, that is to say [*describe goods*].

(*r*) That is *seised*, but not merely by his servant without the defendant's knowledge; Gordon *v.* Rolt, 4 Ex. 365; 18 L. J. Ex. 432; Freeman *v.* Rosher, 13 Q. B. 780; 18 L. J. Q. B. 340; unless the defendant *afterwards* ratified the act, which even a corporation may do if for their benefit. Eastern Counties Ry. Co. *v.* Broom, 6 Ex. 314; 20 L. J. Ex. 196.

(*s*) A general description of a deed or bill is sufficient, and the date need not be mentioned. Cro. Car. 262; Bac. Ab. Detinue, B. In an action for an injury to, or for the conversion of goods, a general description of their nature, as in the form, should be given. 1 Saund. 333, note (7); 2 Saund. 74, note (1); 1 Chit. Pl. 7th ed. 391; Steph. Index. A declaration in trover for "divers goods and chattels" would be substantially bad. Ib.; Pope *v.* Tillman, 7 Taunt. 642. In trover for "a ship with the apparel and appurtenances," the plaintiff having failed as to the ship, was not allowed to set up a distinct title to a new boat and cordage. Shannon *v.* Owen, 1 M. & R. 392. Trover for "twenty acres of barley," held good, as only designating the quantity of corn. Joyce *v.* Hayman, 1 Alcock & Napier, 22, Irish. It is not advisable to enumerate too many goods, because the defendant may have the verdict entered for him as to those not proved. Williams *v.* Great Western Ry. Co. 1 Dowl. N. S. 16.

(*t*) Commence as *ante*, p. 8. This form is proper where there was a clear conversion *before* the act of bankruptcy for which the bankrupt might have maintained trover. In most instances the next form is appropriate where there is any doubt whether the conversion was not after the bankruptcy, and it may be added as a second count without violating the pleading rules. Lackington *v.* Vines, 1 D. & L. 716. What evidence will support the latter count. Edwards *v.* Hooper, 11 M. & W. 366. Whenever the bankrupt could have maintained the action, in case no bankruptcy had intervened, the depositions were conclusive evidence under 6 Geo. 4, c. 16, s. 92. Alsager *v.* Close, 10 M. & W. 576.

(*u*) Commence as *ante*, p. 7 or 13. A similar form by an administrator may easily be framed.

5. *By an Executor for a Conversion after the Testator's Death.*

That the defendant, after the death of the said A. B., converted to his own use, and wrongfully deprived the plaintiff, as such executor [*or* "administrator"] as aforesaid, of the use and possession of goods of the plaintiff as such executor [*or* "administrator"], that is to say [*describe goods*].

6. *Trover against an Executor for a Conversion by the Testator.*

That the said A. B. in his lifetime, and within six calendar months next before his death, converted to his own use, and wrongfully deprived the plaintiff of the use and possession of his goods, that is to say [*describe them*], and the plaintiff says that this action was commenced within six calendar months next after the defendant, as executor as aforesaid, took upon himself the administration of the estate and effects of the said A. B.

DETINUE.

Obs. — In this form of action the plaintiff claims the *specific* recovery of goods and chattels, or deeds, or writings, *detained* from him by the defendant, with damages for the detention. Special form, Atkinson *v.* Baker, 4 Taunt. R. 229. See 3 Bl. Com. 146, 152; Co. Litt. 296 *b*; 1 Chit. Pl. 121; Steph. ; 2 Stark. Ev. tit. Detinue, 280; Selw. N. P. Detinue. This action lies for a wrongful *detention*, whether the taking were in the first instance lawful or wrongful, Ib., and it is sufficient to maintain the action if the plaintiff is entitled to the possession of goods wrongfully detained. Gledstane *v.* Hewitt, 1 C. & J. 565; Newton *v.* Beck, 27 L. J. Ex. 272; [3 H. & N. 220;] Oliver *v.* Oliver, 31 L. J. C. P. 4; [11 C. B. N. S. 139; Eyre *v.* Higbee, 15 How. Pr. 45; S. C. 22 How. Pr. 198.] And it lies though the defendant have wrongfully parted with the goods before action brought. Jones *v.* Dowle, 9 M. & W. 19; 1 Dowl. N. S. 391. In *trover*, damages (only) for a *conversion* are recoverable, the goods themselves cannot be obtained; though this is obviated in practice by the jury being directed, by consent, to give damages greater than the value of the goods, with a condition that they are to be reduced to 40*s.* if the goods are restored. In *detinue* the plaintiff claims the goods in *specie*. The judgment is, in effect, that he recover the goods if they can be obtained from the defendant by the sheriff, and a certain sum assessed by the jury for damages for the detention; and if the goods cannot be had, then a certain sum assessed by the jury as their value, besides the damages for detention, with costs. Therefore, in case the plaintiff is anxious to get possession of the identical goods or deeds claimed, detinue is a better form of action than trover. The jury must assess the value of each of the goods, &c. separately, because some of them may be forthcoming, others not, when execution issues. Phillips *v.* Jones, 15 Q. B. 780; 19 L. J. Q. B. 374. See Williams *v.* Archer, 5 C. B. 318; 17 L. J. C. P. 82; and if the jury omit to do this, the error cannot be corrected by a writ of inquiry. Pawly *v.* Holly, 2 Bl. R. 854; Anderson *v.* Passman, 7 C. & P. 193, Coleridge J. In detinue for several things, the court would not on motion assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff; Phillips *v.* Hayward, 3 Dowl. 362; but in practice orders are made both in detinue and trover, that upon delivery up of the goods and payment of nominal damages and costs the action be stayed by writ, and that in case the plaintiff should elect to proceed for greater damages or other goods, and should fail, he should pay costs subsequently incurred. See 2 Chit. Pr. 11th ed. 1367; Chit Forms, 9th ed. 796.

As different causes of actions may now be joined, provided they be by and against the same parties and in the same rights, but not accruing to the plaintiff in different rights, such as assignees, executor, &c. a count in trover may be joined to one in detinue; 15 & 16 Vict. c. 76, s. 41; but unless there be some special reason for both, one or other may be ordered to be struck

OBS. out, upon application to the court or a judge. [Mockford *v.* Taylor, 19 C. B. N. S. 209.] A count in detinue for a bill will be allowed, with one for the amount of the bill. Kirkpatrick *v.* The Bank of England, 8 Dowl. 881.

And if all, or any, are delivered up after action brought, the plaintiff cannot have judgment to recover the goods so delivered to him or their value, but may have judgment to recover damages for their detention if he has sustained any damage, and may have judgment to recover the residue of the goods or their value, and damages for their detention. Crossfield and other Administrators *v.* Such, 22 L. J. Ex. 65; [8 Ex. 159.]

The courts of common law have now power to compel the delivering up of the chattels in specie by 17 & 18 Vict. c. 125, s. 78, which enacts that "The court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff that he cause to be made of the defendant's goods the assessed value of such chattel, provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods, the damages, costs, and interest in such action."

But this rule as to option does not apply where, at the trial, the value of the article has not been assessed. Chilton *v.* Carrington, 24 L. J. C. P. 78; 1 Jur. N. S. 477. See the form of a writ of execution under this section, Reg. Mich. 1854, Nos. 34, 35. These writs do not contain any clause directing the damages, costs, or interest in the action to be levied. These writs cannot be issued without a rule of court or order of a judge. See 1 Chit. Arch. Pr. 11th ed. 698.

1. *Count in Detinue.* (*x*)

That the defendant detained from the plaintiff his title-deeds of land, called Belmount, in the county of ——, that is to say [*describe deeds*].

2. *Form stating Special Damage.* (*y*)

That the defendant detained from the plaintiff his goods, that is to say, a lease of premises in —— Street, in the county of ——, and by reason of the premises the plaintiff was prevented from selling, and lost divers opportunities of selling on advantageous terms the said premises, and the term and interest therein, and was prevented from obtaining and receiving the price for which he might have sold the same; and by reason of the matters aforesaid, and the said detention of the said lease, was prevented from selling the term and interest of the plaintiff in the said premises to one A. B., who would have bought the same, and the plaintiff claims a return of the said lease, and £—— for its detention.

(*x*) This form is given by the common law procedure act, 1852 (15 & 16 Vict. c. 76), sched. B, 29.

(*y*) This action lies, though the defendant have wrongfully parted with the goods before suit. Jones *v.* Dowle, 9 M. & W. 19. The goods, &c. are usually described as in trover. And it is said more certainty is required in the description of the goods in detinue than in trover. 2 Saund. 74 *c*; Co. Litt. 286 *b*; Graham *v.* Gracie, 13 Q. B. 548. [As to replevin, see Litchman *v.* Potter, 116 Mass. 371; *ante*, 592, note (*f*).] The date of a deed need not be mentioned. Alcorn *v.* Westbrook, 1 Wils. 116. A count in detinue for a bill, and one for money had and received, would be allowed. Kirkpatrick *v.* Bank of England, 8 Dowl. 881. The value of each article should be separately assessed by the jury. Phillips *v.* Jones, 15 Q. B. 780; 19 L. J. Q. B. 374; and see Williams *v.* Archer, 5 C. B. 318; 17 L. J. C. P. 82.

TRUSTEES OF PUBLIC WORKS.

See *ante*, "Commissioner," "Negligence."

TURBARY.

See *ante*, "Common of Pasture," and *post*, pleas, "Trespass to Realty." Form for disturbance of common of turbary, Greenhow *v.* Ilsley, Willes R. 619; 2 Chit. on Pl. 7th ed. 611.

Turbary is a privilege of cutting and carrying away turf, and is appendant to an ancient house, the right being limited to the requirements of the house. Co. Litt. 36 *b*, 37 *a*. It does not confer the right to use otherwise than for burning. Valentine *v.* Penny, Noy's R. 145; Wilson *v.* Willes, 7 East, 121.

WAGON, OR COACH, OR BOOKING OFFICE KEEPER.

Obs. — See a form in contract, *ante*, pt. 1, p. 105, form 14. Gibbart *v.* Dale, 5 Ad. & E. 543. Form for losing passengers' luggage, *ante*, 493, form 6. Miles *v.* Cattle, 6 Bing. 744. The contract of a booking office keeper is only to deliver safely to a carrier, and it is not sufficient evidence of negligence on the part of such office keeper to show merely that the goods did not reach their destination; Gibbart *v.* Dale, *ubi sup.*; nor does trover lie against the office keeper in such case; Williams *v.* Jessey, 5 Scott, 66; unless the goods be lost by wilful negligence. Wyld *v.* Pickford, 8 M. & W. 443. But it is otherwise with a warehouseman. Devereux *v.* Barclay, 2 B. & Ald. 702. See Chitty & Temple on Carriers, 18–60.

WAREHOUSEMAN.

Obs. — See the common count for warehouseroom, *ante*, pt. 1, p. 256. Trover lies against a warehouseman for the misdelivery of goods, even though it is by mistake. Devereux *v.* Barclay, 2 B. & Ald. 702. Warehousemen and wharfingers may insure their customers' goods against fire, and may recover the whole value under a policy on goods "held in trust or on commission." Waters *v.* Monarch Assurance Co. 5 El. & Bl. 870; 25 L. J. Q. B. 102. See *post*, pleas, tit. "Lien."

WARRANTIES.

See "Fraud," *ante*, 518 *et seq.* and "Warranty," *ante*, part 1, pp. 256–262, 475.

WASTE.

See "Landlord and Tenant," "Rector," "Dilapidation," "Reversion."

WATERCOURSES.

Obs. — See Gale on Easements, by Willes. The right to the enjoyment of a watercourse is an *easement* and not a profit *à prendre* in the soil of another. In Manning *v.* Wasdale, 5 Ad. & E. 758, it was held that the right of an occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes for the more convenient use of his mes-

Obs. suage, is an *easement*. See Race *v.* Ward, 4 El. & Bl. 702; Bailey *v.* Appleyard, 8 Ad. & E. 161. [Mr. Angell in his work on Watercourses (§ 90) says, "The right to the use of the flow of the water, in its natural course, and to the momentum of its fall on the land of the proprietor, is not what is called an easement, because it is inseparably connected with, and inherent in, the property in the land; it is parcel of the inheritance and passes with it." In Johnson *v.* Jordan, 2 Met. 239, Shaw C. J. says, a natural watercourse "is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it. Unity of possession and title in such land with the lands above it or below it does not extinguish or suspend it." In a later case, Cary *v.* Daniels, 5 Met. 238, Wilde J. says, "The right which a party has to the use of water flowing over his own land is undoubtedly identified with the realty, and is a real or corporeal hereditament, and not an easement; but the right of a party to have the water of a stream or watercourse flow to or from his lands or mill, over the land of another, is an incorporeal hereditament, and an easement, or a prædial service, as defined by the civil law. And it is immaterial whether the watercourse be natural or artificial; or whether the right is derived *ex jure naturæ*, or by grant or prescription." This language is quoted, as a correct statement of the law, by Hubbard J. in the still later case of Crittenton *v.* Alger, 11 Met. 284. See the remarks of Erle J. in Stokoe *v.* Singers, 8 El. & Bl. 36; Pollock C. B. in Dickinson *v.* Grand Junction Canal Co. 7 Exch. 299, 300; Parke B. in Rawstron *v.* Taylor, 11 Exch. 382; Wightman J. in Chasemore *v.* Richards, 7 H. L. Cas. 349; 5 H. & N. 984, 985; and Lord Wensleydale in the same case; Holsman *v.* Boiling Spring Bleaching Co. 1 McCarter, 343; Wheatley *v.* Baugh, 25 Penn. St. 528, 531, and other cases cited in note (1) to Angell Watercourses, § 90.]

The law respecting the right to water is explained in Mason *v.* Hill, 5 B. & Ad. 1; 3 B. & Ad. 904. Running water is originally *publici juris*, and an individual can in general only acquire an exclusive right to it, enabling him to sue for an obstruction or injurious interference with the stream to his prejudice, by *applying* so much of it as he requires for a beneficial purpose. [See Chatfield *v.* Wilson, 27 Vt. 670; S. C. 31 Vt. 358; Tillotson *v.* Smith, 32 N. H. 90; Parker *v.* Griswold, 17 Conn. 288; Corning *v.* Troy Iron & Nail Factory, 40 N. Y. 191; Van Hoesen *v.* Coventry, 10 Barb. 518.] Each owner of land on the banks of a river or stream has a right to the enjoyment of the water flowing in its natural course, and is entitled to use it for any purpose not inconsistent with similar enjoyment in the owners above and below. Sampson *v.* Hoddinott, 26 L. J. C. P. 147; [1 C. B. N. S. 590;] Embrey *v.* Owen, 6 Ex. 369. [As to the uses a party may make of a natural watercourse running through his land, see Elliott *v.* Fitchburg R. R. Co. 10 Cush. 191; Springfield *v.* Harris, 4 Allen, 494; Gould *v.* Boston Duck Co. 13 Gray, 442; Pitts *v.* Lancaster Mills, 13 Met. 156; Miner *v.* Gilmour, 12 Moore P. C. 131, 156; Snow *v.* Parsons, 28 Vt. 459; Chatfield *v.* Wilson, 31 Vt. 358; Hayes *v.* Waldron, 44 N. H. 580; Davis *v.* Getchell, 50 Maine, 602; Wheatley *v.* Chrisman, 24 Penn. St. 298; Gerrish *v.* New Market Manuf. Co. 30 N. H. 478, 483; Gillett *v.* Johnson, 30 Conn. 180; Wadsworth *v.* Tillotson, 15 Conn. 366; Stein *v.* Burden, 29 Ala. 127; Nuttall *v.* Bracewell, L. R. 2 Ex. 1; Merrifield *v.* Worcester, 110 Mass. 216, is an important case upon this point.] He cannot, however, acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant from such proprietor, or an enjoyment uninterruptedly for *twenty* years; and the right of appropriation to particular purposes cannot be acquired as against the owners of lands on the banks of the stream by an user for a less period. See Mason *v.* Hill, *ubi sup.*; Williams *v.* Morland, 2 B. & C. 910; Wright *v.* Howard, 1 Sim. & Stu. 190; and see the statute 2 & 3 W. 4; [3 Kent, 439; Angell Watercourses (6th ed.), ch. iv. § 90 *et seq.*; Shaw C. J. in Johnson *v.* Jordan, 2 Met. 239; Wheatley *v.* Baugh, 25 Penn. St. 528, 531; Holsman *v.* Boiling Spring Bleaching Co. 1 McCarter, 335; Hendricks *v.* Johnston, 6 Porter, 472; Pugh *v.* Wheeler, 2 Dev. & Bat. (N. Car.) 50; Omelvany *v.* Jaggers, 2 Hill (S. Car.), 634; Tillotson *v.* Smith, 32 N. H. 94; Jones *v.* Stevens, 3 Vt. 308, 316; Kauffman *v.* Griesemer, 26 Penn. St.

Obs. 407, 413.] See, however, per Alderson J. in Frankum *v.* Falmouth, 6 C. & P. 529; Canham *v.* Fisk, 2 C. & J. 126. A right may be acquired whether the watercourse is natural or artificial. Magor *v.* Chadwick, 11 Ad. & E. 586; Beeston *v.* Weate, 25 L. J. Q. B. 115; Gould *v.* Martyn, 34 L. J. Q. B. 353; Greatrex *v.* Haywood, 8 Ex. 29; Sutcliffe *v.* Booth, 32 L. J. Q. B. 136; Arkwright *v.* Gell, 5 M. & W. 203; [Angell Watercourses (6th ed.), §§ 206, 206 *a*; Earl *v.* De Hart, 1 Beasley (N. J.), 280, 285; White *v.* Chapin, 12 Allen, 516, 520; Shields *v.* Arndt, 2 Green Ch. (N. J.) 234, 249; Dickinson *v.* Miller, 7 Allen, 19, 22; Smith *v.* Miller, 11 Gray, 145; Cass *v.* Penn. R. R. Co. 51 Penn. St. 351; Jessup *v.* Louckes, 55 Penn. St. 350; Dunklee *v.* The Wilton R. R. Co. 24 N. H. 506; Townsend *v.* McDonald, 2 Kernan, 381; Gaved *v.* Martyn, 19 C. B. N. S. 732; Ivimey *v.* Stocker, L. R. 1 Ch. 396.] As to the diversion of surface drainage, see Broadbent *v.* Ramsbottom, 11 Ex. 602; 25 L. J. Ex. 115; Rawstron *v.* Taylor, 11 Ex. 369; 25 L. J. Ex. 33. [Angell Watercourses (6th ed.), § 108 *a et seq.*, and notes and cases cited. Popplewell *v.* Hodkinson, L. R. 4 Ex. 248; Gannon *v.* Hargadon, 10 Allen, 106, 109, 110; Luther *v.* Winnisimmet Co. 9 Cush. 171; Flagg *v.* Worcester, 13 Gray, 601; Parks *v.* Newburyport, 10 Gray, 28, 29; Colt J. in Wheeler *v.* Worcester, 10 Allen, 591, 602, 603; Ashley *v.* Wolcott, 11 Cush. 192, 195; Dickinson *v.* Worcester, 7 Allen, 19; White *v.* Chapin, 12 Allen, 516, 518; Buffum *v.* Harris, 5 R. I. 243, 253; Goodale *v.* Tuttle, 29 N. Y. 459; Curtis *v.* Ayrault, 47 N. Y. 73, 78; Waffle *v.* New York Central R. R. 58 Barb. 413; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Hoyt *v.* Hudson, 27 Wisc. 656; Sweet *v.* Cutts, 50 N. H. 437; Greeley *v.* Maine Central R. R. 53 Maine, 200; Pettigrew *v.* Evansville, 25 Wisc. 223, 226; Kauffman *v.* Griesemer, 26 Penn. St. 407; Martin *v.* Riddle, 26 Penn. St. 415, in note; Lattimore *v.* Davis, 14 La. 161; Adams *v.* Harrison, 4 La. An. 165; Bellows *v.* Sackett, 15 Barb. 96; Laumier *v.* Francis, 23 Misson. 181; Bentz *v.* Armstrong, 8 Watts & S. 40; Butler *v.* Peck, 16 Ohio St. 334; Beard *v.* Murphy, 37 Vt. 99; Miller *v.* Laubach, 47 Penn. St. 154; Earl *v.* De Hart, 1 Beasley Ch. (N. J.) 280; Bowlsby *v.* Spear, 2 Vroom, 351; Tillotson *v.* Smith, 32 N. H. 90, 96; Livingston *v.* McDonald, 26 Iowa, 160, 172; Stone *v.* Augusta, 46 Maine, 127; Turner *v.* Dartmouth, 13 Allen, 291; Barry *v.* Lowell, 8 Allen, 127; Franklin *v.* Fisk, 13 Allen, 211, 212; Bangor *v.* Lausil, 51 Maine, 521; Bassett *v.* Salisbury Manuf. Co. 43 N. H. 569.] As to the right to subterranean water, see Acton *v.* Blundell, 12 M. & W. 324; Chasemore *v.* Richards, 29 L. J. Ex. 81; 7 H. L. Cas. 349; 2 H. & N. 168; Reg. *v.* The Metropolitan Board of Works, 32 L. J. Q. B. 135; 3 B. & S. 710; Hodgkinson *v.* Ennor, 32 L. J. Q. B. 231; 4 B. & S. 229; [Wheatley *v.* Baugh, 25 Penn. St. 528, 531; Haldeman *v.* Bruckhardt, 45 Penn. St. 519; Arnold *v.* Foote, 12 Wend. 330; New River Co. *v.* Johnson, 2 El. & El. 445; Frazier *v.* Brown, 12 Ohio St. 300; Brown *v.* Illius, 25 Conn. 583, 594; Roath *v.* Driscoll, 20 Conn. 533; Whetstone *v.* Boneser, 29 Penn. St. 59; Smith *v.* Adams, 6 Paige, 433; Bennett J. in Chatfield *v.* Wilson, 28 Vt. 55; Clarke *v.* Conroe, 38 Vt. 473; Radcliff *v.* Mayor &c. 4 Comst. 195, 200; Harwood *v.* Benton, 32 Vt. 724; Ellis *v.* Duncan, 21 Barb. 230; Greenleaf *v.* Francis, 18 Pick. 121; Parker *v.* Boston & Maine R. R. Co. 3 Cush. 107; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Wilson *v.* New Bedford, 108 Mass. 261; Monson & Brimfield Manuf. Co. *v.* Fuller, 15 Pick. 554; Ball *v.* Nye, 99 Mass. 582; Fuller *v.* Chicopee Manuf. Co. 16 Gray, 46; Pixley *v.* Clark, 35 N. Y. 520.]

By the stat. 2 & 3 W. 4, c. 71, s. 2, it is enacted, "that no claim which may be lawfully made at the common law by custom, prescription, or grant, *to any way or other easement*, or to any *watercourse or the use of any water*, to be enjoyed or derived *upon*, *over*, *or from any land or water*, when such way or other matter as herein last before mentioned shall have been *actually enjoyed* by any person *claiming right thereto without interruption for the full period of twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of *twenty years*, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed *absolute* and indefea-

Obs. sible, *unless* it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by *deed or writing*."

The 4th, 5th, and 7th sections of the act, which show how the prescribed periods are to be calculated, and point out *exceptions* in the case of persons under disability, as infancy or enjoyment against tenants for life, &c. have been already cited fully, *ante*, 479, Obs. See, further, *post*, "Trespass;" pleas, "Watercourses," where the recent cases on this subject are fully cited. In Wright *v.* Williams, 1 M. & W. 77, it was held that a claim by the owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterward to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a "watercourse" within the 2 & 3 W. 4.

As to *licenses* to make drains, &c. see Hewlins *v.* Shippam, 5 B. & C. 221; Fentiman *v.* Smith, 4 East, 107; Mason *v.* Hill, *supra*. The plaintiff's father, by oral license, permitted the defendant to lower the bank of a river, and make a weir above plaintiff's mill, whereby less water than before flowed to plaintiff's mill, held, that plaintiff could not sue defendant for continuing the weir. Liggins *v.* Inge, 7 Bing. 682; and see Wood *v.* Leadbitter, 13 M. & W. 828.

It is no defence to an action for obstructing a watercourse, in violation of a right acquired, that slight alterations have been made by the claimant in the mode of enjoying his privilege, &c. See Saunders *v.* Newman, 1 B. & Ald. 258; Greenslade *v.* Halliday, 6 Bing. 379; Hall *v.* Swift, 4 Bing. N. C. 381; [Angell Watercourses (6th ed.), § 224 *et seq.* and cases cited; Gilford *v.* Winnipiseogee Lake Co. 52 N. H. 262.] Nonuser for sixteen years. Bower *v.* Hill, 1 Bing. N. C. 549. [See Angell Watercourses (6th ed.), § 240 *et seq.*; Browne *v.* M. E. Church, Baltimore City, 37 Md. 108.]

It is sufficient to *declare generally* upon the plaintiff's possession and enjoyment of the use of the water as of right, as in the above form. This was sufficient before the 2 & 3 W. 4, c. 71, and the 5th section sanctions such mode of alleging the claim; see *ante*, 479, Obs. As to the form of claiming and justifying under a right of this kind in a *plea*, see *post*, "Trespass," plea, "Watercourses." Ward *v.* Robins, 15 M. & W. 237. It has been usual to charge in the declaration that the plaintiff was possessed of a mill or close, "*and by reason thereof*" of right ought to have enjoyed, &c.: this allegation of right resulting from *possession* is inapplicable where the right arises from a *grant*, or license, or agreement. See Fentiman *v.* Smith, 4 East, 107; Hewlins *v.* Shippam, 5 B. & C. 221; 3 Stark. Ev. 3d ed. 1248. And where the declaration charged that the plaintiff was possessed of a *mill*, "and by reason thereof" was entitled to a watercourse, but the proof was, that the right existed only in respect of plaintiff's *land*, and could not have arisen from his possession of his mill, as it was built within twenty years, the judge at trial would not permit an amendment; and although the jury found the plaintiff's right specially, and it was indorsed on the postea under 3 & 4 W. 4, c. 42, s. 24, yet the court above would not give judgment for the plaintiff on that finding; because if the declaration had been accurate the defendant might have pleaded differently. Frankum *v.* Earl of Falmouth, 6 C. & P. 529; 2 Ad. & E. 452; and see Stockport Waterworks Company *v.* Potter, 3 H. & C. 300; [Nuttall *v.* Bracewell, L. R. 2 Ex. 1. See Angell Watercourses (6th ed.), § 405 *et seq.*] It seems advisable in general to omit the words, "by reason thereof," &c.

Care should be taken to describe the *cause* of the injury accurately in the declaration. A count for *diverting* water is not supported by evidence of penning back and causing an overflow. Griffiths *v.* Marson, 6 Price, 1. A count for erecting a dam, and thereby preventing water from supplying a mill, was held to be sustained by proof that the dam prevented the regular supply of the water, but did not divert the stream, as the water returned to its regular course before it reached the mill, and caused no waste. Shears *v.* Wood, 7 Moore, 345. And where the charge was the digging a sewer and diverting water from a pond, and the evidence was that the water was diverted by digging the sewer, but previously to making it, and that since the sewer was made, the water could not rise to its former height; held not a variance as

Obs. regarded the continuance of the sewer. Dukes *v.* Gostling, 1 Bing. N. C. 589; [See Angell Watercourses (6th ed.), § 413 *et seq.*]
The venue is local. [Angell Watercourses (6th ed.), § 418.]

1. *For diverting Water from a Mill.* (*z*)

That the plaintiff was possessed of a mill, and by reason thereof (*a*) was entitled to a flow of a stream for working the same; (*b*) and the defendant by cutting the bank of the said stream [*or* "by erecting a dam across the said stream," *as the case may be*], diverted the water thereof from the said mill.

2. *For spoiling the Water of a Stream which flowed to the Plaintiff's Bleaching Ground.* (*c*)

For that the plaintiff was possessed of certain bleaching works, and there carried on the trade and business of a bleacher, and was entitled to the flow of water of a certain stream of good quality, and used by the plaintiff in his said trade and business [and also to water his cattle], and the defendant fouled the said stream, whereby the water became unfit for the use of the plaintiff in his said trade and business, and he lost great profits thereby [and has also been prevented from watering his cattle in so commodious a manner as he would otherwise have done], and has been obliged to procure water elsewhere for the purposes aforesaid at a great expense, and his said premises have been and are much deteriorated in value.

(*z*). See the form given by the common law procedure act, 1852, sched. B, 30; see another form, Wood *v.* Waud, 3 Ex. 48; 18 L. J. Ex. 305; Dudden *v.* The Clutton Union, 1 H. & N. 627; 26 L. J. Ex. 146; Hall *v.* Swift, 4 Bing. N. C. 381; [Northam *v.* Huxley, 1 El. & Bl. 665; Insole *v.* James, 1 H. & N. 243;] Beesto *v.* Weate, 25 L. J. Q. B. 115; [5 El. & Bl. 986.] For diminishing supply. Blagrove *v.* Bristol Waterworks, 26 L. J. Ex. 57. For taking more water than authorized to take. Penarth & Co. *v.* Cardiff Waterworks Co. 29 L. J. C. P. 230; [7 C. B. N. S. 816.] The venue is local, but a local description is not necessary. Mersey Navigation *v.* Douglas, 2 East, 497. Variance in describing the situation of a weir; Gibson *v.* Wells, 1 New R. 290; but a mistake of this kind not misleading the defendant, &c. would probably be amended at the trial. *Quære*, whether a temporary and slight obstruction, occasioning no real or sensible damage, would be actionable. See Taylor *v.* Bennett, 7 C. & P. 329; *ante*, 481. *Semble* not, if the *right* were not put in litigation by the defendant. See 2 Stark. Ev. 3d ed. 1254, note (*y*). But in general the mere invasion of a right, which might become prejudicial, is actionable without proof of any specific injury. Ib.; 1 Saund. 346 *b*.

(*a*) These words are inapplicable if the right did not result from the possession of the mill. Frankum *v.* Falmouth, 2 Ad. & E. 452; 6 C. & P. 529, where see a form.

(*b*) The right to the water force for a beneficial purpose must be shown. See Williams *v.* Morland, 2 B. & C. 910; Manning *v.* Wasdale, 5 Ad. & E. 758, in which latter case see as to the allegation of a claim of water, for culinary and domestic purposes, for the convenient use of a house.

(*c*) See a statement complaining of the discharge into a stream, of water, &c. from pits containing iron and copper water, Wright *v.* Williams, 1 M. & W. 77. Form, Moore *v.* Webb, 1 C. B. N. S. 673. For polluting a stream. Whaley *v.* Laing, 26 L. J. Ex. 327; 27 L. J. Ex. 422; [2 H. & N. 476;] Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300; Hodgkinson *v.* Ennor, 4 B. & S. 229; 32 L. J. Q. B. 231; [Holsman *v.* Boiling Spring Bleaching Co. 1 McCarter, 335, 342; Merrifield *v.* Lombard, 13 Allen, 16; Snow *v.* Parsons, 28 Vt. 459; Wheatley *v.* Chrisman, 24 Penn. St. 298; Howell *v.* M'Coy, 3 Rawle, 397; Housee *v.* Hammond, 39 Barb. 89; Jones *v.* Crow, 32 Penn. St. 398, 406; Hayes *v.* Waldron, 44 N. H. 585; Crossley *v.* Lightowler, L. R. 2 Ch. Ap. 478; Merrifield *v.* Worcester, 110 Mass. 216; Hall *v.* Lund, 1 H. & N. 676; Hodgkinson *v.* Ennor, 4 B. & S. 229; Stockport Waterworks Co. *v.* Potter, 7 H. & N. 160. Count, for polluting an artificial watercourse. Whaley *v.* Laing, 2 H. & N. 476.]

3. *Against the Occupier of Land for improperly keeping open the Hatch of a Reservoir connected with a Stream, whereby Plaintiff's Mill was not sufficiently supplied with Water.*

See a form in the last edition of this work.

4. *Against Commissioners of a Level for stopping up a Drain which drained Plaintiff's Land.* (*d*)

For that plaintiff was possessed of land, and entitled to have the waters from time to time collecting and being in and upon the said land drained and carried away from the same through a certain drain, and from thence through other drains into [the sea]; yet the defendant wrongfully placed large quantities of earth, stones, and rubbish in the said drain, and wrongfully stopped and obstructed the said drain, and kept and continued the same so stopped up and obstructed, whereby large quantities of the waters which from time to time during that time collected, and were in and upon the said land of the plaintiff, were obstructed and prevented from running away from the same through the said drain, as they otherwise would have done, and were penned and driven back upon the said land of the plaintiff, and accumulated thereon, and by reason thereof the said land of the plaintiff is rendered wet and swampy, and unproductive; and thereby also cattle and sheep of the plaintiff, depasturing upon the same land, became diseased, and were injured and destroyed; and also by reason of the premises, divers crops of corn, grain, and hay of the plaintiff, growing upon his said land, were spoiled, damaged, and destroyed; and also by reason of the premises the plaintiff has incurred expenses in endeavoring to cultivate his said lands, and to restore the same to their former good state and condition, and the plaintiff has been and is otherwise much injured.

5. *Against the adjoining Occupier for discharging Rain from the Eaves of a Roof on to the Plaintiff's Land.* (*e*)

That the defendant was possessed of a building abutting on the land of the plaintiff, and wrongfully built the eaves of the said building hanging over the plaintiff's land, whereby the rain-water poured on to the said land and made it wet and useless.

6. *For obstructing the Plaintiff from discharging Rain-water on to the adjoining Land of the Defendant.*

Battishill *v.* Reed, 25 L. J. C. P. 290; [18 C. B. 696.]

7. *For mooring a Vessel in the Thames opposite Plaintiff's Wharf, and thereby preventing the access of Vessels thereto.* (*f*)

Rose *v.* Groves, 5 M. & G. 613.

(*d*) See Sharpe *v.* Hancock, 7 M. & G. 354.

(*e*) See Fay *v.* Prentice, 1 C. B. 828; Tucker *v.* Newman, 11 Ad. & E. 40.

(*f*) See Wyatt *v.* Thompson, 1 Esp. R. 252. And see "Nuisances," *ante*, 580, and "Ways," *post*, 631.

OTHER FORMS FOR OBSTRUCTIONS, &c. TO WATERCOURSES, &c.

8. *For diverting Water from Plaintiff's Mill, &c. by making Cuts from the Stream and not keeping the Banks in Repair, &c.*

Vooght *v.* Winch, 2 B. & Ald. 662; Williams *v.* Morland, 2 B. & C. 910.

9. *For throwing Rubbish into a Stream.*

Murgatroyd *v.* Robinson, 26 L. J. Q. B. 233; (*g*) [8 El. & Bl. 391; Carlyon *v.* Lovering, 1 H. & N. 784.]

10. *General Count, not showing Mode of Diversion of Water from Mill.*

Frankum *v.* Earl of Falmouth, 2 Ad. & E. 452; *ante*, tit. "Easement."

11. *For lowering Banks and making a Weir, and thereby causing Water to flow irregularly to Plaintiff's Mill.*

Liggins *v.* Inge, 7 Bing. 682.

12. *For suffering a Ditch to be choked (which it was Defendant's Duty to cleanse as Occupier of an Adjoining Close), whereby the Water overflowed Plaintiff's Close.*

Bell *v.* Twentyman, 1 Q. B. 766.

13. *For stopping a Gutter in Defendant's Yard through which the Refuse Water and Eaves Droppings from Plaintiff's House were carried away.*

Thomas *v.* Thomas, 2 Cr., M. & R. 35.

14. *For stopping up a Drain and Sewer through which Plaintiff had a Right for Rain and Water to flow.*

Pyer *v.* Carter, 26 L. J. Ex. 258; [1 H. & N. 916; Fitzsimons *v.* Inglis, 5 Taunt. 534; Thomas *v.* Thomas, 2 Cr., M. & R. 34; Cawkwell *v.* Russell, 26 L. J. Ex. 35; Blagrave *v.* Bristol Waterworks Co. 1 H. & N. 369.]

15. *For injuring Plaintiff's Land by causing a Watercourse to flow with Unusual Force, &c.*

Williams *v.* Morland, 2 B. & C. 910.

16. *For removing a Hatch, whereby Plaintiff could not work his Mill.*

2 Chit. Pl. 7th ed. 606. The like by a *reversioner*. Greenslade *v.* Halliday, 6 Bing. 379.

17. *Against a Miller for an Improper Elevation of his Hatch and Mill Head.*

Saunders *v.* Newman, 1 B. & Ald. 258.

(*g*) See Carlyon *v.* Lovering, 26 L. J. Ex. 251; [1 H. & N. 784.]

18. *For an Injury to the Plaintiff's Reversion in a Close by an Interruption of a Right to irrigate the Same by a Watercourse.*

Greenslade *v.* Halliday, 6 Bing. 379.

19. *For the like Injury, and for discharging into the Stream Water from Copper Works, and from Pits in which Iron was deposited.*

Wright *v.* Williams, 1 M. & W. 77.

20. *For obstructing Plaintiff in his Right to water Cattle at a Pond and take the Water for Domestic Purposes.*

Manning *v.* Wasdale, 5 Ad. & E. 758; [*for disturbing the plaintiff in the use of a well;* Tyler *v.* Bennett, 5 Ad. & E. 377.]

21. *For making Public Works so carelessly that Water flowed over Plaintiff's Land.*

Allen *v.* Hayward, 15 L. J. Q. B. 99; [7 Q. B. 960.]

22. *Against a Canal Company for not managing the Canal according to an Act of Parliament.*

Blackmore *v.* The Glamorganshire Canal Co. 3 Y. & J. 60.

23. *For disturbing the Plaintiff's Right to a Sewer.*

Lee *v.* Stevenson, 27 L. J. 263; [El., Bl. & El. 512; Cooper *v.* Pegg, 16 C. B. 264.]

24. *For obstructing a Watercourse from a Colliery made by the Plaintiff over the Land, and by the License of an Adjacent Owner.* (*h*)

Roberts *v.* Rose, 33 L. J. Ex. 1; [3 H. & C. 162.]

WAYS.

Obs. — See, in general, as to public and private ways, Vin. Abr. and Com. Dig. tit. Chimin; Bac. Abr. Highways; 1 Saund. 326, note (*b*); Burn's J. tit. Highways; Gale on Easements, by Willes.

No action lies for an obstruction in a common highway, unless the plaintiff can show special damage; see the cases cited, *ante*, "Nuisances," Obs. 619. A private way is claimed either by *grant*, *reservation*, *prescription*, or from *necessity*. The provisions of the late act, 2 & 3 W. 4, c. 71, s. 2, as it relates to the claim of a right of way by prescription, have been fully noticed, *ante*, Obs. 496. The decisions explaining the provisions of the statute (Bright *v.* Walker, 1 Cr., M. & R. 211; Beasley *v.* Clark, 2 Bing. N. C. 705, &c.), are fully cited in the note to the plea in *Trespass*, "Way," *post*, justifying under a right of way. Case is the only remedy for obstructing a right of way, and it seems that form of action might be adopted where the obstruction arises from a building erected by the defendant at one time, partly upon the plaintiff's land and partly upon the defendant's over which the way extended. See per Lord Abinger C. B. and Parke B. Wells *v.* Ody, 1 M. & W. 459.

See "Nuisances," *ante*, 580, "Watercourses," *supra*, 624.

(*h*) See, also, in same case, pleas, "New Assignment," and "Replication."

1. *For obstructing a Private Right of Way.* (*i*)

That the plaintiff was possessed of a messuage [*as the case may be*], and was entitled to a way from the said messuage over a close to a public highway, and back again, for himself and his servants on foot, and with horses, cattle, carts, and carriages at all times; yet the defendant wrongfully obstructed the said way.

[1*a*. *Another Form for obstructing Way.*

And the plaintiff says he owned a tract of land [*describing it*], and there was a way leading to the same from [*here mention the other terminus*], which the plaintiff had a right to use as a foot-way and carriage-way, and the defendant erected a fence across said way and placed stones in the same, so that the plaintiff could not use the same.

See South Metropolitan Cemetery Co. *v.* Eden, 16 C. B. 42; Benge *v.* Swaine, 15 C. B. 784; Dodd *v.* Burchell, 1 H. & C. 113.]

OTHER FORMS FOR OBSTRUCTING WAYS, &c.

2. *For obstructing a Public Highway, showing Special Damage to the Plaintiff as Occupier of a Shop, &c. on the Highway; and Law.*

Wilkes *v.* Hungerford Market Co. 2 Bing. N. C. 281; Vallance *v.* Savage, 7 Bing. 595; and see Ross *v.* Groves, 5 M. & G. 613; *ante*, p. 580.

3. *For placing Rubbish on a Highway which caused Plaintiff to Fall into a Canal.*

Goodthorpe *v.* Hardman, 13 M. & W. 377; 2 D. & L. 442; and see *ante*, 577, note (*k*). Similar form against a surveyor. Davis *v.* Curling, 15 L. J. Q. B. 56.

4. *For obstructing the Plaintiff's Access to a Pond, the Water of which Plaintiff was entitled to for his Cattle, &c.*

Manning *v.* Wasdale, 5 Ad. & E. 758.

5. *For obstructing a Right of Way into Defendant's Passage to repair a Gas Pipe and use a Coal Shoot necessary for the Enjoyment of his House.*

Hinchcliffe *v.* Lord Kinnoul, 4 Bing. N. C. 1.

(*i*) Venue local, see form, &c. Bright *v.* Walker, 1 Cr., M. & R. 211; 2 Chit. Pl. 7th ed. 617; Worthington *v.* Simson, 29 L. J. Q. B. 116. Way across a stream. Bower *v.* Hill, 1 Bing. N. C. 549. Form for disturbing a way *leased* to the plaintiff. Kooystra *v.* Lucas, 5 B. & Ald. 830. A reversioner may sue if *his* interest be injured. If a highway intervene, say "on a certain public highway, and from and out of the said public highway, through a certain gate, thereunto, into, through, &c." See Duncan *v.* Louch, 5 Q. B. 904.

WEIR.

Trespass for throwing down the Plaintiff's Weir appurtenant to his Fishery. (*k*)

Williams *v.* Wilcox, 8 Ad. & E. 314.

WIFE.

See *ante*, "Husband and Wife." Also, *ante*, part 1, pp. 146, 401.

WINDOWS.

See *ante*, "Ancient Lights."

WITNESS.

Obs. — A witness may be punished for not obeying a subpœna by attachment. See Chit. Arch. Pr. *in voc;* and in cases before magistrates, see 11 & 12 Vict. c. 42, s. 16, and 11 & 12 Vict. c. 43, s. 7.

So, also, he may be sued under 5 Eliz. c. 9, s. 12. See Pearson *v.* Iles, 2 Doug. 556.

Or he may be sued at common law for non-attendance. Pearson *v.* Iles, *supra*, even though the plaintiff was not nonsuited, but withdrew the record in consequence of the absence; Mullett *v.* Hunt, 1 Cr. & M. 752; or where the subpœna required attendance on the 31st of March, but the trial did not come on until April 6. Davis *v.* Lovell, 4 M. & W. 678; 7 Dowl. 178. See, also, Lamont *v.* Crook, 6 M. & W. 615; Amey *v.* Long, 9 East, 473. But damage must be sustained. Couling *v.* Coxe, 6 C. B. 703.

Conduct money received with a subpœna may be recovered back as money had and received, where the attendance becomes unnecessary and no expenses have been incurred by the defendant. Martin *v.* Andrews, 7 El. & Bl. 1; 26 L. J. Q. B. 39.

1. *Against a Witness for not attending on his Subpœna at a Trial, whereby the Plaintiff was obliged to withdraw the Record before the Cause was called on.* (*l*)

For that the plaintiff brought an action against G. H., in the court of ——, and such proceedings were then had that the same was about to come on for trial at ——, and thereupon the plaintiff caused to be issued a writ of subpœna out of the said court of ——, directed to the defendant, by which said writ the defendant was commanded [*set out the material parts of the writ*], and after-

(*k*) See as to fishing wiers, 24 & 25 Vict. c. 109.

(*l*) See a form, Cowling *v.* Coxe, 6 C. B. 703; 18 L. J. C. P. 100; Mullett *v.* Hunt, 1 Cr. & M. 752, where it was held not to be necessary to maintain this action that the cause should have been called on, and the jury sworn, in order that the plaintiff should be nonsuited; as the plaintiff has always a right to call a witness on his subpœna, on the cause being called on, without swearing the jury. Hopper *v.* Smith, 1 Mood. & Malk. 115. See, also, a form for not appearing as a witness in an action of ejectment, whereby the nominal plaintiff was nonsuited; Davis *v.* Lovell, 7 Dowl. 178; 4 M. & W. 679; it was held in that case that it was no objection to the action, that a subpœna (which commanded the witness to attend from day to day) was not served until after the commission day, there being a reasonable time left for the party to attend after the service and before the cause was tried. Form where plaintiff was nonsuited, Masterman *v.* Judson, 8 Bing. 225.

wards the plaintiff, within a reasonable (*m*) time before the said trial, caused the said writ to be made known and shown (*n*) to the defendant, and a copy thereof left with him, and caused to be paid to him £——, being a reasonable sum (*o*) for his costs and charges of attending the said trial; and afterwards at the place mentioned in the said subpœna, the said cause was called on for trial, and the plaintiff had a good cause of action (*p*) in the same, and the testimony of the defendant was necessary and material for the plaintiff (*q*) on the said trial, yet the defendant did not attend (*r*) and give evidence in obedience to the said writ, whereby the plaintiff could not proceed to the trial of the said cause, and was obliged to and did withdraw the record, and was afterwards obliged to pay to the said G. H. the costs and charges by him incurred by reason of the plaintiff not proceeding to trial, and divers costs and charges incurred by the plaintiff were wholly lost to him [*add a count for money had and received to recover the conduct money*]. (*s*)

2. *Against a Witness for Breach of Contract to give Evidence.*

Yeatman *v.* Dempsey, 29 L. J. C. P. 177; [7 C. B. N. S. 628.]

(*m*) In Maunsall *v.* Ainsworth, 8 Dowl. 869, it was held after verdict, that the allegation that the defendant could and might have appeared, was equivalent to this; what is such reasonable time must vary according to circumstances.

(*n*) This, though necessary for the purpose of *attaching* the witness, need not be proved to maintain this action. Mullett *v.* Hunt, 2 Cr. & M. 753.

(*o*) This means a reasonable one both for going and returning, Newton *v.* Harland, 1 M. & G. 956; 9 Dowl. 16, after exhausting what he may have got from the other party, if spent by him; Batteley *v.* M'Leod, 3 Bing. N. C. 405; S. C. 5 Dowl. 481; and having regard to the circumstances of life of the party; Dixon *v.* Lee, 1 Cr., M. & R. 645; and whether he would have undertaken the journey to give evidence at that particular time; Vice *v.* Anson, 1 Mood. & Malk. 97; but does not include compensation for loss of time. Collins *v.* Godefroy, 1 B. & Ad. 950. See, further, 1 Chit. Arch. *in voc.*

(*p*) This is in general a material averment; Needham *v.* Fraser, 3 D. & L. 190; but an allegation that the defendant could have given material evidence is equivalent to it *after verdict*; Mullett *v.* Hunt, 1 Cr. & M. 762; or on *general* demurrer. Davis *v.* Lovell, 4 M. & W. 684. "It may be possible to frame a good declaration, without averring that the plaintiff had a good cause of action; it might show that there were various issues, and that the evidence of the witness was material for some of them, and that the plaintiff had sustained damage by his absence." Per Cresswell J. Needham *v.* Fraser, *supra*.

(*q*) This is a necessary averment; Scholes *v.* Hilton, 10 M. & W. 16; but it is no answer to an application for an *attachment* for not obeying a subpœna, that the witness's evidence was not material. Scholes *v.* Hilton, 10 M. & W. 15. See, further, 1 Chit. Arch. Pr. 8th ed. 334.

(*r*) Calling the witness on his subpœna is the best evidence of this, but it is not absolutely necessary, to maintain this action, if the plaintiff can prove *aliunde* that the witness was absent; Lamont *v.* Crook, 6 M. & W. 615; nor to obtain an attachment. Goff *v.* Mills, 2 D. & L. 28.

(*s*) See Martin *v.* Andrews, 7 El. & Bl. 1; 26 L. J. Q. B. 39. [Count for preventing the service of a subpœna on a witness. Wigens *v.* Cook, 6 C. B. N. S. 784, 787.]

PLEAS IN ACTIONS IN TORT.

NOT GUILTY.

Obs. — By the Pleading Rules, Trin. T. 1853, r. 16, it is ordered, that "In actions for torts the plea of not guilty shall operate as a denial only of the breach of duty and wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration." Then follow examples of particular instances, which will be found, *post*, under the several subjects to which they apply.

In the above rule the words "wrongful act" mean only *the act* which is asserted in the declaration to be wrongful, and not the *wrongful character* of that act, otherwise as there could be no act of a wrongful character without some right to invade, the plea would put in issue *the right alleged*, as well as the act of invasion of it. Frankum *v.* Lord Falmouth, 2 Ad. & E. 452; 6 C. & P. 529; and see Duke *v.* Gostling, 1 Bing. N. C. 588.

In accordance with this principle, where a plaintiff asserts that a girl is his servant, and that his consequent right to her services has been invaded by the defendant's seducing her, the preliminary assertion that she is his servant is not denied by the general issue. Torrence *v.* Gibbons, 5 Q. B. 297. So where the plaintiff asserts that he was possessed of a carriage which was injured by the collision of another, the fact of his being so possessed must be specially denied. *Post*, "Negligence," 670. See other similar instances, *post*, "Common," "Copyright," "Nuisance, "Patent," "Way," &c.

Other instances may be found in actions against agents, attorneys, bailees, and carriers; in these cases a contract, either express (as to complete a book which defendant had contracted to complete, see Sweet *v.* Lee, 4 Scott N. R. 77; Boorman *v.* Brown, 3 Q. B. 510) or implied (as in the case of delivery of goods to a carrier), is asserted in the declaration and the *duty*, or legal obligation, to perform that contract being stated (*ante*, Obs. "Agents") the declaration then complains of its breach; in that case the plea of not guilty does not deny the *contract;* thus, in the example given in the same rules, "in an action against a carrier, it will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received." Webb *v.* Page, 1 D. & L. 531; 6 M. & G. 196. See, also, Walker *v.* Jackson, 10 M. & W. 161. So in Spencer *v.* Dawson, 1 Mood. & Rob. 552, Parke B. held that in an action for deceit on a warranty for a horse, not guilty denied both the fraudulent warranty and also the unsoundness, *but not the bargain and sale;* (*a*) but the *terms* of the misrepresentation being part of the wrongful act, would be denied by that plea. Mash *v.* Denham, 1 Mood. & Rob. 442.

The legal obligation or duty, being a mere inference of law, cannot be denied by special plea. Trower *v.* Chadwick, 3 Bing. N. C. 334; Cane *v.* Chapman, 5 Ad. & E. 647.

Nor can the defendant show by special plea that the facts are such that at common law he is not liable, as in the case of a collision of carriages or ships,

(*a*) *Aliter* where they are not capable of separation. Mummery *v.* Paul, 1 C. B. 316; 2 D. & L. 582. And see Norton *v.* Scholefield, 9 M. & W. 665.

Obs. that both he and the plaintiff were in fault. Elwell *v.* Grand Junction Ry. Co. 3 M. & W. 245; Davis *v.* Mann, 10 M. & W. 548.

Or that others, and not he, are liable. General Steam Navigation Co. *v.* Guillou, 11 M. & W. 877, cited *post*, 670, "Negligence."

Or controvert in any other way than by the general issue, that he did not do the wrongful act complained of. Pickwood *v.* Neate, 10 M. & W. 206; Gough *v.* Boyar, 2 M. & W. 770; *post*, "Agent," 637; or show that the plaintiff himself did it. Norton *v.* Scholefield, 9 M. & W. 665, per Parke B.

If libel or slander is of the nature of a privileged communication, that destroys its *malicious* character, and negatives the existence of any actionable wrongful act; see O'Brien *v.* Clement, 15 L. J. Ex. 285; such a defence therefore may be given in evidence under not guilty. Little *v.* Price, 5 Ad. & E. 645; *post*, 658; and see Cotton *v.* Brown, 3 Ad. & E. 312, per Denman C. J.

The inducement is generally some assertion of a right in the plaintiff unconnected with the wrongful act complained of, and the exercise of which is not itself unlawful. Per Maule J. Card *v.* Case, 5 C. B. 622; 17 L. J. C. P. 126; and see per Patteson J. Cotton *v.* Brown, 3 Ad. & E. 312; Rose *v.* Groves, 5 M. & G. 613.

Instances of this plea, admitting the *inducement*, will be found under the head of "Malicious Prosecution," *post*, 668; "Sheriffs," *post*.

The effect of the general issue in trover will be found under that title, *post*.

PLEA OF NOT GUILTY. (*b*)

That he (*c*) is not guilty.

NOT GUILTY BY STATUTE. See *ante*, Obs. 286.

ABATEMENT.

Obs. — See *ante*, "Pleas in Contract," p. 268 *et seq.*; where see forms of pleas, that may easily be adapted to torts.

ACCIDENT.

See pleas, *post*, "Negligence," 670, and generally, *ante*, "Negligence," p. 564.

ACCORD AND SATISFACTION.

Plea of Accord and Satisfaction. (*d*)

That he delivered to the plaintiff, and the plaintiff accepted and received from the defendant, certain goods [*or* "paid to the plaintiff, who then received from the defendant £——,"] in full satisfaction and discharge of the grievances in the declaration mentioned, and of all the said causes of action in respect thereof.

(*b*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sch. B, 43.

(*c*) "They are," or if in an action against husband and wife for the tort of the latter, that the "defendant A." (the wife), is not guilty.

(*d*) See Obs., *ante*, 288; [Boosey *v.* Wood, 3 H. & C. 484.] See a plea of accord and satisfaction by one of several defendants. Bainbridge *v.* Lax, 9 Q. B. 819; 16 L. J. Q. B. 85. See, also, Thurman *v.* Wilde, 11 Ad. & E. 453; [Hey *v.* Moorhouse, 6 Bing. N. C. 52.]

AGENTS.

Obs. — See "Attorneys," *ante*, 304. Not guilty would deny the breach of duty charged as neglect, misconduct, &c. but not the retainer of the defendant in the character alleged, nor the delivery of goods to him to be sold, &c. in that character. Webb *v.* Page, 6 M. & G. 196; 1 D. & L. 531; R. G. T. T. 1853, *ante*, Obs. In case against an agent for improperly drawing a bill in plaintiff's name, a plea that he drew it for a purpose to which his authority extended was held bad, as amounting to the general issue. Pickwood *v.* Neate, 10 M. & W. 206. See *post*, "Carriers."

Plea denying the Retainer, &c. (*e*)

That the plaintiff did not retain or employ him [*or* "deliver to him the said goods and chattels or any part thereof, for the purpose or upon the terms," *as the case may be*] as alleged.

ANCIENT LIGHTS. (*f*)

Obs. — Not guilty denies the mere fact of obstruction, admitting the plaintiff's possession of the house, and that he was entitled to the right to the enjoyment of the light. Frankum *v.* Lord Falmouth, 2 Ad. & E. 452. See R. G. T. T. r. 16, 1853. The right to an ancient light, since the passing of 2 & 3 W. 4, c. 71, s. 3, depends upon that statute, and not on any presumption of a grant or fiction of a license having been obtained from the adjoining proprietor. Tapling *v.* Jones, 84 L. J. C. P. 342; L. R. 1 H. L. 260.

1. *Denial that Plaintiff was possessed of the House.* (*g*)

That the plaintiff was not possessed of the said messuage as alleged.

2. *Denial of the alleged Right to the Light, &c.* (*h*)

That there were not of right any or either of the said windows through which the light or air ought to have entered as alleged.

3. *Plea justifying Obstruction under an Act of Parliament.*

Turner *v.* Sheffield Ry. Co. 10 M. & W. 425.

(*e*) See form by a broker, Turpin *v.* Bilton, 5 M. & G. 460.

(*f*) See forms of declaration and notes, *ante*, 479. Effect of not guilty. *Ante*, 635.

(*g*) This plea would be proper where the action is incorrectly brought by a landlord upon his possession, instead of charging an injury to his *reversion*; see *ante*, 594, form 1; the house having been in the occupation or holding of a tenant when the grievance existed. The next form is proper where the exclusive right to the light is denied.

(*h*) This plea puts the plaintiff on proof of his right by twenty years' uninterrupted enjoyment, &c. See 2 & 3 W. 4, c. 71, s. 3; *ante*, Obs. 479; or by grant. It would seem to be the proper form where the defendant contends that the right has been lost, by the mode of the enjoyment of the light having been essentially altered by the plaintiff himself to defendant's prejudice, &c. See Garritt *v.* Sharp, 5 Ad. & E. 325. See another form (with a special inducement), and law, Flight *v.* Thomas, 11 Ad. & E. 690, and another, though *semble*, a *double* traverse, Garritt *v.* Sharp, *ubi supra*. A special plea of mere non-user would be bad. See Manning *v.* Wasdale, 5 Ad. & E. 758. The statute 2 & 3 W. 4, which sanctions the general form of claiming the right to light in a declaration for obstructing it (see *ante*, 479, 480, Obs.), provides that "if the general allegation be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in *evidence to sustain or rebut such* allegation." See a form justifying obstructing ancient lights under a railway act, Turner *v.* Sheffield & Rotherham Ry. Co. 10 M. & W. 426.

4. *Plea on Equitable Grounds that the Plaintiff acquiesced in the Building causing the Obstruction.*

Davies *v.* Marshall, 10 C. B. N. S. 692; 31 L. J. C. P. 61. (*i*)

[5. *Plea justifying an Entry on the Plaintiff's Land to remove an Obstruction to the Defendant's Ancient Lights.*

That at the time of the alleged trespasses the defendant was possessed of an ancient dwelling-house adjoining the said close of the plaintiff, and by reason thereof was entitled to have the light and air enter into the said dwelling-house through a certain ancient window therein; and because the said building in the said close wrongfully obstructed the light and air, and prevented the same from entering into the said dwelling-house through the said window, the defendant entered the said close of the plaintiff and pulled down the said building in order to remove the said obstruction, doing no more than was necessary for that purpose, which are the alleged trespasses.

A like plea. Thompson *v.* Eastwood, 8 Ex. 69.]

ANIMALS. See "Mischievous Animals," *post.*

ASSAULT. See *post*, "Trespass to the Person."

ATTORNEYS.

See *ante*, "Agents," as to the effect of not guilty, and "Attorneys," *ante*, Pleas in Contract, p. 304.

AVOWRY. See *post*, "Replevin."

BAILEES.

Obs. Effect of not guilty, *ante*, "Agents," and Pleas in Contract, *ante*, 311. The bailment if denied must be specially traversed, as *that the plaintiff did not let to hire, &c. to the defendant.* See *post*, "Carrier."

BANK OF ENGLAND AND BANKERS.

Obs. See pleas in the forms referred to, *ante*, 486, particularly, Coles *v.* Bank of England, 10 Ad. & E. 437; and see Pickwood *v.* Neate, 10 M. & W. 206. The plea of not guilty would merely deny the default or breach of duty, and would admit the inducement of plaintiff's *title* or right. See form of plea by bankers sued for not paying a check of their customer. Whittaker *v.* Bank of England, 6 C. & P. 700, 702.

(*i*) See replication thereto.

BOOKING OFFICE KEEPER. See *ante*, 486.

CARELESSNESS. See "Negligence," *post.*

CARRIAGES, COLLISION OF. *Post*, "Negligence."

CARRIERS.

Obs. — See generally, *ante*. 94 and 355.

An example is given, R. G. T. T. r. 16, 1853. "In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage but not of the receipt of the goods by the defendant as carrier for hire, or of the purpose for which they were received."

Of the effect of *not guilty*. Where the defence is founded upon the provisions of the carriers' act, 1 W. 4 c. 68, cited, *ante*, 94, requiring that the value of goods of a certain description should be declared, &c. there should be a special plea accordingly. Syms *v.* Chaplin, 5 Ad. & E. 634. See Form 5, *ante*, 378, and another form in contract, where the goods were delivered to a servant of the defendant, not at a receiving house. Syms *v.* Chaplin. See Boyce *v.* Chapman, 2 Bing. N. C. 222. These forms will equally apply in *case*. See a plea of a contract (not within the carriers' act) limited by previous notice. Wylde *v.* Pickford, 8 M. & W. 443. Plea by a carrier (charged as a wharfinger) that the goods were destroyed by an accidental fire. Bourne *v.* Gatliffe, 7 M. & G. 850. Money may be paid into court by a carrier sued for the loss of or injury to goods. See "Payment," *post.* The replications suggested, *ante*, 357, would in general be applicable to pleas founded on the carriers' act. Where there has been an arrangement between the bailor and a sub-carrier without notice to the carrier, the carrier was held not liable for the carelessness of the sub-carrier in not carrying out the arrangement. Butterworth *v.* Brownlow, 34 L. J. C. P. 266; 19 C. B. N. S. 409.

1. *Plea by a Carrier denying the Receipt by him of the Goods.* (*k*)

That the plaintiff did not deliver to him, nor did he receive the said goods and chattels from the plaintiff, or any of them for the purpose alleged.

2. *Plea that the Defendant was not a Common Carrier.*

That he was not a common carrier [of goods, *or* of passengers and their luggage] as alleged.

3. *Plea that the Plaintiff did not pay the Carriage.* (*l*)

That the plaintiff did not pay, nor was he ready and willing to pay to the defendant his reasonable charge for the carriage and delivery of the said goods.

(*k*) See forms, &c. Palmer *v.* Grand Junction Ry. Co. 4 M. & W. 750; Davey *v.* Mason, 1 C. & Marsh. 46; *supra*, Obs.; form of plea by ship-owner, Major *v.* White, 7 C. & P. 42; Quiggin *v.* Duff, 1 M. & W. 174. What is a sufficient delivery, or is a receiving house of a carrier. Sims *v.* Chaplin, 5 Ad. & E. 534; *ante*, 99, and notes. The above plea puts the plaintiff on proof of a delivery to the carrier or his servant for the purpose alleged.

(*l*) See a plea of tender of the goods to and refusal to pay the carriage by the plaintiff. Crouch *v.* The Great Western Ry. Co. 26 L. J. Ex. 418; [2 H. & N. 491.] Plea to an action against a company for refusing to receive and carry a horse, that the sender declared the value of the horse to be over £50, and that the company demanded an increased fare, under 17 & 18 Vict. c. 31, s. 7, which he refused to pay; and right of company to make such demand. Robinson *v.* South Western Ry. Co. 34 L. J. C. P. 234; [19 C. B. N. S. 51.]

4. *Plea by a Carrier, sued on his Common Law Liability, that the Goods (Oil) were lost by being put in an Insecure Cask.* (*m*)

As to the not safely and securely delivering the said hogshead of oil for the plaintiff, the defendants say that at the time the said oil was delivered to them as aforesaid the same was contained in a cask, which was then bad and insufficient, and not properly secured and coopered, without any default on the part of the defendants, for which reason, and not otherwise, the said cask or hogshead afterwards, and after the defendants had conveyed the same to ——, and before the defendants could safely and securely deliver the said oil there for the plaintiff as aforesaid, broke, burst, and gave way, and the said oil therein then escaped from the said cask or hogshead, and was wholly wasted and lost without the defendants' default.

5. *Plea by a Carrier by Water, that the Goods lost were Silver, within the* 26 *Geo.* 3. *c.* 86, *s.* 3, *that their Value was not declared in the Bill of Lading, and that they were stolen without Defendant's Default.* (*n*)

Gibbs *v.* Potter, 10 M. & W. 70.

6. *Plea of Notice and Stoppage in Transitu by an Unpaid Consignor.* (*o*)

Jones *v.* Jones, 8 M. & W. 431.

COGNIZANCE. See *post*, "Replevin."

COLLISION. See "Negligence," *post*, 670.

COMMON OF PASTURE.

OBS. — "Not Guilty" would deny the mere fact of obstruction, and not deny the plaintiff's possession of the tenements in respect of which he claims common of pasture, or the existence or validity of such claim.

The prescription statute, 2 & 3 W. 4 (478, 479), which sanctions the general form of alleging a right of common in case for disturbing it, provides that, "If the general allegation be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to *sustain* or *rebut* such allegation." Where the obstruction in fact is admitted, but *justified* or excused on account of a license, &c. there

(*m*) This admits that the defendant did not *safely or securely* deliver the goods, and excuses the non-delivery by reason of the consignor's neglect. In Webb *v.* Page, 6 M. & G. 196; 1 D. & L. 531, it was held that under the general issue the defendant could not show that the loss of the goods arose from the plaintiff's own negligence in packing them, or from the plaintiff having misrepresented their weight so as to induce the defendant to employ an insufficient van. See, also, Walker *v.* Jackson, 10 M. & W. 161; Ohrloff *v.* Briscall, L. R. 1 C. P. 231; 35 L. J. C. P. 63; Czech *v.* The General Steam Navigation Co. 37 L. J. C. P. 3; L. R. 3 C. P. 14.

(*n*) See, now, 17 & 18 Vict. c. 104. s. 503, and Williams *v.* The African Steam Ship Co. 1 H. & N. 300; 26 L. J. Ex. 69; De Rothschild *v.* Royal Mail Steam Packet Co. 7 Ex. 734; 21 L. J. Ex. 273; and *ante*, 360.

(*o*) See, also, *ante*, 359, 360.

OBS. must be a specia. plea accordingly. As to encroachments on a common by license, see Doe *v.* Wilson, 11 East, 56; Harvey *v.* Reynolds, 12 Price, 724; 1 C. & P. 141; Doe *v.* Wilkinson, 3 B. & C. 413; Doe *v.* Clark, 8 B. & C. 717. In some cases a plea of license to obstruct (see *post*, "License") may be judicious. Plea that defendant had a right of common for cattle levant and couchant, justifying under it. Bowen *v.* Jenkin, 6 Ad. & E. 911. A surcharge should be new assigned. Ib. Plea of *approvement* of a common by the owner. Patrick *v.* Stubbs, 9 M. & W. 831. And see *post*, "Trespass," and *ante*, "Common of Pasture," 496.

1. *Denial of Plaintiff's Right of Common.*

That the plaintiff was not of right entitled to such common of pasture as alleged.

2. *Denial of Plaintiff's Possession of the Land.* (*p*)

That the plaintiff was not possessed of the said land as alleged.

3. *Plea of Right of Common of Pasture.* (*q*)

That the defendant at the time of the alleged trespass was possessed of land, the occupiers whereof for thirty (*r*) years before this suit enjoyed as of right, (*s*) and without interruption, common of pasture over the said land of the plaintiff, for all their cattle, levant and couchant, upon the said land of the defendant, at all times of the year as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common.

(*p*) Of course the traverse will be in the words of the declaration, negativing the allegation therein. See pleas to a declaration by a member of a municipal corporation, Beardsworth *v.* Torkington, 1 Q. B. 784; Parry *v.* Thomas, 5 Ex. 37; 19 L. J. Ex. 198.

(*q*) This form is given by the common law procedure act, 1852 (15 & 16 Vict. c. 76), sch. B, 47. This plea is founded on the prescription act, 2 & 3 W. 4, c. 71, the provisions of which, in relation to rights of common, have already been cited. *Ante*, Obs. 496. The form of plea is sanctioned by the 5th section of that act, which, with the decisions thereon, see *post*, tit. "Ways." See a form for a certain number of cattle, Nichols *v.* Chapman, 29 L. J. Ex. 461. If the defendant have not enjoyed the right of common during any portion of the thirty years next before suit, add a plea of immemorial right; Richards *v.* Fry, 7 Ad. & E. 698; Ward *v.* Robins, 15 M. & W. 240; but such immemorial right cannot be claimed to exist in occupiers. Davies *v.* Williams, 20 L. J. Q. B. 331. See a form, Jones *v.* Richard, 5 Ad. & E. 414, 415. Where a plea claimed an immemorial right of herbage for the defendant and his ancestors, it was held that this was not proved by proving a grant eighty-one years ago from one who then had the right. Welcome *v.* Upton, 5 M. & W. 402; 7 M. & W. 536; 7 Dowl. 475. See Bailey *v.* Stevens, 31 L. J. C. P. 226. As to rights of common in general, and the remedy by action for disturbing them, see *ante*, 496, "Common of Pasture," Obs.; Bowen *v.* Jenkin, 6 Ad. & E. 911. See the forms of pleas in trespass of prescriptive rights of common, prescribing in a *que estate*, &c.; Arlett *v.* Ellis, 6 B. & C. 672; 9 B. & C. 671; Tapley *v.* Wainwright, 5 B. & Ad. 395; and see various pleadings and points decided thereon. Ib. Plea of common *per cause de vicinage*. Clarke *v.* Tucker, 10 Q. B. 604; 15 L. J. Q. B. 19; Jones *v.* Robin, 10 Q. B. 581; 15 L. J. Q. B. 15. See plea of common, by a burgess, under a grant to a corporation. Parry *v.* Thomas, 5 Ex. 37; 19 L. J. Ex. 198. The extinction of a right of common by the general inclosure act should be specially pleaded. Ib. A plea claiming a right to turn cattle on the *locus in quo*, not saying for what purpose, is bad. Bailey *v.* Appleyard, 8 Ad. & E. 161.

(*r*) Add another plea stating sixty years if there be evidence to support it. See Parker *v.* Mitchell, 11 Ad. & E. 788; Lowe *v.* Carpenter, 6 Ex. 825; 20 L. J. Ex. 374.

(*s*) These words are essential, and the omission would not be cured by verdict. Holford *v.* Hawkinson, 5 Q. B. 584; Bright *v.* Walker, 1 Cr., M. & R. 211.

4. *Plea of a Right to dig and carry away Marl or Sand.* (*t*)

Glover *v.* Dixon, [9 Ex. 158.]

5. *Plea justifying pulling down a Building erected on a Common.* (*u*)

Davies *v.* Williams, 20 L. J. Q. B. 330.

6. *Replication denying the Right of Common.* (*x*)

That the occupier of the said land did not for thirty [*or* sixty] years before this suit, enjoy as of right and without interruption the alleged right of common.

7. *Replication that the Cattle were not the Defendant's Commonable Cattle.* (*y*)

Bowen *v.* Jenkins, 6 Ad. & E. 911.

CONSTABLES. See "Trespass to the Person."

CONVERSION OF GOODS. See *post*, "Trover."

COPYHOLDER.

Plea by a Copyholder justifying taking Coals under a Custom.

Anglesea *v.* Atherton, 10 M. & W. 218.

COPYRIGHT. (*z*)

1. *Plea denying the Copyright.*

That the plaintiff was not the proprietor of the said copyright as alleged.

(*t*) Other forms, to dig minerals, Paddock *v.* Forrester, 3 M. & G. 903; Hoyle *v.* Coupe, 9 M. & W. 450; Clayton *v.* Corby, 3 Q. B. 813. Pleas, stones; Peppin *v.* Shakespeare, 6 T. R. 748; coal; Anglesea *v.* Atherton, 10 M. & W. 281. See Wilkinson *v.* Pund, 11 M. & W. 33. Plea of common of turbary; Grant *v.* Gunner, 1 Taunt. 435; Wilson *v.* Willes, 7 East, 121; right of common under inclosure act. Bailiffs &c. of Godmanchester *v.* Phillips, 1 Ad. & E. 554.

(*u*) A commoner may pull down a building wrongfully erected upon the common, and which prevents him exercising his rights thereon, provided he use no unnecessary violence.

(*x*) A similar form is given by the common law procedure act, 1852 (15 & 16 Vict. c. 76), sch. B, 54. Peter *v.* Daniel, 5 C. B. 568; 17 L. J. C. P. 177. Under 2 & 3 W. 4, c. 71, ss. 5 and 7, a life estate should be specially replied. Pye *v.* Mumford, 11 Q. B. 666; 17 L. J. Q. B. 138. Form, &c. Cooke *v.* Blake, 1 Ex. 220; 17 L. J. Ex. 371. See *post*, "Way."

(*y*) Under this issue the plaintiff cannot insist on a surcharge. Ib. That the right of common has been extinguished by proceedings under the general inclosure act must be replied specially. Parry *v.* Thomas, 5 Ex. 37; 19 L. J. Ex. 198. Replication to a plea setting up a prescriptive right of common, and justifying entry on wrongfully inclosed and separated lands, that they had been inclosed and separated more than twenty years. Tapley *v.* Wainwright, 5 B. & Ad. 395. See, also, Hawke *v.* Bacon, 2 Taunt. 156; Richards *v.* Peake, 2 B. & C. 918.

(*z*) That the book was not first published

2. *That the Title of the Book was an Attempt to impose it on the Public as the Production of a Celebrated Author, who had not written it.*

Wright *v.* Tallis, 1 C. B. 893.

Notice to be given with the Pleas in an Action for pirating a Copyright in pursuance of 5 *&* 6 *Vict. c.* 45, *s.* 16. (*a*)

In the ——

A. B., Plaintiff,
C. D., Defendant.

Take notice that the defendant means to rely on the trial of this action upon the following objections, viz.: — 1. That he is not guilty of the grievance laid to his charge; 2. [*describe the several points to be relied on in separate paragraphs according to the fact*]. (*b*)

Dated ——

in England. Chappell *v.* Purday, 12 M. & W. 303; 1 D. & L. 458; Boosey *v.* Purday, 5 Ex. 145; 18 L. J. Ex. 378. That the book was printed, published, and sold without the printer's name, contrary to 2 & 3 Vict. c. 12. Chappell *v.* Davidson, 18 C. B. 194; 25 L. J. C. P. 225. Declaration, law, &c. *ante*, 368, 498. Not guilty would deny only the mere fact of the *infringement* of the copyright; but it would not deny that the book was the subject of copyright property; Millingen *v.* Picken, 1 C. B. 799; either on the ground of its immoral or irreligious character, or in the case of copyright in designs (*ante*, 498), that it was not the subject of a certificate of registration under the statute. Ib. Other pleas similar to the above would be allowed, denying, 1. That the plaintiff was the proprietor when the book was printed; 2. That there was any subsisting copyright in the book; and 3, stating that the book was not printed in the British dominions. Chappell *v.* Purday, 12 M. & W. 305; S. C. on argument as to the last plea, 14 M. & W. 303. Plea to declaration for pirating a print, that the date of the first publication was not engraved thereon. Brookes *v.* Cock, 3 Ad. & E. 138. A person selling a copy of a print from a spurious plate is liable to an action at the suit of the proprietor under the statute 17 Geo. 3, c. 57, although he sells it innocently, not having any knowledge of the piracy. Gambart *v.* Sumner, 29 L. J. Ex. 98. No copyright of a book is acquired under 5 & 6 Vict. c. 45, by the registration before actual publication. Correspondent &c. Company *v.* Saunders, 11 Jur. N. S. 540. As to rights of compiler of a directory, see Kelly *v.* Morris, L. R. 1 Eq. 697; 35 L. J. Ch. 423.

(*a*) By 5 & 6 Vict. c. 45, s. 16, it is enacted, "That after the passing of this act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of defence be, that the plaintiff in such action was not the author or first publisher of the book, in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book and the time when and the place where such book was first published, otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with title, time, and place specified in such notice."

(*b*) See Leader *v.* Purday, 7 C. B. 4; Boosey *v.* Davidson, 4 D. & L. 147; Boosey *v.* Purday, 10 Jur. 1038; Sweet *v.* Benning, 16 C. B. 459.

COUNTY COURTS.

See "Trespass to the Person," and "Notice of Action."

CUSTOM.

OBS. — "It is an acknowledged principle that to give validity to a custom, which has been well described to be an usage, which obtains the force of law, and is, in truth, the binding law, within a particular district, or at a particular place, of the persons or things which it concerns (see Le Case de Tanistry, Davy's Reports, 31–32), it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption." Per Tindal C. J. Tyson *v.* Smith, 9 Ad. & E. 421. Thus, a right claimed by the inhabitants of a township to enter upon the land of a private person, and to take water from a well for domestic purposes, is a good custom. Race *v.* Ward, 4 El. & Bl. 702; 24 L. J. Q. B. 153. So, also, a custom for all the freemen and citizens of a neighboring city to hold horse-races over the close of M. on Ascension Day in every year, is good, and in pleading such a custom, it being claimed for a day certain, it need not be alleged that the day is a seasonable day. Mounsey *v.* Ismay, 32 L. J. Ex. 94. See Blewitt *v.* Jenkins, 12 C. B. N. S. 16; The Marquis of Salisbury *v.* Gladstone, 6 H. & N. 129; 30 L. J. Ex. 3. See, also, as to void customs, Blackett *v.* Bradley, 1 B. & S. 140; 31 L. J. Q. B. 65, and the cases there cited; Hilton *v.* Lord Granville, 5 Q. B. 701; 13 L. J. Q. B. 193; Christchurch *v.* Buckingham, 16 C. B. N. S. 391. [As to custom for all the inhabitants in one place to exercise rights, as to train horses, at all seasonable times in another, see Sowerby *v.* Colman, L. R. 2 Ex. 96.] As to custom in a manor to dig and get clay, Salisbury *v.* Gladstone, 9 H. L. Cas. 692; 34 L. J. C. P. 222. See, also, Clayton *v.* Corby, 2 Q. B. 813; and see Elwood *v.* Bullock, 6 Q. B. 383, cited *post*, "Way;" and see a form in replevin, justifying taking cattle under a custom of the Forest of Dartmore, to cause drifts to be made of cattle depasturing in the forest, in order to take them to a pound where it might be ascertained whether they were estrays, &c. Mortimer *v.* Moore, 15 L. J. Q. B. 118.

Plea justifying under a Custom to erect Stalls on a Common at a Fair.

Tyson *v.* Smith, 6 A. & E. 745; in Error, 9 Ad. & E. 406.

DAMAGE FEASANT. See *post*, 646, 647, "Distress," "Replevin."

DEFAMATION. See *post*, "Libel and Slander."

DETINUE. See *post*, "Trover."

DISTRESSES.

OBS. — By 11 Geo. 2, c. 19, s. 21, landlords and bailiffs, when sued for making a distress, or seizure or sale thereon, may plead the *general issue* and give the special matter in evidence. See *ante*, 286, Obs. This does not extend to a distress made *off* the premises upon goods fraudulently removed. Vaughan *v.* Davis, 1 Esp. R. 257; Furneaux *v.* Fotherley, 4 Camp. 136; Postman *v.* Harrell, 6 C. & P. 225. But it renders the plea of not guilty "by statute"

Obs. (*ante*, 286), sufficient in actions on the case for irregularities or excesses committed in making or conducting a distress or sale of goods seized upon the premises demised, and that plea puts in issue the tenancy and the ownership of the goods. Williams *v.* Jones, 11 Ad. & E. 643. A distraining bailiff, who is turned out, and afterwards forcibly reënters, may give those facts in evidence under that plea. Eagleton *v.* Gutteridge, 11 M. & W. 565; 2 Dowl. N. S. 1056. The tenancy may, however, be disputed by a separate plea. Yates *v.* Tearle, 6 Q. B. 282; and to an action against a landlord for not giving a copy of the charges, he may plead that he did not personally interfere with the distress. Hart *v.* Leach, 1 M. & W. 560. Plea that the whole rent distrained for was due. Gambrell *v.* Earl of Falmouth, 4 Ad. & E. 73. Where there is a count in trover, upon which the validity of the distress *ab initio* is disputed, the plea of not guilty by statute will be sufficient by virtue of 11 Geo. 2, but a special plea may sometimes be judicious. The defendant will not in general be allowed to plead not guilty by statute, and also justifications which exist either at common law or under the statute. Ross *v.* Clifton, 11 Ad. & E. 640; *ante*, 286, 287, Obs. It will be proper to pay money into court upon any count or part of a count for an excess or irregularity really committed.

By s. 20 of the above act, "no tenant or tenants, lessee or lessees, shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of sufficient amends hath been made by the party or parties distraining his or her or their agent or agents before such action brought." This tender may be shown under the general issue.

But if all the trespasses in the declaration cannot be justified under a distress for rent, then it may be necessary to plead a special justification. See forms, Twigg *v.* Potts, 2 Cr., M. & R. 98; Hooker *v.* Nye, 1 Cr., M. & R. 258; Neale *v.* Mackenzie, 2 Cr., M. & R. 84; in error, 1 M. & W. 747; Ladd *v.* Thomas, 12 Ad. & E. 117. See Welsh *v.* Rose, 6 Bing. 638; 4 M. & P. 484; Whitworth *v.* Smith, 5 C. & P. 250. Form of plea and replication where the declaration charges the removal of fixtures, Twigg *v.* Potts, *supra*. The tenancy is a material and traversable fact. Norman *v.* Whitcombe, 2 M. & W. 357; Bowler *v.* Nicholson, 12 Ad. & E. 341. The allegation that the tenancy continued up to the time of the distress is material. Drewe *v.* Avery, 13 M. & W. 399; 2 D. & L. 371.

Where the defendant pleads specially, the plaintiff, instead of joining issue, may reply denying the tenancy, see Twigg *v.* Potts, 1 Cr., M. & R. 89; or he may reply payment of the rent; or, it seems, that at the time when, &c. no part was in arrear; or (as regards the trespass to the goods) that they were not *upon* the premises when distrained, or were *privileged* goods; see Swire *v.* Leach, 33 L. J. C. P. 150; 18 C. B. N. S. 479; *post*, "Replevin;" and *infra*, form 3; or, that the plaintiff had no reversionary interest; or a *tender* of the rent; or an *eviction* by the defendant before the rent became due; see form and law, Mackenzie *v.* Neale, 1 M. & W. 747; or that defendant had taken a sufficient previous distress for the same rent, and had afterwards abandoned it; form, &c. Dawson *v.* Cropp, 3 D. & L. 225; 1 C. B. 961; or may new assign; *post*, 671.

1. *By Statute* 11 *Geo.* 2, *c.* 19, *s.* 21, *Public Act.*

Not guilty, *ante*, 288.

2. *Plea justifying under a Distress for Rent due for other Premises, the Plaintiff having fraudulently removed his Goods to the locus in quo, to prevent a Distress.* (*c*)

That before the said alleged trespasses the defendant demised to A. B. a

(c) This must be specially pleaded. See forms, Fletcher *v.* Mariller, 9 Ad. & E. 453; Bowler *v.* Nicholson, 12 Ad. & E. 341. See Ashmore *v.* Hardy, 7 C. & P. 501; Cartwright *v.* Smith, 1 Mo. & Rob. 284; 2 Saund. 284 *a*; Rich *v.* Woolley, 7 B. 651; and Norman *v.* Wescombe, 2 M. & W. 349; Anderson *v.* The Midland Ry. Co. 30 L. J. Q. B. 94. Replication, that the removal was before the rent was due (Rand *v.* Vaughan,

certain messuage at the yearly rent of [£100], payable [half-yearly], and that [£50] of the said rent, for a [half year] of the said tenancy, was then due and in arrear from the said A. B. to the defendant; and whilst the said rent was due and in arrear from A. B. he fraudulently and clandestinely conveyed away and carried off certain of his goods from the said messuage, to prevent the defendant from distraining the same for the arrears of rent aforesaid, and placed the same in the said premises of the plaintiff; and thereupon the defendant, whilst the said rent was due, and within the space of thirty days next ensuing such conveying away and carrying off the said goods, entered into the said premises of the plaintiff, and took and seized the said goods there, as a distress for the said arrears of rent.

3. *Plea of Tender of Amends to a Declaration for an Irregular Distress.* (*d*)

That after the committing of the alleged grievances, and before this action, the defendant tendered and offered to pay to the plaintiff £——, as and being sufficient amends for the said alleged grievances, which the plaintiff refused to receive.

4. *To a Plea justifying taking Goods under a Distress for Rent; Replication that they were privileged, as being on the Premises in the Way of Trade.* (*e*)

That before and at the time of the making of the said distress the said G. D. was, and carried on the trade and business of, a [*coach painter*] upon the said workshops and premises in the said plea mentioned, and being such [*coach painter*], the plaintiff sent to the said G. D. the said carriage, and the said G. D. then accepted the same, for the purpose of the same being painted for the plaintiff by the said G. D., in the way of his said trade and business, for reward to the said G. D. in that behalf, in and upon his said workshops and premises, and it remained thereon in the way of his said trade and business and not otherwise, until the defendants, before the said carriage was painted, and before a reasonable time for that purpose had elapsed, seized and carried away the said carriage and converted and disposed of the same to their own use, as in the declaration alleged.

1 Bing. N. C. 767; Watts *v.* Thomas, 1 Jur. 919), in which case the landlord cannot distrain. See Dibble *v.* Bowater, 2 El. & Bl. 564; 22 L. J. Q. B. 396. Form of plea, replication, and new assignment, where doors were broken open under a justice's warrant, under 11 Geo. 2, c. 19, s. 7, which gave landlords power to break open houses, &c. in which goods are locked up and fraudulently secured, Norman *v.* Wescombe, 2 M. & W. 349. See, also, Rich *v.* Wolley, 7 Bing. 651.

(*d*) By 11 Geo. 2, c. 19, s. 20, the tenant shall not recover in case for an irregular distress, where there was a right to distrain, if tender of sufficient amends have been made before action brought. In Williams *v.* Price, 3 B. & Ad. 695, where in trespass the defendant pleaded that he tendered a certain sum, being sufficient amends, it was held that the plaintiff could reply that the defendant did not tender the sum named, or that the sum was insufficient, and not that he did not tender sufficient amends. See per Tindal C. J. 3 Bing. N. C. 418; see *post*, "Tender of Amends," and *ante*, Obs.

(*e*) See a similar form in the case of a commission agent, Findon *v.* M'Laren, 6 Q. B. 891. Law, &c. Gibson *v.* Ireson, 3 Q. B. 39; and see the cases referred to, *post*, "Replevin."

5. *Plea to a Count for not leaving the Overplus with the Sheriff, that there was no Overplus.*

See form, Lyon *v.* Tomkins, 1 M. & W. 603; though not guilty "by statute" would suffice. If the overplus were paid to the plaintiff, plead accord and satisfaction, *ante*, 636. If there was an overplus not paid before action, it should be paid into court.

6. *Justification for seizing, &c. Cattle under a Distress Damage Feasant.* (*f*)

That at the time of the alleged trespasses he was lawfully possessed of a certain close [called ——], situate in the county aforesaid, and because the said cattle were wrongfully in the said close eating the grass there, and doing damage there to the defendant, the defendant seized and took the said cattle in the said close as a distress for the said damage, and impounded them, being the trespasses in the declaration alleged.

7. *The like by a Pound-keeper, stating the Delivery of the Cattle to him.*

Mason *v.* Newland, 9 C. & P. 575.

8. *Justification by a Lord of a Manor for seizing Cattle because they were trespassing on the Common; and Replication, badness of the Pound.*

Wilder *v.* Speer, 8 Ad. & E. 548.

OBS. — A conversion by the defendant after the distress must be specially replied. Dye *v.* Featherdale, 3 Wils. 20; and see 4 T. R. 364; 1 Stark. 173.

9. *Replication to Pleas Damage Feasant.*

OBS. — The possession of the close may be traversed. Bond *v.* Downton, 2 Ad. & E. 26. Excess should be specially replied. An irregularity in the distress makes the party distraining a trespasser *ab initio*, and a replication of the excess is an answer to the plea altogether. Six Carpenters' case, 8 Co. 1466; 1 Smith L. Cas. Replication that the close in which the cattle were seized adjoined a highway, and that they were wrongfully driven from the highway

(*f*) A distress damage feasant can only be taken while the animals were actually doing damage, or if it be necessary to detain them to prevent their doing further damage. Worner *v.* Biggs, 2 C. &. K. 31. See forms, Dye *v.* Leatherdale, 3 Wils. 20; Singleton *v.* Williamson, 31 L. J. Ex. 287; 1 Saund. 221, note (1); and see a similar form in trover, Weeding *v.* Aldritch, 9 Ad. & E. 861. For impounding a railway engine. Ambergate &c. Ry. Co. *v.* Midland Ry. Co. 23 L. J. Q. B. 17. See a plea under 5 & 6 W. 4, c. 59 (now repealed. See 12 & 13 Vict. c. 92; and 17 & 18 Vict. c. 60, s. 1), justifying selling the animal to pay for having supplied it with food. Layton *v.* Hurry, 8 Q. B. 811; 15 L. J. Q. B. 214. Sometimes it may be necessary to except some of the trespasses not justifiable. As to justifying or omitting to plead to an alleged conversion, see Taylor *v.* Cole, 1 H. Bl. 555, in error; in K. B. 3 T. R. 292. It seems not necessary to name or particularly describe the close. See Bond *v.* Downton, 2 Ad. & E. 26. In that case the close was named, and plaintiff replied that the defendant was not possessed "of the close in the plea mentioned, wherein the said pigs were alleged to be eating;" and it was held the plaintiff was not only bound to prove his possession of a close of the name stated, but that such was the close in which the cattle were eating, &c. As to impounding under certain circumstances, and recovering expenses, and power of sale, see 17 & 18 Vict. c. 60; Layton *v.* Hurry, 8 Q. B. 811; 15 L. J. Q. B. 244.

Obs. In an action for an escape on *final* process, the defendant may plead the four last pleas, and also deny the judgment, which he may impeach, if the original debtor could have done so. Lane *v.* Chapman, 11 Ad. & E. 966.

The protection which a certificate of registration of a deed under the bankruptcy act, 1861, affords to a sheriff who has discharged a debtor, does not extend to process issued in respect of debts accruing due after the date of registration of the deed. Williams *v.* Rose, L. R. 3 Ex. 5; Dignam *v.* Bailey, W. N. 1868, Q. B. 18; [37 L. J. Q. B. 71.]

1. *Plea to an Action against the Sheriff for an Escape, or for not taking a Person on Mesne Process, that he was not indebted to Plaintiff.* (*g*)

That the said E. F. was not at the time of the issuing of the said writ of *capias* indebted to the plaintiff in the said sum of £——, as alleged.

2. *Plea to an Action against the Sheriff for an escape on Mesne Process, that he took a Bail Bond which he assigned to the Plaintiff.*

See Holden *v.* Raphael, 4 Ad. & E. 228; Mendez *v.* Bridges, 5 Taunt. 325.

3. *Plea that the Escape was by the Fraud, &c. of the Assignee of the Judgment.*

Hiscocks *v.* Jones, 1 M. & Mal. 260; and see Merry *v.* Chapman, 10 Ad. & E. 516.

4. *Plea that the Escape was without the Knowledge of the Defendant, and that the Debtor voluntarily returned into Custody.*

Form held bad for not averring that the defendant was ignorant of where the debtor was during any period of his absence. Davis *v.* Chapman, 5 Bing. N. C. 453; and see 2 M. & G. 921; 9 Dowl. 645.

5. *Plea showing that the Custody of the Prisoner was not legal.*

Constant *v.* Chapman, 2 Q. B. 771.

6. *Plea that the Debtor was discharged by a Bankrupt Commissioner under* 5 *&* 6 *Vict. c.* 116, *and* 7 *&* 8 *Vict. c.* 96.

Thomas *v.* Hudson, 14 M. & W. 353.

Obs. — The attorney of the execution creditor has no authority to authorize the discharge. Savory *v.* Chapman, 11 Ad. & E. 829.

7. *Plea that the Debtor produced a Certificate of Registration of a Deed under Bankruptcy Act,* 1861, *whereupon Defendant discharged him, and Replication.*

Williams *v.* Rose, 37 L. J. Ex. 12; Lloyd *v.* Harrison, 34 L. J. Q. B. 97;

(*g*) See Baker *v.* Fenn, 2 Esp. R. 476; Alexander *v.* Macauley, 4 T. R. 611; Rosc. Evid. 6th ed. 610. The admission of the debt by the defendant in the original action before the escape is good evidence against the sheriff. Rogers *v.* Jones, 7 B. & C. 86; Williams *v.* Bridges, 2 Stark. R. 42. The same evidence which would fix the debtor in an action against him for the debt will be sufficient against the sheriff. Sloman *v.* Herne, 2 Esp. R. 695; Gibbon *v.* Coggon, 2 Camp. 188. As to whether the sheriff can reduce his liability by any equities which the defendant would have had against the plaintiff, Evans *v.* Maners, 9 Dowl. 256.

35 Ib. 153; L. R. 1 Q. B. 502; Dignam *v.* Bailey, W. N. 1868, Q. B. 18; [37 L. J. Q. B. 71.]

ESTOPPEL.

Obs. — See *ante*, 379, "Estoppel." A judgment for the lessor of the plaintiff in ejectment is not conclusive of the plaintiff's title, in trespass for the mesne profits, with a plea of not possessed where such judgment is not replied by way of estoppel. Matthew *v.* Osborne, 13 C. B. 919; Doe *v.* Huddart, 2 Cr., M. & R. 316. It is not necessary in the replication to aver notice of the proceedings in ejectment to the defendant, or that a writ of possession was issued or executed. Wilkinson *v.* Kirby, 15 C. B. 430; 23 L. J. C. P. 224. An estoppel may be replied to a plea of *liberum tenementum*. Feversham *v.* Emerson, [11 Ex. 385.] See form of replication, Doe *v.* Wright, 17 Ad. & E. 763.

EXECUTION. See *post*, "Trespass to the Person."

FAIRS. See "Market."

FALSE REPRESENTATION. See "Fraud."

FENCES.

Plea in Trespass for entering Close and with Cattle depasturing, &c. that Defendant's Cattle escaped from his adjoining Land through the Defect of the Fences of Plaintiff's Close, which he ought to have repaired.

[That at the time of the alleged trespasses he was possessed of a close adjoining the said close of the plaintiff, and the plaintiff and all other the tenants and occupiers of the said close of the plaintiff then and at all times of right ought to have maintained and repaired the places between the said close of the defendant and the said close of the plaintiff, so as to prevent cattle lawfully being and depasturing in those closes respectively from escaping out of the one into the other of them through defects of the said fences; and because the said fences at the time of the alleged trespasses were ruinous and in decay for want of repair thereof, the said cattle then lawfully being and depasturing in the said close of the defendant escaped out of the said close of the defendant into the said close of the plaintiff through the defects of the said fences between the said closes, and were in the said close of the plaintiff, which are the alleged trespasses.]

If the plaintiff's case be that defendant *turned* the cattle on the *locus in quo*, or that they were wrongfully put and *left* in a highway adjoining, &c. see 2 H. Bl. 527; 2 Saund. 284; or were unruly, &c. the replication should be special. See another form, Carruthers *v.* Hollis, 8 M. & W. 114. See *ante*, 516.

When the owner or occupier of copyhold inclosure is liable for injuries caused by non-repair of fences. Barber *v.* Whiteley, 34 L. J. Q. B. 212.

FISHERY.

Plea justifying fishing Oysters in a Navigable River.

Mayor of Malden *v.* Woolnett, 12 Ad. & E. 13. See other forms, 3 Chit. Pl. 370, and in the cases referred to in Harr. Index, tit. Fish; and Mayor of Colchester *v.* Brooks, [7 Q. B. 339;] Holford *v.* Bailey, [8 Q. B. 1000;] Mannall *v.* Fisher, 5 C. B. N. S. 856; [Shuttleworth *v.* Le Fleming, 19 C. B. N. S. 687;] *ante*, 517.

FIXTURES. See *post*, "Landlord and Tenant."

FRAUD.

Obs. — In actions for fraudulent warranty, as for deceit on a warranty of a horse, not guilty denies both the fraudulent warranty and also the unsoundness, but not the bargain and sale. Spencer *v.* Dawson, 1 Mood. & R. 552. Where, however, the sale is not alleged as inducement, and is not capable of separation from the misrepresentation and deceit, it would appear that all those facts are denied by not guilty; Mummery *v.* Paul, 1 C. B. 316; 2 D. & L. 582; as in an action for misrepresenting the value of a business sold by assignment of a lease. Ib. See, also, Evans *v.* Collins, 12 L. J. Q. B. 339; 5 Q. B. 805. In any case the *terms* of the misrepresentation would seem to be in issue under that plea. Mash *v.* Denham, 1 Mood. & Rob. 442. In cases where the *scienter* is the gist of the action, it is denied by not guilty. Thomas *v.* Morgan, 2 Cr., M. & R. 496; *post*, "Mischievous Animals." See the declarations, *ante*, 518, &c. In an action for falsely representing a third person to be trustworthy, the defendant cannot plead specially that the representation was not in writing and signed by the defendant according to 9 Geo. 4, c. 14, s. 6. Turnley *v.* M'Gregor, 6 M. & G. 46. See the Observations, *ante*, 394, "Frauds, Statute of." See several pleas in Lyde *v.* Bernard, 1 M. & W. 101; and Langridge *v.* Levy, 2 M. & W. 519; but, *semble*, they all amount to not guilty. A person by his acts causing another to believe that he is the purchaser of goods, may be precluded from disputing that he is not, although his acts were not intended to induce that belief. Cornish *v.* Abingdon, 28 L. J. Ex. 262; [4 H. & N. 549.] As to damage, see Eastwood *v.* Bain, [3 H. & N. 738;] Mullett *v.* Mason, L. R. 1 C. P. 555; 39 L. J. C. P. 299. ["It is now well settled that, in actions for deceit, or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value, if the property had been what it was represented or warranted to be." Gray J. in Morse *v.* Hutchins, 102 Mass. 440; Reggio *v.* Braggiotti, 7 Cush. 166; Stiles *v.* White, 11 Met. 356; Jones *v.* Just, L. R. 3 Q. B. 197; Dingle *v.* Hare, 7 C. B. N. S. 145; Loder *v.* Kekulé, 3 C. B. N. S. 128; Bartlett *v.* Blanchard, 13 Gray, 429; Tuttle *v.* Brown, 4 Gray, 457; Goodwin *v.* Morse, 9 Met. 278; Whitmore *v.* South Boston Iron Co. 2 Allen, 52; Grose *v.* Hennessey, 13 Allen, 389; Brown *v.* Bigelow, 10 Allen, 242; Houghton *v.* Carpenter, 40 Vt. 588; Woodward *v.* Thacher, 21 Vt. 580; Muller *v.* Eno, 4 Kernan, 597; Cary *v.* Gruman, 4 Hill, 625; Sharon *v.* Mosher, 17 Barb. 518; Voorhees *v.* Earl, 2 Hill, 288; Worthy *v.* Patterson, 20 Ala. 172; Sherwood *v.* Sutton, 5 Mason, 1; Moulton *v.* Scruton, 39 Maine, 287; Overbay *v.* Lighty, 27 Ind. 27; Cothers *v.* Keever, 4 Barr, 168; Fisk *v.* Hicks, 31 N. H. 535; Page *v.* Parker, 40 N. H. 47. Where the warranty is fraudulent, the vendor is responsible for all the

Obs. consequences of the plaintiff acting upon the faith of the warranty; thus, where the defendant sold a cow, and fraudulently warranted it to be sound, when he knew it to have an infectious disease, and the plaintiff placed it with other cows, which caught the disease and died, the plaintiff was held entitled to recover as damages the value of all the cows. Mullett *v.* Mason, L. R. 1 C. P. 559. A like case is Bradley *v.* Rea, 14 Allen, 20.]

Plea denging the Bargain and Sale in Case for a False Warranty or Fraudulent Misstatement. (h)

That the plaintiff did not bargain with the defendant to buy of him, nor did the plaintiff buy of the defendant, the said ——, upon the terms and in manner alleged.

GAME. *Post*, "Trespass to Realty," *ante*, 603, "Shooting."

GENERAL ISSUE. *Ante*, 636, "Not Guilty."

HIGHWAY. *Ante*, 527; *post*, "Way."

HOUSES. See "Nuisances," "Reversion."

HUNDRED.

Pleas in an Action against the Hundred for Damage done by Rioters.

Obs. — *Ante*, 527. The defendants might plead denying the riot, the beginning to demolish, &c. the examination of plaintiff before a justice, or his entering into recognizances to prosecute. They might also plead that though plaintiff knew one of the rioters, he did not disclose his name to the justice, or that the damage did not exceed £30. See several of these pleas, Birley *v.* Salford Hundred, 11 M. & W 391.

HUSBAND AND WIFE. *Ante*, 146, 272, and note (*q*), 401, 528.

IMPRISONMENT. *Post*, "Trespass to the Person."

INFANCY.

Obs. — *Ante*, 14, 406. An infant can only appear to defend by guardian. Arch. Pr. *in voc.* If an appearance be entered for an infant in his own name, the court will set it aside, but will require him to undertake to appear by guardian; Leech *v.* Clabburn, 21 L. J. Ex. 37; and that even after judgment if

(*h*) See form, &c. Shepherd *v.* Pybus, 3 M. & G. 870; and another traverse "that defendant did not by warranting the said horse sound, &c. cause and procure plaintiff to agree to sell, &c.;" *sed qu.* as to this latter plea, *ante*, Obs.

Obs. the plaintiff did not know defendant was an infant. James *v.* Aswell, 11 Jur. 562. The petition of an infant of very tender years to sue may be signed by the father. Eades *v.* Booth, 8 Q. B. 718; 3 D. & L. 77. "A special admission of *prochein amy*, or guardian to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified." R. 5, H. T. 1853.

An infant is liable in damages for his tortious act. But if the tortious act is connected with a contract, he may plead infancy. See Burnard *v.* Haggis, [14 C. B. N. S. 45;] 32 L. J. C. P. 189; Bartlett *v.* Wells, 31 L. J. Q. B. 57; [1 B. & S. 836;] Jennings *v.* Randall, 8 T. R. 330. And he is not liable for a false representation that he is of full age. Liverpool Adelphi Loan Association *v.* Fairhurst, 9 Ex. 429; 23 L. J. Ex. 163; Wright *v.* Leonard, 11 C. B. N. S. 258; 30 L. J. C. P. 865; [1 Chitty Pl. 86, and notes (*m*) and (*o*), and cases there cited.]

INNKEEPERS. (*i*)

[1. *Plea that Defendant was not an Innkeeper.*

That the defendant was not an innkeeper, and did not keep a common inn for the accommodation of travellers, as alleged.

A like plea. Armistead *v.* Wilde, 17 Q. B. 261. See Day *v.* Bather, 2 H. & C. 14.]

2. *Plea that Plaintiff did not bring the Goods into Defendant's Inn.*

That the plaintiff did not, as such traveller as aforesaid, bring into the said inn the said [writing case or package] containing the said goods and chattels and effects, or any or either of them, as alleged.

[3. *Special Plea to Count for refusing to lodge the Plaintiff, that the Defendant offered the Plaintiff Reasonable and Proper Accommodation, which the Plaintiff refused to accept.*

Fell *v.* Knight, 8 M. & W. 269.

4. *Plea of Lien by Innkeeper of Plaintiff's Goods, for Amount of Charges incurred as Guest.*

Allen *v.* Smith, 12 C. B. N. S. 638. See Snead *v.* Watkins, 1 C. B. N. S. 267.]

JUDGMENT RECOVERED.

Obs. — See Obs. *ante*, 421; Shadwell *v.* Hutchinson, 2 B. & Ad. 97. The form may easily be adapted from the one given, *ante*, 422; and see Basham *v.* Lumley, 3 C. & P. 482, note (*e*); and see 2 Saund. 47 *b*; Vin. Abr. Judgment, Q. 4. A recovery against a co-trespasser is a bar to the action; Cro. Jac. 74; Com. Dig. Action, K. 4, L.; 1 Saund. 207 *a*; Bull. N. P. 20; it therefore cannot be given in evidence under not guilty, even in mitigation of damages; Day *v.* Porter, 2 Mood. & Rob. 151; and see Martin *v.* Kennedy, 2 B. & P. 70; but must be specially pleaded. Day *v.* Porter, 2 M. & Rob. 151. But a provocation, though not arising at the time of the trespass, goes in mitigation of damages, and may therefore be given in evidence under not

(*i*) Not guilty would deny the breach of duty or wrongful act only. That plaintiff brought goods into the inn, being matter of inducement, should be specially denied if untrue. Pleas, that the loss arose from the plaintiff's neglect, &c. 3 Chit. Pl. 7th ed. 260, and other pleas referred to in the cases cited, *ante*, 531.

Obs. guilty. Frazer *v.* Berkeley, 2 Mood. & Rob. 3. The queen's bench has held that it is no answer to an action in *case* for an excessive distress, that a verdict has been obtained for a *trespass* for the same cause of action. Bainbridge *v.* Bourne, Nov. 1846. See form of plea of judgment recovered in admiralty court, Harris *v.* Willes, 15 C. B. 710; 24 L. J. C. 93; but see, also, Nelson *v.* Couch, [15 C. B. N. S. 99;] 33 L. J. C. P. 46, and *ante*, 421, Obs. [Foreign judgment against plaintiff in respect of the same grievances. General Steam Nav. Co. *v.* Guillou, 11 M. & W. 878.] See other forms, Buckland *v.* Johnson, 15 C. P. 145; Cooper *v.* Shepherd, 3 C. B. 266.

LANDLORD AND TENANT.

Obs. — In actions for irregular distresses, the plea of not guilty "by statute," *ante*, 286, would generally suffice; *ante*, "Distresses," 644; and that plea would deny the tenancy and the ownership of the goods. Williams *v.* Jones, 11 Ad. & E. 643. In an action for an injury to a reversionary interest, not guilty would admit the tenancy as laid in the declaration, and that the premises were in the possession of the tenant named, the demise to him by the plaintiff, and that the reversion belonged to the plaintiff; Raine *v.* Alderson, 4 Bing. N. C. 702; it would deny the actual commission of the acts of injury charged, as waste, &c. but not that they were acts of a wrongful character. Bacon *v.* Smith, 1 Q. B. 364, note (*a*); Frankum *v.* Lord Falmouth, 2 Ad. & E. 452. In an action for *continuing* a nuisance to plaintiff's reversionary interest it would merely deny the fact of continuing it, but would admit that it was *wrongfully* continued, if at all. Greenfield *v.* Edgcombe, 14 L. J. Q. B. 322.

In actions for waste it is necessary that there must be a constant diminution of the value of the estate, or an increased burden upon it, or an impairing of the evidence of title. Huntley *v.* Russell, 13 Q. B. 588; and see, further, Co. Litt. 546; Bac. Ab. Waste, C. 3.

A yearly tenant is bound to keep and leave the premises wind and water-tight, and to use them in a tenant-like manner. Ferguson's case, 2 Esp. 590; Horsefall *v.* Mather, Holt N. P. 7; Pomfret *v.* Ricroft, 1 Wm. Saund. 323 *a*.

See "Distresses," "Reversion," "Effect of Not Guilty," *ante*, 286, "Declarations," *ante*, 535.

1. *To a Count for an Injury to Plaintiff's Reversion, Pleas denying*
   1. *The Possession of the Property by the Tenant of Plaintiff;*
   2. *That the Reversion was in Plaintiff.*

That the said [messuage] was not, nor was any part thereof, in the possession or occupation of the said E. F. as tenant thereof to the plaintiff, (*k*) as alleged.

That the reversion of the said premises with the appurtenances, or any part thereof [or of the said several things, or any of them, so fixed, fastened, and set up in or upon the same as aforesaid], was not in the said plaintiff, nor did the same belong to him, as alleged.

2. *Landlord against Tenant, for Waste, &c. Plea denying the Tenancy.*

That he did not become tenant of or hold or enjoy the said dwelling-house

(*k*) If there be a written demise, it must be produced and proved, it seems, by the plaintiff. See Cotterill *v.* Hobby, 4 B. & C. 465; Strother *v.* Barr, 5 Bing. 136; Reg. *v.* Merthyr Tydvil, 1 B. & Ad. 29.

[*or* messuage and premises], with the appurtenances or any part thereof, as tenant thereof to the plaintiff, *on the terms* (*l*) alleged.

3. *Plea to a Count by a Landlord for injuring a House, and removing Fixtures, that they were put up by the Tenant for the Purposes of his Trade.* (*m*)

And for a plea as to the pulling down, prostrating, and destroying the said oven, and pulling down, prostrating, damaging, and destroying a small part of the said walls, partitions, and other parts of the said messuage, the defendant says that the said W. H., before and at the said times when [*&c.*], was lawfully possessed of the said messuage, and long before and at the said several times when [*&c.*], had used, exercised, and carried on, in and upon the said messuage, the trade and business of a baker, the said messuage with the appurtenances having before that time been let and demised to him for the purpose of his using, exercising, and carrying on his said trade and business therein as aforesaid; and that he the said W. H., in the course of his said trade and business, and for the purpose of carrying on the same in and upon the said messuage as aforesaid during the said tenancy, before the said times when [*&c.*], set up and erected in and upon the same the said oven in the declaration mentioned, in a due, careful, usual, and proper manner [and in such a manner that the same could be removed without doing extensive or substantial damage to the said messuage], doing as little damage as possible to the said messuage upon that occasion. And the defendant further saith, that the said W. H., being so possessed of the said messuage, and so using, exercising, and carrying on his said trade and business therein, he the defendant, during the said tenancy, to wit, at the said times when [*&c.*], as the servant of the said W. H. and by his command, did pull down the said oven, and in so doing did necessarily and unavoidably pull down, prostrate, damage, and destroy a little of the said walls, partitions, and other parts of the said messuage as the defendant lawfully might for the cause aforesaid, doing no unnecessary damage to the said messuage on those occasions, which are the grievances in respect of which this plea is pleaded [and the defendant, as the servant and by the command of the said W. H., during the said tenancy, at the expense of the said W. H., repaired all damage which had arisen from the said erection and pulling down of the said oven].

4. *Replication thereto, that the Terms of the Demise forbade the Removal.*

That before and at the said times when [*&c.*], the said W. H. was possessed of the said messuage with the appurtenances, as tenant thereof to the

(*l*) See forms, &c. Bacon *v.* Smith, 1 Q. B. 346. If any special terms on which the defendant held the premises are alleged in the declaration, it is important to include the word "*terms*" in the traverse, otherwise the mere fact of a tenancy could be denied only. Hallifax *v.* Chambers, 4 M. & W. 662; and see Beech *v.* White, 12 Ad. & E. 668.

(*m*) See, as to fixtures, Amos on Fixtures; Chit. jr. Contr. Index, Landlord, &c.; Wansborough *v.* Maton, 4 Ad. & E. 884; West *v.* Blakeway, 2 M. & G. 729; *ante*, 536, note (*r*). See form of plea that an alleged fixture was put up by screws and for ornament only, and was therefore removed, and replication, &c. Avery *v.* Cheslyn, 3 Ad. & E. 75. Where there is a count in trover for the fixtures (as to which see Dalton *v.* Whittam, 3 Q. B. 961), plead not guilty, and that the plaintiff was not possessed in order to try the right to the fixtures.

plaintiff (the reversion thereof so belonging to him), under and by virtue of a certain indenture of lease, made between the plaintiff of the one part, and the said W. H. of the other part, whereby the plaintiff demised unto the said W. H. the said messuage with the appurtenances, for the term of twenty-one years from [*&c.*], and the said W. H. did thereby covenant with the plaintiff that in case the said W. H. should, during the said term, erect an oven on the said premises, the plaintiff should on request find or allow unto the said W. H. all the iron work necessary for the same, and, on completion of the same in a substantial and proper manner, allow unto him, out of the then next quarter's rent thereby reserved, the sum of £5 towards the expenses of erecting the same, and that in case the said W. H. should during the said term erect any building or buildings on the said demised premises, the same should not be afterwards taken down or removed, but be peaceably and quietly given and yielded up to the plaintiff at the said expiration or other sooner determination of the said term without any allowance being made by the plaintiff for the same; and the plaintiff says that the said oven in the declaration mentioned was erected by the said W. H. in and upon the said demised premises and affixed thereto, and became parcel thereof, after the making of the said indenture and before the commencement of this suit, and during the said term, and that he the plaintiff did on request find and allow unto the said W. H. all the iron work necessary for the same, and the same oven was then completed in a substantial manner, and the plaintiff was then ready and willing to allow to the said W. H., out of the then next quarter's rent, the sum of £5 towards the expenses of erecting the same according to the said indenture; and the said oven remained and was erected and stood in and upon the said demised premises, and was affixed as such building as aforesaid to the said premises until the defendant at the said times when [*&c.*], committed the said several grievances in the said plea attempted to be justified.

5. *Plea that the Premises were held at a Rent under £20, and that the Tenancy was determined under Notice to quit, and Entry under 1 & 2 Vict. c. 74.*

Edmunds *v.* Pinniger, 14 L. J. Q. B. 273; [7 Q. B. 558.]

OBS. — And see *ante*, tit. "Distress," and another form, Mills *v.* Goff, 14 M. & W. 72. See similar form by a constable, justifying under a justice's warrant, but held bad for not alleging that he was a constable of the "district" in which the premises were situate. Jones *v.* Chapman, 14 M. & W. 824; 2 D. & L. 907.

LEAVE AND LICENSE.

OBS. — See 3 Haar. Ind. Trespass; Com. Dig. Pleader, 3 M. 35; Vin. Abr. License. To an action for an *assault* this may be given in evidence under not guilty. Christopherson *v.* Bare, 11 Q. B. 473; 17 L. J. Q. B. 109; and see Coward *v.* Baddeley, 28 L. J. Ex. 260; 4 H. & N. 478, and in trover under not possessed. Bingham *v.* Clements, 12 Q. B. 260; 17 L. J. Q. B. 289. A license, either by deed, or by parol, to enter, &c. real property, is always revocable unless it amount to a grant; Wood *v.* Leadbitter, 13 M. & W. 838; as in case of an auctioneer employed to enter premises to sell goods thereon. Taplin *v.* Florence, 20 L. J. C. P. 137; Wood *v.* Manley, 11 Ad. & E. 34. The revocation may be specially replied. Adams *v.* Andrews, 15 Q. B. 284

Obs. 20 L. J. Q. B. 33. Evidence of a license. Feltham *v.* Cartright, 5 Bing. N. C. 569. Where a license to take possession is part of the original bargain in a demise of property, that should be specially pleaded, as it cannot be relied on under the general plea of license (Tompkins *v.* Lawrence, 8 C. & P. 731; Hammond *v.* Colls, 3 C. B. 212; 14 L. J. C. P. 288), unless the deed contain a clause authorizing the above form. Kavanagh *v.* Gudge, 1 D. & L. 928; 7 M. & G. 316. Where there are several trespasses laid in the declaration, and the defendant pleads license, it seems that he must prove a license commensurate with and covering all the trespasses proved upon the declaration, and will fail as to such as are not shown to have been licensed, and that in such case a *new assignment* is not necessary. Barnes *v.* Hunt, 11 East, 451; Hayward *v.* Grant, 1 C. & P. 448. But in Bracegirdle *v.* Peacock, [8 Q. B. 174;] 15 L. J. Q. B. 73, Patteson J. expressed a doubt whether those cases could be supported; and see 1 Saund. 300, *f*, *g*. In general a replication or new assignment of *excess* is not necessary, Symons *v.* Hearson, 12 Price, 369, unless the plaintiff goes for substantial damages for what in the declaration is only laid as aggravation, such as an assault committed with an entry into a house, &c. Kavanagh *v.* Gudge, *supra*. Where the trespass is a continuing one, the plaintiff may deny the license, and also new assign. Loweth *v.* Smith, 12 M. & W. 582; 2 D. & L. 212. It seems that where there has been a *revocation* of the license before the trespass, it should be replied. See 1 Saund. 300 *a*, 2 Ib. 5, note (3); Feltham *v.* Cartright, 5 Bing. N. C. 569.

Acquiescence to a trespass may be pleaded on equitable grounds. Davies *v.* Marshall, 31 L. J. C. P. 61; [10 C. B. N. S. 697. See Bankart *v.* Haughton, 27 Beav. 425; Cotching *v.* Basset, 32 Beav. 101; Johnson *v.* Wyatt, 2 De G., J. & S. 18.]

1. *Plea of Leave and License.* (*n*)

That he did what is complained of by the plaintiff's leave.

2. *Replication of a Revocation of the Leave and License.*

That before the grievances complained of the plaintiff revoked the said leave and license as the defendant well knew.

LIBEL AND SLANDER.

Obs. — See the notes and observations to the declarations, *ante*, 538. "In an action for *slander* of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial *of speaking the words*, of speaking them *maliciously*, and *in the defamatory sense imputed*, and *with reference* to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged." R. G. T. T. 1853, r. 16. The same principles apply to *libel*, as not guilty denies that the words were used on an unjustifiable occasion. Per Parke B. O'Brien *v.* Clement, 15 L. J. Ex. 285.

[On certain occasions a person is privileged to write or speak according to the best of his belief, and he is not liable to an action for matter written or spoken on such privileged occasions, although it be false; unless he has written or spoken maliciously in fact and not by reason of the privilege, as where he has asserted false and defamatory matter knowing it to be false. On such occasions of privilege it is not sufficient for the plaintiff to prove the falseness of the matter merely, but he must also show that the defendant acted or spoke on the occasion with a malicious intent. Taylor *v.* Hawkins, 16 Q. B. 308; Hemmings *v.* Gasson, El., Bl. & El. 346.]

Under the plea of not guilty the defendant may show facts tending to negative the malice such as that, though really false, the words, were used *bonâ fide*, and in the belief of their truth by way of a privileged communication. Lillie

(*n*) Form given by the common law procedure act, 1852 (15 & 16 Vict. c. 76), sch. B, 44.

Obs. *v.* Price, 5 Ad. & E. 645; Heming *v.* Trenery, 9 Ad. & E. 930; Lucan *v.* Smith, 1 H. & N. 481. "A communication made *bonâ fide* upon any subject in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged if made to a person having a corresponding *interest or duty*, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable;" Harrison *v.* Bush, 5 El. & Bl. 348; Sommerville *v.* Hawkins, 10 C. B. 583; Toogood *v.* Spyring, 1 Cr., M. & R. 181; [Krebs *v.* Oliver, 12 Gray, 243; Klinch *v.* Colby, 46 N. Y. 427; Whiteley *v.* Adams, 15 C. B. N. S. 392; Fryer *v.* Kinnersley, 15 C. B. N. S. 422; Force *v.* Warren, 15 C. B. N. S. 806; Swan *v.* Tappan, 5 Cush. 104; Gassett *v.* Gilbert, 6 Gray, 94; Brow *v.* Hathaway, 13 Allen, 239; Hatch *v.* Lane, 105 Mass. 394; Nott *v.* Stoddard, 38 Vt. 25; Mayor *v.* Sample, 18 Iowa, 306; Fowle *v.* Bowen, 3 Tiffany (N. Y.), 24; Dale *v.* Harris, 109 Mass. 193; 1 Chitty Pl. 519, 520, and notes; Smith *v.* Kerr, 1 Edm. (N. Y.) Sel. Cas. 190; Lawler *v.* Earle, 5 Allen, 22; "Joannes" *v.* Bennett, 5 Allen, 169; as a complaint to a person that his property had been stolen by another made in a proper quarter to obtain redress; Toogood *v.* Spyring, 1 Cr., M. & R. 181; Amann *v.* Damm, 8 C. B. N. S. 597; or made to the supposed thief himself, though in the presence of a third party; Toogood *v.* Spyring, 1 Cr., M. & R. 181; Padmore *v.* Lawrence, 1 Ad. & E. 380; or made to the servants of the complainant by way of warning. Sommerville *v.* Hawkins, 10 C. B. 583. The privilege is not defeated by the mere fact that the statements were made in the presence of others than the parties immediately interested; nor that they were intemperate or excessive from over excitement. Wells J. in Brow *v.* Hathaway, 13 Allen, 242; Manby *v.* Witt, 18 C. B. 544. But see, as to excess, Erle C. J. in Fryer *v.* Kinnersley, 15 C. B. N. S. 422, 431. As to the communications of a mercantile agency, see Beardsley *v.* Tappan, 5 Blatchf. C. C. 497; Jeffras *v.* McKillop, 4 N. Y. Sup. Ct. (1874) 578; Ormsby *v.* Douglass, 37 N. Y. 477. The occasion of privilege is a question for the judge; the existence of express malice is one for the jury. Cooke *v.* Wildes, 5 El. & Bl. 328; Huntley *v.* Ward, 6 C. B. N. S. 514; Cowles *v.* Potts, 34 L. J. Q. B. 247.]

In cases of privileged communications, if the plaintiff prove express malice, the defendant may be deprived of the privilege. Pearson *v.* Le Maitre, 5 M. & G. 700; Harris *v.* Thompson, 13 C. B. 333; Taylor *v.* Hawkins, 16 Q. B. 308 ["The law is, that, if the plaintiff gives evidence from which the jury may infer malice, — which I take to mean, if he cast imputations which he did not believe to be true, or was acting from sinister or corrupt motives, and not with the *bonâ fide* intention of discharging a duty social or moral, the plaintiff may sustain the action, notwithstanding the words were spoken upon an occasion which *primâ facie* justified them, viz. in answer to an inquiry." Erle C. J. in Jackson *v.* Hopperton, 16 C. B. N. S. 829, 837. See Ormsby *v.* Douglass, 37 N. Y. 477; Garrett *v.* Dickerson, 19 Md. 418. The libel itself may be evidence of malice. Gilpin *v.* Fowler, 9 Ex. 615.] The rule of privileged communications does not justify defamatory comments on the motive or conduct of the plaintiff. Tuson *v.* Evans, 12 Ad. & E. 733. [See Holt *v.* Parsons, 23 Texas, 9. The only effect of privilege on actionable words is to rebut the legal inference or presumption of malice, and to that extent constitute an answer to an action upon them. Garrett *v.* Dickerson, 19 Md. 418. The burden is then shifted and rests on the plaintiff to show express or actual malice. Hagan *v.* Hendry, 18 Md. 177. The plaintiff may prove statements made by the defendant subsequently to the libel, as tending to show malice in the defendants at the time of its publication. Hemmings *v.* Gasson, 1 El., Bl. & El. 346.]

A letter written confidentially by B. to persons who employed A. as their solicitor, containing charges injurious to his professional character in the management of their affairs in which B. was also interested, was held to be privileged. McDougall *v.* Claridge, 1 Camp. 267. But where a master wrote a first letter without a previous application, and then a second in answer to inquiries made of him as to plaintiff's character, the jury found that the communication was maliciously made, and the court upheld the verdict. Pattison *v.* Jones, 8 B. & C. 578.

The court of common pleas were equally divided in opinion as to whether it is

Obs. actionable, honestly, and with reasonable ground of belief that it is true, to volunteer information (otherwise libellous) to a stranger affecting the interests of the latter where the danger to him is not imminent. Coxhead *v.* Richards, 2 C. B. 569. [See Krebs *v.* Oliver, 12 Gray, 243.] But such a communication to another to protect a man's own interests, would not be actionable. Blackham *v.* Pugh, 2 C. B. 611.

[Confidential communications made by way of advice to protect the interests of the persons to whom they are made, at their request, are privileged; as the character of a servant given to a person asking it; Weatherstone *v.* Hawkins, 1 T. R. 110; Child *v.* Affleck, 9 B. & C. 403; or the voluntary communication to the latter of a fact subsequently discovered; Gardner *v.* Slade, 13 Q. B. 796; and the presence of a third person on such occasions does not take away the privilege. Taylor *v.* Hawkins, 16 Q. B. 308; Manby *v.* Witt, 18 C. B. 544. It would seem that such statements voluntarily made to a person respecting the conduct of a person in his employ, or whom he was likely to take into his employ, or with whom he is otherwise connected, are privileged. See Pattison *v.* Jones, 8 B. & C. 578; M'Dougall *v.* Claridge, 1 Camp. 267. And see Coxhead *v.* Richards, 2 C. B. 569; Amann *v.* Damm, 8 C. B. N. S. 597. A statement of opinion made to a tradesman in answer to his inquiry respecting the handwriting of a fictitious order for goods, which purported to have been sent by the person making the statement was held to be privileged. Croft *v.* Stevens, 7 H. & N. 570. A character of a person who was a candidate for the office of trustee of a charity given to a person canvassing on his behalf, was held privileged. Cowles *v.* Potts, 34 L. J. Q. B. 247. A clergyman is not privileged in circulating imputations on the character of a person about to set up a school in his parish. Gilpin *v.* Fowler, 9 Ex. 615.]

The defendant gave notice to his footman and cook, who separately went to him and asked him his reasons for discharging them; he told each (in the absence of the other) that he or she was discharged because both had been robbing him. This was held to be privileged. Manby *v.* Witt, 18 C. B. 544; and see Fryer *v.* Kinnersley, 15 C. B. N. S. 422; Whitely *v.* Adams, 15 C. B. N. S. 392.

A petition presented to the secretary for war by a creditor of an officer in the army, *bonâ fide* with a view of obtaining the payment of a debt, and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not libellous. Fairman *v.* Ives, 5 B. & A. 642; Woodward *v.* Lander, 6 C. & P. 548. Nor is an application by a borough elector to the secretary of state, imputing misconduct to a magistrate. Harrison *v.* Bush, 5 El. & El. 344; and see Blagg *v.* Sturt, 10 Q. B. 899. Nor a representation to the postmaster-general, respecting the conduct of a person under him when made *bonâ fide*. Woodward *v.* Lander, 6 C. & P. 588; and see, also, Beatson *v.* Skene, 5 H. & N. 838; 29 L. J. Ex. 430. [Complaints made to a wife of the conduct of her husband are not privileged. Wenman *v.* Ash, 18 C. B. 836.]

A report of an examination in bankruptcy is privileged. Ryalls *v.* Leader, L. R. 1 Ex. 296.

Words spoken by an M. P. in parliament; [Rex *v.* Creevey, 1 M. & S. 273; Lake *v.* King, 1 Wms. Saund. 131 *b*; Stockdale *v.* Hansard, 9 Ad. & E. 1; Campbell J. in Davidson *v.* Duncan, 7 El. & Bl. 229;] or by a judge or counsel; Hodgson *v.* Scarlett, Holt's N. P. Ca. 621; 1 B. & A. 232; Revis *v.* Smith, 18 C. B. 126; [Mackay *v.* Ford, 5 H. & N. 792; Needham *v.* Dowling, 15 L. J. C. P. 9; Jekyll *v.* Moore, 2 B. & P. N. R. 341;] or witnesses in a legal proceeding; [Revis *v.* Smith, 18 C. B. 126; Henderson *v.* Broomhead, 4 H. & N. 569; Dawkins *v.* Lord Rokeby, House of Lords, 2 Central Law J. 491; Barnes *v.* McCrate, 32 Maine, 442; Dunlap *v.* Glidden, 31 Maine, 435; Calkins *v.* Sumner, 13 Wisc. 193; Osborne *v.* Forshee, 22 Mich. 209; White *v.* Carroll, 42 N. Y. 161; see Cook *v.* Cook, 100 Mass. 194;] are privileged; or by a coroner in addressing a jury impanelled before him; Thomas *v.* Churton, 2 B. & S. 475; 31 L. J. Q. B. 139; or by a man for the purpose of obtaining redress; King *v.* Sewell, 3 M. & W. 297; Finden *v.* Westlake, M. & M. 461; or forwarding the ends of justice, as giving a man in charge; Johnson *v.* Evans, 3 Esp. 32; and see Force *v.* Warren, 15 C. B. N. S. 806; or where the words are used honestly (Kelly *v.* Partington, 5 B. & Ad. 645), by

Obs. way of advice to persons asking it, or who have a right to expect it; Toogood *v.* Spyring, 1 Cr., M. & R. 181; Warren *v.* Warren, 1 Cr., M. & R. 250; as in answer to an inquiry; but not officious gossip, Rumsey *v.* Webb, 1 Car. & M. 104, respecting the character of a servant, &c. Fountain *v.* Boodle, 3 Q. B. 5; Child *v.* Affleck, 9 B. & C. 403; and see Kelly *v.* Partington, *supra*. Where A. was trustee of a charity, and also a bailiff to B., B. communicated with C. in reference to the trusteeship, when C. said A. was a rogue and had been guilty of discreditable conduct, &c. all that was said having reference to A.'s trustworthiness as a trustee, and B. in consequence of this dismissed A. from his employment; the court held this to be a privileged communication. Cowles *v.* Potts, 34 L. J. Q. B. 247. Where words are used by a person having an interest in the transaction to which they relate (Tuson *v.* Evans, 12 Ad. & E. 736), to another person interested in conducting it; Padmore *v.* Lawrence, 11 Ad. & E. 380; or by a person having sustained a supposed grievance to a person believed capable of redressing it (per Cresswell J. Blackham *v.* Pugh, 15 L. J. C. P. 293; 2 C. B. 611), they are privileged; but according to a decision of the queen's bench such application, to be privileged, must be to a competent tribunal, having jurisdiction in the subject-matter; Blagg *v.* Sturt, 16 L. J. Q. B. 39; 10 Q. B. 905; Affidavit in exchequer chamber, June 1847. ["The decisions, ancient and modern, are uniform, that no proceeding in a regular course of justice is to be deemed an actionable libel." Metcalf J. in Kidder *v.* Parkhurst, 3 Allen, 393; Cutler *v.* Dixon, 4 Co. 14 *b;* Lake *v.* King, 1 Saund. 131; Watson *v.* Moore, 2 Cush. 138; Hill *v.* Miles, 9 N. H. 14.] To say of a clergyman that he came to perform divine service in a towering passion, &c. is libellous. Walker *v.* Brogden, 19 C. B. N. S. 65.

A plain account of the proceedings of a court of justice is not a libel; Curry *v.* Walker, 1 B. & P. 525; Smith *v.* Scott, 2 C. & K. 580; Hoare *v.* Silverlock, 9 C. B. 20; Woodgate *v.* Ridout, 4 F. & F. N. P. R. 202; [Scott J. in Cincinnati &c. Co. *v.* Timberlake, 10 Ohio N. S. 548; Lewis *v.* Levy, 1 El., Bl. & El. 537; Cosgrave *v.* Trade Auxiliary Co. 8 Irish R. C. L. 349.] Nor is fair newspaper comment on a place of public entertainment. Bignell *v.* Buzzard, 3 H. & N. 217; Dibdin *v.* Swan, 1 Esp. N. P. C. 28. Fair literary criticism is also privileged. Carr *v.* Hood, 1 Camp. 355; [Tabart *v.* Tipper, 1 Camp. 350.] Criticism on handbills and placards. Paris *v.* Levy, 9 C. B. N. S. 342. But it is said the sermons of a clergyman publicly preached are not the subject of comment; Gathercole *v.* Myall, 15 M. & W. 319, *sed quære;* and as to comments on sermons published in newspapers, and provocation by plaintiff, see Kelly *v.* Sherlock, L. R. 1 Q. B. 686; Kelly *v.* Tinling, L. R. 1 Q. B. 699.

Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice. Parmiter *v.* Coupland, 6 M. & W. 108; Gathercole *v.* Myall, 15 M. & W. 319; [Cooper *v.* Lawson, 8 Ad. & E. 746; Lucan *v.* Smith, 1 H. & N. 481; Kelly *v.* Tinling, L. R. 1 Q. B. 699; Commonwealth *v.* Odell, 3 Pitts. (Pa.) 449; Wilson *v.* Fitch, 41 Cal. 363; Davis *v.* Duncan, L. R. 9 C. P. 396;] and see, also, Seymour *v.* Butterworth, 3 F. & F. N. P. R. 372. And a writer in a public periodical has no other right than that of any other person of freely discussing the public acts of another. Campbell *v.* Spottiswoode, [3 B. & S. 769; Aldrich *v.* Press Printing Co. 9 Minn. 133. "The privilege of criticising and discussing the words and acts of public men has in modern times been very widely extended." Erle C. J. in Whitely *v.* Adams, 15 C. B. N. S. 418.

Public meetings, Hearne *v.* Stowell, 12 Ad. & E. 720, and reports of public meetings are not privileged. Davidson *v.* Duncan, 7 El. & Bl. 229.]

Payment into court and an apology may now be made in certain cases, and must be specially pleaded, see *post*, form 5, and note.

Where the speaking or publication of the words or libel is admitted, and the defendant intends to rely on their truth as a justification, he must plead this specially. Smith *v.* Richardson, Willes, 20; 1 Saund. 130 (n.); Reg *v.* Newman, 1 El. & Bl. 577; Rumsey *v.* Webb, Car. & M. 104; Prior *v.* Wilson, 1 C. B. N. S. 95. See, also, Helsham *v.* Blackwood, 11 C. B. 111. [A special plea in justification of oral slander sets forth the truth of the words merely; and in respect to words spoken, the truth is a defence although they were

Obs. spoken maliciously and without reason on the part of the defendant to think them true. Foss *v.* Hildreth, 10 Allen, 76; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200. The defence that the words used were privileged by the occasion is not open in Massachusetts, unless it is distinctly set forth in the answer. Goodwin *v.* Daniels, 7 Allen, 61. See, however, under the common law, Hagan *v.* Hendry, 18 Md. 177.]

If the plea of justification is pleaded, and no evidence is adduced in support of it, the damages may thereby be enhanced, and this may afford evidence of express malice. Wilson *v.* Robinson, 7 Q. B. 68; Simpson *v.* Robinson, 12 Q. B. 511. See, also, *post*, 662, note (*q*).

A plea that through mistake the defendant's letter was addressed to the plaintiff's employer instead of to the plaintiff himself was held bad; the letter, even had it been addressed to the plaintiff, not being a privileged communication. Fox *v.* Brodrick, 14 Ir. Com. Law, 453. [A telegram has not the privilege of a sealed letter. Williamson *v.* Freer, L. R. 9 C. P. 393.]

In action by the plaintiff and his wife, a plea that the female plaintiff was not the wife of the male plaintiff was held a good plea in bar. Chantler *v.* Lindsay, 16 L. J. Ex. 16. A plea of accord and satisfaction was held good. Boosey *v.* Wood, [3 H. & C. 484.] Generally, as to what amounts to defamatory matter, see Fray *v.* Fray, 34 L. J. C. P. 45.

As to interrogatories in an action for libel and slander, see Stern *v.* Sevastopulo, 32 L. J. C. P. 268; Baker *v.* Lane, 34 L. J. Ex. 57; Bickford *v.* D'Arcy, L. R. 1 Ex. 354; Atkinson *v.* Fosbroke, L. R. 1 Q. B. 628; 35 L. J. Q. B. 182; [Tupling *v.* Ward, 6 H. & N. 749.]

Ante, 538, "Not Guilty," *ante*, 635, "Limitations," *post*, 666.

1. *Plea to an Action for Slander of the Plaintiff in his Trade, &c.; Denial that he exercised such Trade.* (*o*)

That the plaintiff did not use, exercise, or carry on the trade or business of [*following the words in the declaration*], nor was he a [linendraper], as alleged.

[1*a*. *Denial that Defendant made the Accusation charged.*

And the defendant comes and upon his personal knowledge denies that he accused the plaintiff of the crime of perjury, as set forth in the plaintiff's writ.]

2. *Plea denying that Defendant used the Words in the Sense imputed.* (*p*)

That he did not use the words [*black sheep*] for the purpose of expressing or meaning, nor were they by the said persons in the declaration mentioned, or any of them, understood as expressing or meaning [*&c. following the words in the declaration*], as alleged.

3. *Plea that the Matter published is true.* (*q*)

That the plaintiff, before the publication of the alleged libel [*or* "before the

(*o*) See another form, Cannell *v.* Curtis, 2 Bing. N. C. 228.

(*p*) See form, &c. M'Gregor *v.* Gregory, 11 M. & W. 287. The defendant cannot avail himself of this plea when the words complained of are actionable in themselves, because the plaintiff in such a case need not prove in what sense they were used. Common Law Procedure Act, 1852, s. 61.

(*q*) Truth must be specially pleaded. 1 Saund. 130; and see Rumsey *v.* Webb, 1 Car. & M. 104. But it should not be pleaded without good ground for believing that it will be proved, as the pleading it unsuccessfully would enhance the damages. Wilson *v.* Robinson, 14 L. J. Q. B. 196; [7 Q. B. 68.] Where libellous matter can be divided into two parts, each actionable, the defend-

said words were spoken"] feloniously did steal, take, and carry away certain goods and chattels of one E. F. [*following as nearly as possible the words of the declaration*]. (*r*)

ant may plead separate pleas to each part; Clarkson *v.* Lawson, 5 Bing. 587; and if the rest of the libel be not actionable (see Ingram *v.* Lawson, 5 Bing. N. S. 66), the defendant will succeed thereon on not guilty. Clarke *v.* Taylor, 2 Bing. N. C. 664; [Mountney *v.* Watton, 2 B. & Ad. 673; M'Gregor *v.* Gregory, 11 M. & W. 287; Walker *v.* Brogden, 19 C. B. N. S. 65.] But defamation is not divisible where many statements tend to one conclusion and imputation, and a single sentence, or portion of a sentence, cannot in such case be selected and separately dealt with by plea or demurrer. Per Lord Abinger, Eaton *v.* Jones, 1 Dowl. N. S. 602; and Gregory *v.* Duke of Brunswick, 1 D. & L. 518; 6 M. & G. 205; Smith *v.* Parker, 2 D. & L. 394. In general it suffices that the *gist* and *substance* of the libellous matter charged are justified and covered by the matters of facts stated in the plea, and constituting the offence charged. In Morrison *v.* Harmer, 3 Bing. N. C. 759, the main charge against the plaintiffs was, that they compounded and sold poisonous and deleterious pills, and that defendant had crushed the system of poisoning pursued by the scamps and rascals; and the plea (which was pleaded to the whole declaration) chiefly charged that the pills were dangerous, &c. and the terms of general invective and reproach, as "scamp," "rascal," were not expressly noticed in the plea; it was held that the plea was sufficient, the court saying, that they could not understand those words, however offensive, as containing any charge different and distinct from that of which the truth had been justified in the first plea, and that they were not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient unless it extend also to every epithet or term of general abuse which *may be found in the description* or statement of such imputation. Where the charge against the plaintiff is in itself, on the face of the libel, of a certain and specific nature, and states the facts imputed in so perspicuous a shape, that the plaintiff must know at the trial what evidence he has to adduce to rebut the accusation, and the plea of justification can afford no further information, it is sufficient to allege generally in the plea that the plaintiff committed the offence, or was guilty of the misconduct, using the words of the charge; as if the words be, that plaintiff stole a sheep of E. F., the plea may be, "that he did on, &c. steal the said sheep," &c. But where the charge is general, as that plaintiff is a "scoundrel," or "swindler," or had defrauded various persons, or was guilty of neglect, extortion, &c. as attorney, a general plea merely reiterating the charge, and not showing the *particular* occasion or instance of misconduct, the time, persons, &c. is bad. See 1 Saund. 244 *a*, 244 *b*, note (*m*); 1 Chit. Pl. 7th ed. 563; 1 Har. Ind. Defamation. See J'Anson *v.* Stuart, 1 T. R. 748; 2 Sm. L. C. 6th ed. 57; Jones *v.* Stevens, 11 Price, 235; Hickinbotham *v.* Leach, 10 M. & W. 361; 2 Dowl. N. S. 270. The plea should not repeat general charges made in the libel, but should state particular acts of misconduct. Holmer *v.* Catesby, 1 Taunt. 543; Hickinbotham *v.* Leach, 10 M. & W. 361; [Vanwyck *v.* Guthrie, 4 Duer, 268; S. C. 17 N. Y. 190; Ormsby *v.* Douglass, 5 Duer, 665; Fry *v.* Bennett, 5 Sandf. 54; Anibal *v.* Hunter, 6 How. Pr. 255; Buddington *v.* Davis, 6 How. Pr. 401; Honess *v.* Stubbs, 7 C. B. N. S. 555. The New York Code has not changed the rule of law which requires certainty and particularity in stating the offence charged against the plaintiff in a plea of justification in an action of slander. The answer must state specifically the offence of which the plaintiff is alleged to have been guilty, giving time, place, and circumstances. Billings *v.* Walker, 28 How. Pr. 97; Wachter *v.* Quenzer, 29 N. Y. 547; Tilson *v.* Clark, 45 Barb. 178. But the form in which the plea will be allowed seems to depend in great measure on the nature of the charge in the declaration. See Behrens *v.* Allen, 8 Jur. N. S. C. P. 118.] A plea, which professes to justify the whole, but justifies only a part, is bad. Johns *v.* Gittings, Cro. Eliz. 239; Clarkson *v.* Lawson, 6 Bing. 260; M'Gregor *v.* Gregory, 11 M. & W. 287; Walker *v.* Brogden, 19 C. B. N. S. 65. [The answer should cover the whole charge. Fero *v.* Ruscoe, 4 N. Y. 162; McKinby *v.* Rob, 20 John. 351; Bissell *v.* Cornell, 24 Wend. 354; Loveland *v.* Hosmer, 8 How. Pr. 215; Herr *v.* Bamberg, 10 How. Pr. 128.] If the justification substantially meets and answers the charge against the plaintiff, it is sufficient. Helsham *v.* Blackwood, 11 C. B. 111; Tighe *v.* Cooper, 7 El. & Bl. 639. Proof upon and effect of a plea that the libel is true "in substance and effect." Weaver *v.* Lloyd, 2 B. & C. 678; 1 C. & P. 295. A plea in this general form is frequently allowed, and it is often convenient to adopt it. See Behrens *v.* Allen, 8 Jur. N. S. 118; but see Honess *v.* Stubbs, 7 C. B. N. S 555. See, also, J'Anson *v.* Stuart, 2 Sm. L. C. 6th ed. 67, upon this mode of pleading. Such a plea is good after verdict. Edmonds *v.* Walter, 3 Stark. 7; 2 Chit. 291. Mr. Starkie,

(*r*) Clarke *v.* Taylor, 2 Bing. N. C. 664. When a *comment*, following previous libellous matter, should be separately justified, Cooper *v.* Lawson, 8 Ad. & E. 746. The plea should of course be pleaded only to so much as the defendant can justify. Clarkson *v.* Lawson, 6 Bing. 266; Mountney *v.* Watton, 2 B. & Ad. 673.

[3*a*. *Another Form for Same.*

And the defendant says the plaintiff did feloniously steal, take, and carry away ten dollars, the property of one S. T., in the possession of said S. T. being found, and converted the same to his own use, and so the plaintiff was guilty of the crime of theft, and the defendant's accusation was true.]

4. *Plea justifying a Charge of Insolvency on the Ground that it is true.* (*s*)

That before the publication of the said libel divers persons had given credit to and were then creditors of the plaintiffs in their said trade and business, and the plaintiffs were then indebted to and liable to pay in that behalf their said several creditors divers large sums of money, and the plaintiffs were then under divers pecuniary engagements and liabilities in and relating to their said trade and business, and were unable to meet their said several pecuniary engagements and liabilities in their said trade and business, and were then in bad, embarrassed, and insolvent circumstances, and unable to pay or satisfy their said several creditors their debts in full, and were then about and likely to fail in and be forced and obliged to break up and cease their said trade and business.

[5. *Plea to a Libel imputing a General Charge of Baseness, that the Libel was published in reference to a Particular Transaction, and justifying it.*

Tighe *v.* Cooper, 7 El. & Bl. 639.

Special pleas that the matter was a fair and bonâ fide comment in a newspaper article upon the conduct of the plaintiff in a public capacity. Lucan *v.* Smith, 1 H. & N. 481; Cooper *v.* Lawson, 8 Ad. & E. 746; Kelly *v.* Tinling, L. R. 1 Q. B. 699. *Plea that the libel was a correct report of a preliminary inquiry before a justice of the peace in which the plaintiff was summoned to answer a charge of perjury and was discharged.* Lewis *v.* Levy, El., Bl. & El. 537.]

6. *Plea that Plaintiff was a Swindler, as charged in a Libel.*

Clarke *v.* Taylor, 2 Bing. N. C. 654.

7. *Plea to a Declaration for a Libel on a Vendor of Quack Medicines, that the Matters are true.*

Morrison *v.* Harmer, 3 Bing. N. C. 759.

8. *Plea to a Libel on a Proctor, that he had been suspended.*

Clarkson *v.* Lawson, 6 Bing. 587.

3d ed. Ev. 643, observes, in regard to the evidence in support of a plea of justification in slander, that "there seems to be little if any difference between the evidence in proof of a specific charge thus involved in a civil proceeding, and the evidence which is essential to support an indictment for a similar charge." Cook *v.* Field, 3 Esp. C. 133; Chalmers *v.* Shackle, 6 C. & P. 475; Willmott *v.* Harmer, 8 C. & P. 695. [*Privilege:* When a publication, libellous on its face, can only be excused or privileged on the ground that certain events happened, the answer must allege that these events did happen, in order to lay the foundation of the defence of privilege. Fry *v.* Bennett, 5 Sandf. 54; Buddington *v.* Davis, 6 How. Pr. 401.]

(*s*) [See Watkin *v.* Hill, L. R. 3 Q. B. 396; Foss *v.* Hildreth, 10 Allen, 76, 79.]

9. *Plea to a Libel on an Attorney.*
Jones *v.* Stephens, 11 Price, 235.

10. *The Like on a Medical Man.*
Edsall *v.* Russell, 4 M. & G. 1090.

11. *Plea that Plaintiff did keep out of the Way to evade Process.*
Lay *v.* Lawson, 4 Ad. & E. 795.

12. *That Plaintiff broke into Defendant's Cellar, and got drunk.*
Toogood *v.* Spyring, 1 C., M. & R. 184.

13. *Plea justifying a Libel imputing Polygamy.*
Willmott *v.* Harman, 8 C. & P. 696.

14. *Plea of Justification in an Action by a Clergyman on the ground of the Truth of the Facts contained in the alleged Libel.*
Walker *v.* Brogden, 19 C. B. N. S. 65. (*t*)

15. *Plea of Accord and Satisfaction.*
Boosey *v.* Wood, [3 H. & C. 484.]

SLANDER OF TITLE.

Ante, 549.

OBS. — If the defendant make the statement contained in the declaration in relation to matters in which he is interested *bonâ fide*, and on reasonable grounds, he is not liable in an action for slander of title. Pitt *v.* Donovan, 1 M. & S. 639; Watson *v.* Reynolds, M. & M. 1. As to the truth of the libel being given in evidence under the general issue, see Watson *v.* Reynolds, *ubi supra*.

Where the defendant stated that oil made by the plaintiff was inferior in quality to oil made by the defendant, and gave a feeble light, it was held that no action was maintainable. Young *v.* Macrae, 3 B. & S. 264; and see, *ante*, 549.

"Not Guilty," *ante*, 635.

LIBERUM TENEMENTUM.

See *post*, "Trespass to Realty."

LIEN.

See *post*, "Trover."

LIGHTS.

See *ante*, "Ancient Lights."

(*t*) In the same case a plea that a second letter was a fair comment upon facts set forth in a former letter was held bad.

LIMITATIONS.

Obs. — In contract, *ante*, 431. In actions relating to real property the limitation is twenty years. 3 & 4 W. 4, c. 27, s. 2. See 2 & 3 W. 4, c. 71. By 3 & 4 W. 4, c. 42, s. 3, "Actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, must be brought within twenty years after the cause of such actions or suits." "Actions of debt upon an award, where the submission is not by specialty, or for any fine in respect of any copyhold estate, or for an escape, or for money levied upon any *fieri facius*, must be brought within six years after the cause of such actions and suits." "And actions for penalties, damages, or sums of money given to the party grieved, must be brought within two years after the cause of such actions or suits." And if the penalty is sued for by and given to a common informer within one year. 31 Eliz. c. 5, s. 6.

Thus, in actions on a deed, such as arrears of rent due on a lease, Paget *v.* Foley, 2 Bing. N. C. 679, or a rent-charge, Strachan *v.* Thomas, 12 Ad. & E. 558, recognizance or award, Ib., it is twenty years. A distress cannot be made twenty years after any receipt of rent. See a plea to that effect, Collier *v.* Clarke, 5 Q. B. 467; Musgrove *v.* Emmerson, 10 Q. B. 326; 16 L. J. Q. B. 175; De Beauvoir *v.* Owen, 5 Ex. 166; 19 L. J. Ex. 177. For a penalty under a by-law of a corporation it is six years. Tobacco Pipe Makers *v.* Loder, 20 L. J. Q. B. 415. Form of plea on a money bond. Blair *v.* Ormond, 20 L. J. Q. B. 445; Tuckey *v.* Hawkins, 4 C. B. 655; 16 L. J. C. P. 201. On an indenture. Kempe *v.* Gibbon, 12 Q. B. 662; 17 L. J. Q. B. 298.

Actions of trespass, detinue, and replevin for goods or cattle, and trespass *quare clausum fregit*, must be brought within six years. 21 Jac. 1, c. 16, s. 3.

Actions for assault, battery, wounding, and imprisonment, must be brought within four years. Ib.

Actions of verbal slander must be brought within two years. Ib. This does not apply to actions for *written* slander or libel, nor to slander of title, in which cases the limitation is six years. Ib.; Law *v.* Harwood, Cro. Car. 141. [In an action of slander the burden of proof is on the plaintiff to show that the words were spoken within two years before the suing out of his writ. Pond *v.* Gibson, 5 Allen, 19.]

As to disabilities and their removal, see 21 Jac. 1, c. 16, s. 7; 4 Anne, c. 16; 19 & 20 Vict. c. 97; *ante*, 431.

By 5 & 6 Vict. c. 97, s. 5, "the period within which any action may be brought for any thing done under the authority or in pursuance of any public, local, and personal, or local and personal acts, or other acts of a local and personal nature, shall be *two years*, or in case of continuing damage, then within *one year* after such damage shall have ceased." This does not apply to subsequent acts. See Boden *v.* Smith, 18 L. J. C. P. 121. As to what acts are local and personal within the above statute, see Cock *v.* Gent, 12 M. & W. 234; 13 L. J. Ex. 24; Moore *v.* Shepherd, 10 Ex. 424; 24 L. J. Ex. 28; Burnett *v.* Cox, 16 L. J. Q. B. 80.

By the copyright act, 5 & 6 Vict. c. 45, s. 26, the limitation is twelve calendar months.

By Lord Campbell's act, 9 & 10 Vict. c. 93, s. 3, the action must be brought within twelve months from the time of death.

Against justices the limit is six months. 11 & 12 Vict. c. 44, s. 8.

Under the metropolitan police act, 2 & 3 Vict. c. 71, s. 53, the limitation is three months. Under the highway act, 5 & 6 W. 4, c. 50, three months; county courts act, 9 & 10 Vict. c. 95, s. 138, three months. Under the public health act, 11 & 12 Vict. c. 63, s. 132, six months. Under the metropolis management act, 25 & 26 Vict. c. 102, s. 106, six months.

Actions for anything done in pursuance of the larceny act, 24 & 25 Vict. c. 96, s. 113, must be brought within six months; as also under the malicious injury to property act, 24 & 25 Vict. c. 97, s. 7, and the coinage act, 24 & 25 Vict. c. 99, s. 33.

The period of limitation commences from the accrual of the cause of action, or *damage*, and not necessarily from the time of the act which causes such dam-

OBS. age. Bonomi *v.* Backhouse, [El., Bl. & El. 622;] Backhouse *v.* Bonomi, 9 H. L. Cas. 503; Whitehouse *v.* Fellowes, 10 C. B. N. S. 765; 30 L. J. C. P. 305, where see all the cases collected.

A replication to a plea of the statute that the wrongful taking was fraudulently concealed will not be allowed, Hunter *v.* Gibbons, 1 H. & N. 459, for the fraudulent concealment of the cause of action by the party liable does not prevent the statute of limitations running from the accrual of the right of action. The Imperial Gas Company *v.* The London Gas Company, 10 Ex. 39. [But the general and prevailing rule in the American states is otherwise. See 2 Chitty Contr. (11th Am. ed.) 1235, note (*i*) and cases cited.]

As to what amounts to an acknowledgment of a trespass to take the case out of the statute, see Hunt *v.* Parker, 1 B. & Ald. 92.

As to pleading that a nuisance had been carried on by the defendant twenty years before the plaintiff had an interest in his premises, see Elliotson *v.* Feetham, 2 Bing. N. C. 134; Bliss *v.* Hay, 4 Bing. N. C. 183.

1. *Plea of the Statute of Limitations.* (*u*)

That the alleged cause of action did not accrue within [*state the period of limitation applicable to the case*] years before this suit.

2. *Plea to a Cognizance for Rent, that the Distress was made within Twenty Years next after the Time when the Right accrued to a Person through whom Title is claimed, and that such Person discontinued Receipt of Rent more than Twenty Years before Distress.*

Collier *v.* Clarke, 5 Q. B. 467.

3. DECLARATION. — Breaking and entering plaintiff's close.

PLEA. — Seisin of W. in fee, who demised to J. H. for a term, entry of Q. H., devise to W. H. and assent of executors, and justification as W. H.'s servant.

REPLICATION. — That the entry was for recovering the close, and defendant's entry did not accrue within twenty years before.

REJOINDER. — That no acknowledgment of title had been given before 3 & 4 W. 4, c. 27; that W. H. was entitled when act passed; that the close was not then possessed adversely to right of W. H., and entry made within five years of passing of the act.

SURREJOINDER. — That one S. possessed the close adversely to W. H., and issue thereon.

Holmes *v.* Newland, 11 Ad. & E. 44; in error, 3 Q. B. 679.

LUNACY. See *post*, "Trespass to the Person."

MAGISTRATE.

See "Notice of Action," and "Tender of Amends."

(*u*) This form is given by the common law procedure act, 1852 (15 & 16 Vict. c. 76).

MALICIOUS ARREST AND PROSECUTION.

Obs. — Not guilty denies the *malice*, and the want of probable cause; Hounsfield *v.* Drury, 11 Ad. & E. 98; James *v.* Phelps, 11 Ad. & E. 433; also the prosecution or arrest itself. Cotton *v.* Browne, 3 Ad. & E. 312; [Mitchell *v.* Jenkins, 5 B. & Ad. 588.] Thus in an action for maliciously issuing execution on a warrant of attorney for £103 when only £27 was due, it was held that it lay on the plaintiff to prove that not more than the £27 was due. Gough *v.* Cribb, 11 M. & W. 497; [Haddrick *v.* Heslop, 12 Q. B. 267.] The determination of the proceedings, when necessary to be alleged, must be denied by special plea. Watkins *v.* Lee, 5 M. & W. 270. So in an action for malicious outlawry, the general issue would not deny the allegation of the reversal of the outlawry; Drummond *v.* Pigou, 2 Bing. N. C. 114; nor in an action for maliciously issuing a fiat in bankruptcy would it deny the annulling of the fiat. Atkinson *v.* Raleigh, 3 Q. B. 79. A declaration for maliciously preferring an indictment, containing *several* assignments of perjury, is supported by showing that some of the assignments of perjury were preferred without probable cause, although there may have been probable cause for the others. Ellis *v.* Abrahams, 15 L. J. Q. B. 221. [In an action for malicious prosecution the defendant, for the purpose of rebutting malice and to show probable cause, may introduce evidence to prove that he acted upon the advice of counsel, having in good faith fully laid the case before him. Eastman *v.* Keasor, 44 N. H. 518; Ravenga *v.* Mackintosh, 2 B. & C. 693; Snow *v.* Allen, 1 Stark. 502; Hewlett *v.* Cruchley, 5 Taunt. 277; Stone *v.* Swift, 4 Pick. 389; Bacon *v.* Towne, 4 Cush. 217; Williams *v.* Vanmeter, 8 Missou. 339; Laird *v.* Davis, 17 Ala. 27; Stevens *v.* Fassett, 27 Maine, 266; Ash *v.* Marlow, 20 Ohio, 119; Walter *v.* Sample, 25 Penn. 275; Hall *v.* Suydam, 6 Barb. 83; Ames *v.* Rathbun, 55 Barb. 194; Collins *v.* Hayte, 50 Ill. 337; Alexander *v.* Harrison, 38 Missou. 258; Bartlett *v.* Brown, 6 R. I. 37; Wills *v.* Noyes, 12 Pick. 327; Wilder *v.* Holden, 24 Pick. 8. But the defendant is not protected by the advice of counsel unless he made to him a full and fair disclosure of the facts; Sappington *v.* Watson, 50 Missou. 83; Cooper *v.* Utterbach, 37 Md. 282; Ash *v.* Marlow, 20 Ohio, 119; Hewlett *v.* Cruchley, 5 Taunt. 277; Hill *v.* Palm, 38 Missou. 13; and acted in good faith upon the advice. Cole *v.* Curtis, 16 Minn. 182; Center *v.* Spring, 2 Clarke (Iowa), 393. Proof that the defendant acted under the advice of a person not learned in the law is not admissible for the purpose of rebutting malice. Straus *v.* Young, 36 Md. 246; Olmstead *v.* Partridge, 16 Gray, 381. As to the proof of facts tending to show the plaintiff guilty of the charge imputed to him in order to prove probable cause, and to mitigate damages, although it does not appear that such facts were known to the defendant at the time of the prosecution, see Bacon *v.* Towne, 4 Cush. 217.]

Plea to an Action for Malicious Prosecution that it was not determined. (*x*)

That the said prosecution was not determined as alleged [*or* the said indictment was not returned to the said court by the said jurors "not found"].

MASTER AND SERVANT.

Obs. — In actions for seduction, or for enticing away servants or apprentices, or for injuries to servants, not guilty denies the wrongful act and the accruing loss, but admits that the party seduced, &c. was the servant of the plaintiff. Tor-

(*x*) Describe the proceedings according to the fact. See Obs. and declarations, *ante*, 550 *et seq.* Another form of plea, Coombe *v.* Capron, 1 M. & R. 398, in which the words within the brackets were omitted. Where the suit is alleged to have been determined by "judgment as appears by record," *nul tiel record* would appear to be the proper plea. See Brown *v.* Jones, 15 M. & W. 191.

Obs. rence *v.* Gibbons, 5 Q. B. 297; Eager *v.* Grimwood, 1 Ex. 61; 16 L. J. Ex. 236. The service must be specially denied if necessary. See Kenrick *v.* Horner, 7 El. & Bl. 628; 26 L. J. Q. B. 214.

In actions for negligence, see *post*, "Negligence," 670; *ante*, "Master and Servant," 558; and *ante*, "Negligence," 564.

1. *Plea that the Party injured is not the Servant of the Plaintiff.* (*y*)

That the said A. B. was not the servant of the plaintiff as alleged.

2. *Plea justifying Moderate Correction of an Apprentice for Disobedience.* (*z*)

That the plaintiff was the apprentice of the defendant in his trade and business of a ——, and behaved and conducted himself saucily and contumaciously towards the defendant, and refused to obey his lawful commands relating to his duty as such apprentice, whereupon he, the defendant, then moderately corrected him, the plaintiff, for his said misbehavior.

MESNE PROFITS. *Post*, "Trespass to Realty."

MISCHIEVOUS ANIMALS.

Obs. — Law, &c. *ante*, 561. In an action for injuries done by defendant's dog or cattle, &c. not guilty denies that the animal did the act complained of, that it belonged to the defendant, and that it was of a savage disposition, Hogan *v.* Sharpe, 7 C. & P. 755, and that the defendant kept it *knowing* it to be so. Thomas *v.* Morgan, 2 Cr., M. & R. 496. See Gerard *v.* Dickenson, 4 Co. 18 *a*. See declarations, &c. *ante*, 562, 563.

Where the owner of a dog accustomed to kill game allowed the dog to be at large near a wood, wherein the owner knew game was kept, and the dog strayed into the wood and did damage to the game, the owner was held liable. Read *v.* Edwards, 17 C. B. N. S. 243. [See form in this case.]

1. *Plea that the Defendant's Dog attacked the Plaintiff because he irritated it.*

That the plaintiff, without the leave or license and against the will of the defendant, and without any reasonable cause or lawful occasion, teased, and irritated the said dog; and that the attacking and biting of the plaintiff by the said dog were entirely caused and occasioned by the said teasing and irritating of the said dog.

(*y*) Form, &c. Harris *v.* Butler, 2 M. & W. 539; Torrence *v.* Gibbons, 5 Q. B. 297. Plea that the plaintiff was a servant of the defendant with the negligent servant. Wiggett *v.* Fox, 11 Ex. 832. A similar plea, Griffiths *v.* Gidlow, 3 H. & N. 648. Plea that the plaintiff was a volunteer assisting defendant's servant. Degg *v.* Midland Ry. Co. [1 H. & N. 773.] See Potter *v.* Faulkner, [1 B. & S. 800;] Hutchinson *v.* York, &c. Ry. Co. 5 Ex. 353.

(*z*) See form, &c. Penn *v.* Ward, 2 Cr., M. & R. 338; S. C. 4 Dowl. 215. Of a son. Winterbourne *v.* Brookes, 2 C. & K. 16. The like of a mariner acting mutinously. Gale *v.* Dalrymple, R. & M. 118; Murray *v.* Montriou, 6 C. & P. 471; Lamb *v.* Burnett, 1 C. & J. 291; Johnson *v.* Bridge, 3 Dowl. 207. If the *cause* for *any* correction, &c. be denied, issue may be joined on the plea; but if the plaintiff contend that there was an *excess* of correction, &c. he *must new assign*; see Penn *v.* Ward, *supra*; or other reply excess.

2. *Plea that the Plaintiff was warned not to go near the Dog, &c. but did so, wherefore, &c.*

That the defendant had caused the said dog to be tied and fastened up in a careful and proper manner in and upon a certain part of certain premises of him the defendant, where the plaintiff had not any [right or] occasion to pass; and that the plaintiff was warned and cautioned against going near to the said dog, or teasing and inciting the same: yet the plaintiff went near to the said dog, and teased the same, and thereby caused the said dog to attack and bite the plaintiff.

NEGLIGENCE.

Obs. — See *ante*, 564, 578, 579. Not guilty denies the wrongful act charged, *i. e.* the negligence and the damage. R. G. T. T. 1853, r. 16. In collision of carriages, &c. it would, therefore, admit that the defendant was in possession by himself or his servant, but would deny that it was caused by any negligence of himself or servants. Durnford *v.* Trattles, 12 M. & W. 530. The form of the declaration may, however, be such that the plea of not guilty will put in issue that the carriage was being driven by the defendant's servant. Mitchell *v.* Crasswaller, 16 C. B. 237; 22 L. J. C. P. 100.

There must be separate pleas, if the facts warrant them, traversing the plaintiff's possession of the damaged carriage; Woolfe *v.* Beard, *infra;* Emery *v.* Clark, 2 M. & Rob. 260; as likewise the defendant's possession of the carriage which did the injury. Taverner *v.* Little; Wheatley *v.* Patrick, 5 M. & W. 652; Hart *v.* Crowley, 12 Ad. & E. 378. If on the latter traverse it be proved that the carriage which did the injury was the defendant's, it then lies on him to show that it was not under his management when the accident occurred, which he may do under not guilty. Mitchell *v.* Crasswaller, 16 C. B. 237; 22 L. J. C. P. 100; Joyce *v.* Cassell, 8 C. & P. 370. So under this plea it may be shown that the injury arose from the plaintiff's negligence; Ellis *v.* South Western Ry. Co. 2 H. & N. 424; 26 L. J. Ex. 349; or, in the case of a public conveyance, by the negligence of those conducting it. Thorogood *v.* Bryan, 8 C. B. 131; Bridge *v.* Grand Junction Ry. Co. 3 M. & W. 244. As to the negligence of those in the care of infants, see Waite *v.* North Eastern Ry. Co. 27 L. J. Q. B. 417.

No action lies where both parties are in fault and contributed to the injury, *ante*, 570, and this may be shown under not guilty. Bridge *v.* Grand Junction Ry. Co. 3 M. & W. 245. And it is not necessary to plead that it was caused partly by the plaintiff's negligence. Norton *v.* Scholefield, 9 M. & W. 665; Gough *v.* Bryan, 2 M. & W. 770. [The contributory negligence or wrong of a third party is no defence. Illidge *v.* Goodwin, 9 C. & P. 190; Lynch *v.* Nurdin, 1 Q. B. 29; Abbott *v.* Macfie, 2 H. & C. 744; Harrison *v.* Great Northern Ry. Co. 3 H. & C. 231.]

The same applies to collision of ships. Woolfe *v.* Beard, 8 C. & P. 374; Vennel *v.* Garner, 1 Cr. & M. 21; The Ligo, 2 Hagg. Adm. Rep. 356. So where the negligence consists of a breach of admiralty rules, it may be shown under not guilty; Dowell *v.* Steam Navigation Co. 26 L. J. Q. B. 59; also it may be shown under not guilty that the defendant was a member of a *quasi* French corporation to whom a vessel, which ran down another, belonged, and which, by the law of France, was alone accountable for the act of the master. Steam Navigation Co. *v.* Guillou, 11 M. & W. 877.

1. *Plea traversing that the Carriage, &c. was the Plaintiff's.*

That the said carriage and horses [*as the case may be*] was not the plaintiff's [*or* defendant's] as alleged.

2. *Plea traversing that the Carriage was under the Care and Control of the Defendant's Servant.*

That the said carriage and horses [*as the case may be*] were not under the care and control of the defendant's servant as alleged.

[3. *Plea to a Count for a Trespass, that it was caused by Plaintiff's own Negligence.* (*a*)

That the alleged trespass was caused by the negligence and improper conduct of the plaintiff and not otherwise.]

NEW ASSIGNMENT.

Obs. — See *ante*, 439. Where the *cause* of excuse stated in the plea is true, the plaintiff must, where he relies on an *excess* or trespass committed at *another* time, in general reply or new assign such excess or other trespass. See Penn *v.* Ward, 2 Cr., M. & R. 338. The case of Price *v.* Peek, 1 Bing. N. C. 380, clearly explains this principle. That was an action of trespass against bailiff and sheriff for taking the plaintiff on a charge of felony to a police station, and *thence to a prison*. The sheriff, after pleading not guilty, justified the taking *from the police station* to the prison under a *ca. sa.* The plaintiff, admitting the writ and the delivery of the warrant to the bailiff, replied *de injuriâ absque residuo causæ*. Held, that under this replication he could not give evidence to involve the sheriff in the misconduct of the bailiff, *committed before the plaintiff arrived at the police station* (namely, the charging the plaintiff with felony and having him detained on that charge) ; and that in order to the admission of such evidence the circumstances should have been *replied or new assigned specially*. Tindall C. J. in delivering judgment, said, "The traverse *de injuriâ suâ propria absque residuo causæ*, puts nothing in issue but each and every fact alleged in the special plea and not admitted in the replication. In this case it puts nothing in issue but whether the assault and imprisonment mentioned in the plea were committed under color of the writ and warrant or not. It is true that under the authority of the case of Lucas *v.* Nockells, 10 Bing. 157 (and see Carnaby *v.* Welby, 8 Ad. & E. 880); the plaintiff may show under that traverse that the sheriff did not act under the writ at all; that although he had it in his possession, he acted at the time for a purpose and with an object entirely distinct from the execution of the writ, and that he only avails himself of it at the trial as an excuse for an illegal act. But there is no authority in that case or any other, that where the sheriff has really acted under the writ at the time, and avails himself of it in his plea, the plaintiff shall be at liberty under this replication to give antecedent matter in evidence to render the subsequent arrest under the writ illegal. Such a reply confesses the arrest stated in the plea to have been made under the writ, but avoids it by new matter of fact; and, therefore, like any other matter of confession and avoidance, must be specially pleaded. Where the plaintiff seeks to avoid any legal excuse for a trespass by showing matter subsequent, which makes the defendant a trespasser *ab initio*, he is bound to plead such matter, and cannot take advantage of it under the general traverse *de injuriâ*, &c.; see the authorities collected in 1 Saund. 300 *d*, in note; and the case is the same upon principle, whether the act done by the defendant is precedent or subsequent to the execution of the writ, and the reason is undoubtedly the same in each case, viz. that the defendant ought not to be taken by surprise at the trial."

Declaration of two counts for assault and imprisonment. Plea, that defendant

(*a*) [See M'Laughlin *v.* Pryor, 4 M. & C. 48; *ante*, 570; Railroad Co. *v.* Gladmon, 15 Wallace, 401; Beatty *v.* Gilmore, 16 Penn. St. 463; Durant *v.* Palmer, 5 Dutch. 544. Plea of compulsory pilotage in foreign waters. The Halley, L. R. 3 Adm. 3.]

Obs. being bail for plaintiff arrested him to render him in discharge, and detained him till he had satisfied the demand in the action. Replication, *de injuriâ*. It appeared that defendant, in addition to detaining plaintiff till he satisfied the demand in the action, detained him *an hour longer*, till he paid the expenses of the defendant becoming bail, &c. Held, that this was *one continuing trespass*, and that, therefore, in order to recover *for that part of it* which was unjustifiable (namely, the additional detention for the bail's expenses), the plaintiff ought to have *newly assigned*. Lambert *v.* Hodgson, 1 Bing. 317. So where to trespass for imprisoning the plaintiff, the defendant justified (as churchwarden), for indecent behavior in a church, and to prevent its renewal, and the plaintiff replied *de injuriâ*, and also newly assigned an imprisonment after the expiration of a reasonable time, &c.; it was held this mode of replying was good and was not double. Worth *v.* Terrington, 13 M. & W. 781; 2 D. & L. 352. See Atkinson *v.* Matteson, 2 T. R. 172, 177; 1 Saund. 299, note (6).

A new assignment in trespass to realty is necessary where the declaration is general and the subject-matter divisible, and the plea *apparently* sets up matter of justification, covering the trespasses to which the plea is pleaded, but *really* only answers a part; in such case, the part not answered must be new assigned. 1 Saund. 299, 300; Bracegirdle *v.* Peacock, [8 Q. B. 174.] So, where the plaintiff cannot deny the *cause* of justification, and either relies on another *distinct* trespass, or upon an *excess* committed by the defendant in exercising his right, he should new assign. The onus of proving that the trespasses *were* distinct will lie on the plaintiff. Darby *v.* Smith, 2 M. & Rob. 184. In trespass to the *person*, where the plaintiff relies on *excess*, it is usual to reply it. In trespass to *realty*, where the plaintiff relies on *excess* it is usually *new assigned*.

Sometimes the plaintiff may deny the justification and also new assign, without committing the fault of duplicity. Thus in trespass to land, laid to have been committed *on divers days*, so that distinct trespasses may have been committed at separate periods, where the defendant pleads a right of way, &c. the plaintiff may traverse the right, and also new assign other trespasses *extra viam*, or on totally different occasions and for other purposes. See 1 Chit. Pl. 7th ed. 661. So where a plea justified (by leave and license) a trespass, in entering, &c. a house, it was held, that a replication traversing the justification, and also newly assigning continuing in the house and excess, was good. Loweth *v.* Smith, 12 M. & W. 582; Playfair *v.* Musgrove, 14 M. & W. 239; and see Worth *v.* Terrington, 13 M. & W. 781. *Trespass* for breaking and entering a house, and breaking locks, &c. *Plea* justifying as sheriff under process, stating that defendant was lawfully in the dwelling-house, and that he could not get out or remove the goods without breaking, &c. New assignment that action brought for breaking the outer door, &c. Plea justifying as before, and as no one was in the house, defendant opened door. Second new assignment that action brought for breaking *locks*, &c. belonging to *outer* door. Held good, as the substance of the *second* new assignment was contained in and might be proved under the allegation of the first. Pugh *v.* Griffiths, 7 Ad. & E. 827. But in such cases, on account of *costs*, it is injudicious for the plaintiff to *traverse* the right set up in the plea, unless there be good reason to dispute it.

In trover the form will be nearly as in trespass, stating that the plaintiff, on, &c. another and different occasion, &c. converted, &c. the goods. See Brown *v.* Copley, 7 M. & G. 570, note (*a*); 2 D. & L. 332. Trover for ten *barges* and ten *pieces of timber*, &c.; plea justifying removing them because they obstructed the navigation of the Thames; held, that the plea being general, and *apparently* answering the whole of a *divisible* number of things in the declaration, the plaintiff might traverse, *and also* new assign that he brought his action for *other* pieces of timber converted on another occasion. Page *v.* Hatchett, 8 Q. B. 187; 15 L. J. Q. B. 68. New assignment in an action against a sheriff, justifying under a *fi. fa.*, that the plaintiff sues for converting other goods. Aldred *v.* Constable, 6 Q. B. 370. It was held in that case that this is the proper mode of replying where the sheriff sells under color of the writ under which he legally justifies more than sufficient to satisfy that execution. *Sed quære?* whether a new assignment in trover can

Obs. in any case be correct. Weeding *v.* Aldrich, 9 Ad. & E. 866, per Littledale J.; and see Hawthorne *v.* Newcastle, &c. Ry. Co. 3 Q. B. 735.

One new assignment can now only be pleaded, and that must be consistent with the particulars. Common Law Procedure Act, 1852, s. 87. And by s. 88, "No plea which has already been pleaded to the declaration shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge, and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits."

If a man abuse an authority given to him by the law, he becomes a trespasser *ab initio;* and if in an action of trespass the authority be pleaded, the subsequent abuse should be replied as being an answer to the plea, and not new assigned. The Six Carpenters, and notes thereto, 1 Sm. L. C. 6th ed. 132; Oxley *v.* Watts, 1 T. R. 12; Ellis *v.* Taylor, 8 M. & W. 415; Ladd *v.* Thomas, 12 Ad. & E. 117; West *v.* Nibbs, 4 C. B. 172.

1. *New Assignment to Pleas of Right of Way, Right of Common, &c.* (*b*)

The plaintiff, as to the [second] and [third] pleas, says that he sues, not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, (*c*) and also in other of the said lands, (*d*) and on other occasions, and for other purposes than those referred to in the said pleas.

2. *If the Plaintiff replies and new assigns, the New Assignment may be as follows.* (*e*)

And the plaintiff, as to the [second] and [third] pleas, further says, that he sues not only for the trespasses in those pleas admitted, but also for, &c.

3. *If the Plaintiff replies and new assigns to some of the Pleas, and new assigns only to the others, the Form may be as follows.* (*f*)

And the plaintiff, as to the —— and —— pleas, further says, that he sues not for the trespasses in the —— pleas [*the pleas not replied to*] admitted, but for the trespasses in the —— pleas [*the pleas replied to*] admitted, and also for, &c.

(*b*) This form is given by the Common Law Procedure Act, 1852, sch. B, 55. Where there have been two trespasses, either of which will fit the declaration and particulars, if any; see Common Law Procedure Act, s. 87; and one only is partly; Bracegirdle *v.* Peacock, 7 Q. B. 174; Loweth *v.* Smith, 13 M. & W. 781; or wholly answered, and the plaintiff relies on an excess in committing that trespass, or upon the trespass not answered, he should new assign. Price *v.* Peek, 1 Bing. N. C. 380; Robertson *v.* Gauntlett, 16 M. & W. 289. [See Cator *v.* Lewisham Board of Works, 5 B. & S. 115; South Metropolitan Cemetery Co. *v.* Eden, 16 C. B. 42; Henning *v.* Burnet, 8 Ex. 187; Roberts *v.* Rose, L. R. 1 Ex. 82.] If the defendant cannot prove a material allegation in his plea, such as in justification by a sheriff, that the outer door was open when he entered, the plaintiff should take issue on the plea; Duke of Brunswick *v.* Sloman, 8 C. B. 317; but not if his answer to the plea is matter of *discharge* thereto. Catterall *v.* Lees, 8 C. B. 113.

(*c*) Such as self-defence, see Bone *v.* Daw, 3 Ad. & E. 711; or moderate correction of a school-boy; Penn *v.* Ward, 2 Cr., M. & R. 338; or of a son; Winterbourne *v.* Brooks, 2 C. & K. 16; or where the plaintiff contends that the defendant having a right to enter real property, entered it with unnecessary violence. Harvey *v.* Brydges, 14 M. & W. 440.

(*d*) This is proper where some right of way is truly pleaded, and the plaintiff contends that the trespasses have been *extra viam.* Webber *v.* Sparks, 10 M. & W. 485; Glover *v.* Dixon, 9 Ex. 158; Ellison *v.* Isles, 11 Ad. & E. 655. Omit these words if the action be not for trespass to land.

(*e*) Common Law Procedure Act, 1852, Sched. B, 56.

(*f*) Common Law Procedure Act, 1852, sch. B, 57.

4. *New Assignment of Trespass to the Person.* (*g*)

Commence as in form 1.] But for trespasses committed upon another and different occasion, and purpose, than in that plea alleged.

5. *New Assignment to a Plea of Justification under a Fi. Fa. by a Sheriff, stating that he continued in the House an Unreasonable Time, &c.*

Playfair *v.* Musgrove, 14 M. & W. 239; Ash *v.* Dawnay, 8 Exch. 237.

6. *Similar New Assignment that the Sheriff broke open an Outer Door.*

Pugh *v.* Griffiths, 7 A. & E. 830.

NOLLE PROSEQUI. *Ante*, 441, 442.

NOTICE OF ACTION.

Obs. — There are several statutes which enact that no action shall be brought against persons acting in pursuance of their provisions (*h*) until the expiration of a certain time, after notice in writing has been given to the defendant, that such action will be brought.

By 5 & 6 Vict. c. 97, s. 4, it is enacted, that in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced; and by s. 5, the period during which any action may be brought for anything done under the authority of or in pursuance of any public, local, and personal, or local and personal acts, and divers other acts of a local and personal nature, shall be two years; or in case of continuing damage, then until one year after such damage shall have ceased.

By the provisions of certain statutes the general issue is allowed to be pleaded in certain cases, and special defences, including the want of notice of action, may be given in evidence under that plea, but by s. 3 of the above act, "So much of any clause or provision in any act or acts, commonly called public, local, and personal, or local and personal, or any acts of a local and personal

(*g*) See form, Brancker *v.* Molyneux, 1 M. & G. 726; and see a form of new assignment to a plea by a sheriff justifying under process, that the trespasses were committed *after* an order from the execution creditor to withdraw from the goods. Walker *v.* Hunter, 2 C. B. 324; and see Playfair *v.* Musgrove, 14 M. & W. 239.

(*h*) As to what acts come within these words, 1 Har. Dig. tit. Action; Rosc. Ev. 11th ed. 750; Stark. Ev. 3d ed. vol. ii. p. 580, and vol. iii. p. 729; 3 Burn's J. tit. Justice; Elliott *v.* Allen, 1 C. B. 18. Rate collectors. 27 Geo. 2, c. 20, s. 2; Charrington *v.* Johnson, 13 M. & W. 356; Shatwell *v.* Halt, 10 M. & W. 523; 2 Dowl. N. S. 567. The omission to do an act is equivalent to doing or intending to do an act, so as to entitle a public body to notice of action. Wilson *v.* The Mayor of Halifax, 37 L. J. Ex. 44. It is not necessary that the defendant should be acting in strict pursuance of the statute. It is sufficient if he was acting *bonâ fide*, and reasonably believed himself to be authorized (Carter *v.* Filliter, Car. & Mar. 498) by the statute, or to be doing his duty. Hughes *v.* Buckland, 15 M. & W. 346; Booth *v.* Clive, 20 L. J. C. P. 151; 10 C. B. 827; Jones *v.* Howell, 29 L. J. Ex. 19; Reed *v.* Cowmeadow, 7 C. & P. 821; Smith *v.* Hopper, 9 Q. B. 105; and see Kine *v.* Evershed, 10 Q. B. 143; Gosden *v.* Elphick, 19 L. J. Ex. 9; Jones *v.* Gooday, 9 M. & W. 736; Huggins *v.* Weyday, 15 M. & W. 357. Whether he had reasonable ground for believing he was acting under the statute, Cann *v.* Clipperton, 10 Ad. & E. 582. The *bona fides* is a question for the jury. Horn *v.* Thornborough, 8 Ex. 846; Arnold *v.* Hamel, 9 Ex. 404; Kirby *v.* Simpson, 23 L. J. M. C. 165; 10 Ex. 358; White *v.* Morris, 11 C. B. 1015; 21 L. J. C. P. 151; Rudd *v.* Scott, 2 Scott N. R. 631; Haseldine *v.* Grove, 3 Q. B. 997. It is not necessary that the defendant should know of the existence of the statute. Reed *v.* Coker, 13 C. B. 830.

OBS. nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed." What acts are within this section. Cock *v.* Gent, 12 M. & W. 234; Richards *v.* Easto, 15 M. & W. 244; Moore *v.* Shepherd, 10 Ex. 424; Barnett *v.* Cox, 16 L. J. M. C. 27. It is not meant to apply to future acts. Boden *v.* Smith, 18 L. J. C. P. 121.

The want of notice of action must generally be pleaded specially. Edwards *v.* Great Western Railway, 11 C. B. 588; Davey *v.* Warne, 14 M. & W. 199; Law *v.* Dodd, 17 L. J. M. C. 65; Smith *v.* Pritchard, 2 C. & K. 699. But it is not necessary where the general issue by statute may be pleaded. See *ante*, 286, "Not guilty by statute." Kirby *v.* Simpson, 10 Ex. 358; Taylor *v.* Nesfield, 3 El. & Bl. 724.

Health (Public). — 11 & 12 Vict. c. 63, s. 139. Newton *v.* Ellis, 5 El. & Bl. 115; 24 L. J. Q. B. 337; Mason *v.* The Birkenhead Commissioners, 4 H. & N. 72.

Highways. — 3 Geo. 4, c. 126, s. 147; 5 & 6 W. 4, c. 50, s. 109. Lamont *v.* Southall, 5 M. & W. 416; Huggins *v.* Weyday, 15 M. & W. 357; Davis *v.* Curling, 8 Q. B. 286; Stamp *v.* Sweetland, 8 Q. B. 13; Newton *v.* Ellis, 24 L. J. Q. B. 337; Hardwick *v.* Moss, 7 H. & N. 136; 31 L. J. Ex. 205.

Justices. — By 11 & 12 Vict. c. 44, s. 9, "No action shall be commenced against any justice of the peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode by the party intending to commence such action, his attorney or agent; (*i*) in which said notice the cause of action, (*k*) and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and on the back thereof shall be indorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the attorney or agent, if such notice has been sworn by such attorney or agent. See the cases on this statute collected in 1 Har. Dig. tit. Action; Rosc. Evid. 11th ed. 769; Stark. Evid. 3d ed. vol. ii. p. 580, and vol. iii. p. 729, Constables. Greenway *v.* Hurd, 4 T. R. 553; Hughes *v.* Buckland, 15 M. & W. 355; Wallace *v.* Smith, 5 East, 114; Kirby *v.* Simpson, 25 L. J. M. C. 165; 10 Ex. 358.

Railway Company. — No notice is requisite when the company is sued for negligence in the conveyance of passengers; Carpue *v.* London & Brighton Ry. Co. 5 Q. B. 747; or as carriers for the loss of goods. Palmer *v.* Grand Junction Ry. Co. 4 M. & W. 749; but should be given when the action is brought to recover excess of charges over others similarly circumstanced. Kent *v.* Great Western Ry. Co. 3 C. B. 714; 16 L. J. C. P. 72. Notice is necessary in an action against a company for obstructing a way in carrying their act into effect. Boyd *v.* London & Croydon Ry. Co. 4 Bing. N. C. 669. The word "person" in the clause requiring notice was, in this case, held to include the company itself. Upon this point see, also, the Mayor of Hereford *v.* Morton, 15 L. T. N. S. 187.

Special Constables. — 1 & 2 W. 4, c. 41, s. 19; Jones *v.* Nicholls, 13 M. & W 361; 2 D. & L. 420; Surfling *v.* Ovenden, 9 J. P. 359.

Form of Plea that no Notice of Action was given as required by Statute. (*l*)

That the alleged grievances were committed by the defendant after the

(*i*) No proof of plaintiff's handwriting to the notice is requisite, as it is sufficient if served on his behalf. Forman *v.* Davies, 1 Car. & Mar. 127. Notice by attorney as *prochein amy* of infant plaintiff. Goudoin *v.* Lewis, 10 Ad. & E. 117.

(*k*) The *place* of the *imprisonment* must be specified. Martin *v.* Upcher, 3 Q. B. 662; 1 Dowl. N. S. 555; Jacklin *v.* Fytche, 14 M. & W. 381. But not where the warrant was signed by the justice. Prichett *v.* Gratrex, 1 C. & K. 651; 15 L. J. M. C. 145. The want of these requisites is not cured by the magistrate pleading a tender of amends. Martin *v.* Upcher, *supra*. The *form* of the intended action need not be mentioned. Prichett *v.* Gratrex, *supra*; Sabin *v.* De Brugh, 2 Cowp. 196.

(*l*) A similar plea in action for money received was held bad. Peck *v.* Boyes, 6 M. &. G. 726; Gaston *v.* Great Western Ry. Co. 27 L. J. Q. B. 375; 28 Ib. 321. See,

passing of a certain act [or acts] of parliament made and passed in the —— year of the reign of —— [*&c., set out the title of the statute or statutes*], and were and each of them was done in pursuance of [*or*, by the authority of or under and by virtue of] the said statute [*or* statutes], and that no notice of commencing this action was given to the defendant one calendar month before the same was commenced pursuant to the said statute [*or*, the statutes in that behalf.]

NUISANCES.

Obs. — See "Ancient Lights." "Common," "Reversion," "Watercourses," "Ways." By r. 16, T. T. 1853, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only, that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. Under not guilty the plaintiff must prove that the defendant was the person who caused the nuisance. Dawson *v.* Moore, 7 C. & P. 25; also that the plaintiff sustained an injury from the acts complained of; thus in Norton *v.* Scolefield, 9 M. & W. 661, which was a case for keeping a cesspool which fouled plaintiff's well, it was held that not guilty denied both the fact of keeping the cesspool, and also that the plaintiff's well was thus rendered foul. See, also, Mummery *v.* Paul, 2 D. & L. 585, per Maule J.; 1 C. B. 316. In an action for continuing a nuisance, the continuance only is denied by not guilty. Greenfield *v.* Edgcombe, 7 Q. B. 661. See Grew *v.* Hill, 3 Ex. 801. If the defence is that the nuisance, if any, is of a public nature, and that the plaintiff has sustained no special damage enabling him to sue, then the special damage may be traversed in terms. *Ante*, "Libel;" and Hobson *v.* Thellusson, 36 L. J. Q. B. 302. The inducement or assertion of right ought also to be traversed specially. Frankum *v.* Lord Falmouth, *ante*, 635.

In a declaration for a nuisance, the inducement, or *assertion* of *right* to the thing affected (see per Patterson J. Cotton *v.* Brown, 3 Ad. & E. 312), as that the plaintiff was entitled to the enjoyment of the support of defendant's house or foundations, &c. or was entitled to the enjoyment of water, &c. or was possessed of a house, &c. is not denied by not guilty, and therefore must be specially traversed in the words of the averment. And see per Tindal C. J. in Ross *v.* Groves, 5 M. & G. 613. Thus to an action for removing land which supported plaintiff's house, the defendant might plead: 1, that the land on which the plaintiff's house stood was not supported, &c. by the other land; 2, that the plaintiff was not entitled as of right to *his* land being supported, &c. by the other land. See these forms, Hide *v.* Thornborough, 2 C. & K. 252; and similar forms, Trower *v.* Chadwick, 3 Bing. N. C. 339; Partridge *v.* Scott, 3 M. & W. 220. It is no answer to an action for a nuisance that the act which caused it was done in a proper and convenient spot, and was a reasonable use of the land. Bamford *v.* Turnley, [3 B. & S. 62; Cavey *v.* Ledbitter, 13 C. B. N. S. 470; St. Helen's Smelting Co. *v.* Tipping, 4 B. & S. 608, 616; 11 H. L. Cas. 632;] overruling Hole *v.* Barlow, 4 C. B. N. S. 334; and see Stockport Water Works *v.* Potter, [7 H. & N. 160;] Nuttal *v.* Bracewell, L. R. 2 Ex. 1. Prescriptive right to cause a nuisance. Flight *v.* Thomas, 10 Ad. & E. 590. As to acquiescence, Davies *v.* Marshall, 31 L. J. C. P. 61. See *ante*, 580, Obs.

[1. *Plea justifying the Removal of* [*Coping Stones*] *because they overhung Defendant's Land.*

That at the times of the alleged trespasses he was possessed of lands adjoin-

also, Kent *v.* Great Western Ry. Co. 3 C. B. 714; 16 L. J. C. P. 72; and see a plea in Braham *v.* Watkins, 16 L. J. Ex. 9; Richards *v.* Easto, 15 M. & W. 244. By bailiff of a county court. Tarrant *v.* Baker, 14 C. B. 200. By commissioners under a local act. Mason *v.* Birkenhead Commissioners, 6 H. & N. 72.

ing the said land of the plaintiff, and the plaintiff had built the said [wall] at the extremity of his said land next to the said land of the defendant, and had wrongfully so placed the said [coping stones] on the said [wall] that the same then wrongfully extended beyond the said [wall] and overhung and encumbered the said land of the defendant, wherefore the defendant removed the said [coping stones] from and off his said land to a small and convenient distance into and upon the said land of the plaintiff, which was then a convenient place for putting the same, and there left them for the plaintiff's use, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Plea justifying obstructing a watercourse used by plaintiff through land of a third party, because it discharged water on to the defendant's land. See Roberts *v.* Rose, L. R. 1 Ex. 82.

2. *Plea justifying a Trespass to abate a Nuisance.* (*m*)

That before and at the times of the alleged trespasses he was possessed of a messuage and premises adjoining the said messuage and premises of the plaintiff, and the said [pipe and flue] were used by the plaintiff for the [emission of smoke and sparks therefrom], and were wrongfully a nuisance to the defendant in the use and occupation of his said messuage and premises, and were dangerous to his said messuage and premises, and prevented him from conveniently and safely enjoying the same; and although before the alleged trespasses, or any of them, the defendant requested the plaintiff to remove the said [pipe and flue] and abate the said nuisance, and a reasonable time in that behalf had then elapsed, yet the plaintiff neglected and refused so to do; wherefore the defendant afterwards, for the purpose of abating the said nuisance, took the said [pipe and flue] and removed them to a short and convenient distance and there left them for the plaintiff's use, doing no more than was necessary for the purpose aforesaid, which are the trespasses.]

PATENTS.

Ante, part 1, pp. 218, 443, "Patents;" part 2, "Injunctions," "Patents."

1. *General Issue.* (*n*)

"Not Guilty," *ante*, 635.

(*m*) A plea justifying entering into another's close to abate a nuisance, must show previous notice to remove it, that the plaintiff was a wrong-doer in placing it there, or that it was immediately dangerous to life or health. Jones *v.* Williams, 11 M. & W. 176. [Form of plea where plaintiff wrongfully placed his goods in defendant's close, wherefore defendant entered to remove them to plaintiff's close. Rea *v.* Sheward, 2 M. & W. 424.] The law respecting the right to abate a private nuisance will be found much discussed [in Perry *v.* Fitzhowe, 8 Q. B. 757;] and see Jones v. Williams, 11 M. & W. 176, and *ante*, 580; 3 Bl. Com. 5; Vin. Abr. Nuisance, W. 2, Pl. 3.

(*n*) The plea of not guilty denies only the fact of the infringement, that is, the breaches as alleged in the declaration, and under it the defendant might show that the articles made or the process pursued by him was substantially different from the plaintiff's. Webster on Patents, 114, note (*p*); Heath *v.* Unwin, 13 M. & W. 583. It does not put in issue the intention. Stead *v.* Anderson, 4 C. B. 806; and see R. G. T. T. 1853, r. 16. The validity of the patent cannot be disputed by a defendant in an action for penalties under 5 & 6 W. 4, c. 83, s. 7. See Myers *v.* Baker, 3 H. & N. 802. A plea to a deed of license that the invention was worthless to the knowledge of the plaintiff,

2. *Plea traversing that the Plaintiff was the Inventor.* (*o*)

That the plaintiff was not the first and true inventor of the said manufacture, as alleged.

3. *Plea denying that the Invention was new.* (*p*)

That the said [undisclaimed part of the said (*q*)] invention was not new, as alleged.

4. *Plea that Two Parts of an Invention were not nor was either of them new.* (*r*)

Bentley *v.* Keighley, 6 M. & G. 1039; 8 Q. B. 757.

5. *Plea that the Invention was not an Invention of any Manufacture which could be the subject of a Patent.*

That the said [undisclaimed part of the said] invention was not the making or working of any manufacture for which letters-patent could by law be granted. (*s*)

6. *Plea that the Invention was not an Improvement.* (*t*)

That the said manufacture was not nor is it any improvement whatever, or of any use, benefit, or advantage to the public.

but not of the defendant, is bad; as is also a plea that the plaintiff did not give, nor did defendant take, such exclusive license within such district as by the said deed was provided for. Smith *v.* Scott, 7 C. B. N. S. 771.

(*o*) See form, &c. Russell *v.* Ledsam, 14 M. & W. 577. For the law, Stead *v.* Williams, 7 M. & G. 841. The words "true and first" are satisfied by the plaintiff being the original discoverer, the discoverer and importer from abroad, or the importer only. Beard *v.* Egerton, 15 L. J. C. P. 270.

(*p*) See other forms and law, Morgan *v.* Seaward, 2 M. & W. 545; Carpenter *v.* Smith, 9 M. & W. 300; Nickels *v.* Ross, 8 C. B. 686; Bush *v.* Fox, 9 Ex. 651; Ralston *v.* Smith, 35 L. J. C. P. 49; [Hills *v.* London Gas Light Co. 5 H. & N. 312; Betts *v.* Menzies, 1 El. & El. 990.] Statute 21 Jac. 1, c. 3, s. 6, protects letters-patent "of the sole working or making of any manner of new manufacture in this realm to the true and first inventor." Under this statute a plea is bad which states that the patent was not a *new manufacture*, as being doubtful whether the defendant meant to deny that the subject-matter was a *manufacture* within the statute, or that it was *new*. Spilsbury *v.* Clough, 2 Q. B. 474; Walton *v.* Bateman, 3 M. & G. 773; Myers *v.* Baker, 28 L. J. Ex. 94; 3 H. & N. 802. As to what is a new invention, Russell *v.* Ledsam, 14 M. & W. 579; Crane *v.* Price, 4 M. & G. 580. The plaintiff should give some slight evidence of novelty in this plea by calling persons acquainted with the particular trade to prove they never before heard of a similar invention. Manton *v.* Parker, Webs. Pat. 128. If an invention be only an improved process, that will not sustain a patent unless there be novelty of invention or combination in it. Gibson *v.* Brand, 4 M. & G. 179. Pleas that will be allowed together. Bentley *v.* Keighley, 6 M. & G. 1039; Nickels *v.* Ross, 8 C. B. 684.

(*q*) The defendant will not be allowed to plead that the whole invention was not new, and also that the undisclaimed part was not new. Clark *v.* Kenrick, 12 M. & W. 219.

(*r*) Pleas that as to *a part* one A. B. was the inventor, and that before the granting of the letters-patent A. B. and others publicly used and exercised *a part* of the said invention, were not allowed. Bentley *v.* Keighley, *ubi supra*.

(*s*) See a form in Nickels *v.* Ross, 8 C. B. 686; [Harwood *v.* Great Northern Ry. Co. 2 B. & S. 194; Jordan *v.* Moore, L. R. 1 C. P. 624.] This defence could not be taken under any other plea. Gillett *v.* Wilby, 9 C. & P. 334; Walton *v.* Bateman, 3 M. & G. 773; Spilsbury *v.* Clough, 2 Q. B. 474. If the specification is not set out in the declaration, it might be in this plea, when the question could be decided on demurrer. Per Tindal C. J. Gibson *v.* Brand, 4 M. & G. 197.

(*t*) Other forms, Stead *v.* Anderson, 4 C. B. 806; Bedells *v.* Massey, 7 M. & G. 631; 13 L. J. C. P. 176. In Nickels *v.* Ross, 8 C. B. 684, this was allowed to be pleaded in two pleas, one denying that the manufacture was an improvement, and the other that it was of any use to the public; for "the invention may be an improvement, and yet may be of no

7. *Plea that the Invention was prejudicial to the Public.* (*u*)

Morgan *v.* Seaward, 2 M. & W. 545; Cornish *v.* Keene, 3 Bing. N. C. 572; Stead *v.* Williams, 7 M. & G. 821.

8. *Plea denying the Grant of the Patent.* (*x*)

"Non concessit."

That her majesty did not, by letters-patent, grant the plaintiff the sole privilege to make, use, exercise, and vend the said invention, as alleged.

9. *Plea denying the Enrolment of a sufficient Specification.* (*y*)

That the plaintiff did not, within six calendar months after the date of the said letters-patent, cause to be enrolled in the high court of chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be and might be performed, as alleged.

10. *Plea that the Specification does not sufficiently describe the Invention.* (*z*)

That the plaintiff did not, within six calendar months next after the date of the said letters-patent, describe or ascertain the nature of the said invention, and in what manner the same was and is to be or might be performed, as alleged.

11. *Plea that the Description of the Invention was too vague, and is at variance with Description of the Invention in the Specification.* (*a*)

Stead *v.* Anderson, 4 C. B. 811; Beard *v.* Egerton, 15 L. J. C. P. 270.

use, or prejudicial to the public." Per Tindal C. J. Bedells *v.* Massey, *ubi supra;* and see, also, per Maule J. same case. See, also, Russell *v.* Ledsam, 11 M. & W. 647; 1 D. & L. 347.

(*u*) See note to the last form, and 21 Jac. 1, c. 3, s. 6.

(*x*) See form, Bedells *v.* Massey, 7 M & G. 631. Where the action is by the assignor of a patent, this plea will be allowed, together with a traverse of the assignment. Bunnett *v.* Smith, 13 M. & W. 552. The plea of *nul tiel record* cannot be pleaded to a declaration for the infringement of a patent. See Hindmarsh on Patents, 263.

(*y*) This is a traverse of a material fact. Bentley *v.* Goldthorp, 1 C. B. 368. A plea was held bad as argumentative which stated that plaintiff enrolled an instrument in writing as follows, &c. [*setting it out*], and that he enrolled no other. Muntz *v.* Forster, 6 M. & G. 734. For other forms, and for a form denying that the patent was duly described, Nickels *v.* Ross, 8 C. B. 687.

(*z*) See form, Stead *v.* Williams, 7 M. & G. 821; Bentley *v.* Goldthorp, 1 C. B. 368. Under this plea plaintiff must give some slight evidence of what his invention was. Turner *v.* Winter, 1 T. R. 602; Derosne *v.* Fairrie, 2 Cr., M. & R. 476. This plea will not let in the objection that the title is larger than the description; Ib. 486, per Lord Abinger C. B.; but see per Alderson B. in Cook *v.* Pearce, 8 Q. B. 1044; nor that the invention itself is not good, nor deny that it is the subject of a patent. Jupe *v.* Pratt, Webs. on Patents, 116, note (*s*). See a longer form, Stead *v.* Carey, 1 C. B. 500. The meaning of a specification is for the court, the words of art being first interpreted by a jury. Nielson *v.* Harford, 8 M. & W. 806. And it lies on the defendant under this plea to make out his objection clearly. Bickford *v.* Skewer, 1 Q. B. 938. As to what is a sufficient description, Nielson *v.* Harford, 8 M. & W. 806. It must disclose the most beneficial mode the grantee knows. Ib. When the title was for *improvements*, and the specification described a single improvement, it was held that this did not invalidate the patent. Nickels *v.* Haslem, 7 M. & G. 337. As to what constitutes too great generality, Booth *v.* Kennard, 2 H. & N. 84.

(*a*) Vagueness will not invalidate unless there has been fraud on the crown or prejudice to the public. Cook *v.* Pearce, 8 Q. B. 1044.

12. *Plea that the Invention was known, published,* (*b*) *and used before the Grant of the Letters-patent.*

Stead *v.* Anderson, 4 C. B. 811.

13. *Plea that the Letters-patent were altered, and thereby became null and void; and Replication.*

Nickels *v.* Ross, 8 C. B. 680; Thomas *v.* Welch, 35 L. J. C. P. 200; L. R. 1 C. P. 192.

14. *Plea that the Report of the Judicial Committee of the Privy Council and the Letters-patent thereupon were procured by Fraud, Covin, and Misrepresentation.*

Russell *v.* Ledsam, 11 M. & W. 647; [Bedells *v.* Massey, 7 M. & G. 630.]

15. *Plea that the Letters-patent were obtained upon a False Suggestion in the Plaintiff's Petition.* (*c*)

Nickels *v.* Ross, 8 C. B. 680, 723.

16. *Plea that the Disclaimer extends the Exclusive Right granted by the Letters-patent.*

Seed *v.* Higgins, 8 El. & Bl. 757; Ralston *v.* Smith, 35 L. J. C. P. 49.

17. *Plea that the Invention described in the Specification as altered by the Disclaimer is another and different Invention from that for which the Patent was granted.*

Seed *v.* Higgins, [8 El. & Bl. 757. See Bateman *v.* Gray, 8 Ex. 906; Hancock *v.* Noyes, 9 Ex. 388; Hills *v.* London Gas Light Co. 5 H. & N. 312.]

18. *Plea that the Infringement was before the Disclaimer, &c. mentioned in the Declaration.*

Perry *v.* Skinner, 2 M. & W. 471.

19. *Particulars of Objections to be delivered with the Pleas in an Action for the Infringement of a Patent (Patent Law Amendment Act,* 1852, 15 & 16 *Vict. c.* 83, *s.* 41). (*d*)

In the Q. B. [C. P. *or* Ex. of Pleas].

A. B., plaintiff, against C. D., defendant.

(*b*) Publication does not mean a use by the public, but a use *in public;* Bentley *v.* Fleming, 1 C. & K. 587; so as to come to the knowledge of others than the inventor, as distinguished from the use of it by himself in private. Carpenter *v.* Smith, 9 M. & W. 300. As to previous publication sufficient to avoid the grant, Morgan *v.* Seaward, 2 M. & W. 544.

(*c*) See, also, Morgan *v.* Seaward, 2 M & W. 544.

(*d*) These particulars are necessary under 5 & 6 W. 4, c. 83, s. 5, and the act above cited. See, also, *ante,* p. 586, "Patents." They must be delivered with the pleas, but they do not form part of the record. Reg. *v.* Mill, 1 L., M. & P. 695; 20 L. J. C. P. 16. If the particulars delivered are too general, the party objecting must procure an order for better particulars (Hull *v.* Bollard, 1 H. & N. 134; Bulnois *v.* Mackenzie, 4 Bing. N. C. 127), as he cannot object *at the trial*

Take notice, that the defendant in this action, besides denying that he has infringed the letters-patent in the declaration mentioned, will on the trial rely on the following objections in support of the pleas in this action: —

1. That the defendant did not infringe the alleged patent right.

2. That the alleged inventor was not the first and true inventor. (*e*)

3. That the alleged invention was not new.

4. That the alleged invention was not for the working or making of any manufacture for which letters-patent could by law be granted.

5. That the alleged invention was not any manner of improvement.

6. That the alleged invention was not useful or beneficial or advantageous to the public.

7. That the invention was prejudicial to the public.

8. That her majesty did not grant the said privilege, as alleged.

9. That a sufficient specification was not enrolled.

10. That the specification so enrolled as alleged did not sufficiently describe the invention. (*f*)

11. That the specification so enrolled claims a principle, and is not confined to the proper subject of letters-patent.

12. That prior to the date of the said letters-patent the alleged invention was published (*g*) at —— in the following manner [*state mode of publication*].

13. That prior to the date of the said letters-patent the alleged invention was used (*h*) at —— in the following manner [*state mode of use*].

that they are too general; Nielson *v.* Harford, 8 M. & W. 806; or go beyond those which have been delivered. Macnamara *v.* Hulse, 1 Cr. & M. 471; Patent Law Amendment Act, 1852, s. 41. Either party will be allowed to amend on application to a judge. Patent Law Amendment Act, 1852. A defect in them will not be aided by the particulars of breaches delivered by the plaintiff. Palmer *v.* Cooper, 9 Ex. 231; Palmer *v.* Wagstaffe, 9 Ex. 494. The defendant may object to the validity of the assignment of the patent, though no notice of any objection to it has been given by him. Chollett *v.* Hoffman, 36 L. J. Q. B. 249. The particulars must be precise and definite. Fisher *v.* Dewick, 4 Bing. N. C. 706; Webs. P. C. 264; Heath *v.* Unwin, 10 M. & W. 684; 15 Sim. 552; Jones *v.* Berger, 5 M. & G. 208; Clark *v.* Kenrick, 12 M. & W. 219. If the objection be that the patent is not new, the objector should specify whether he objects to the patent generally on that ground or to part only; and if so, to what part. Russell *v.* Ledsam, 11 M. & W. 647. So if he objects that the patent was obtained by fraud, he ought to state the species of fraud on which he intends to rely. Ib. See Bentley *v.* Keighley, 1 D. & L. 946. 5 & 6 W. 4, c. 83, s. 6, enacts that in taxing the costs of such actions regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the presiding judge, and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the notice of objections as well as the counts in the declaration, and without regard to the general result of the trial. The effect of the statute is to make the objections separate issues, and the judge's certificate should be as to the determination of each objection of which notice has been given, and not as to the issue in the pleadings. Losh *v.* Hague, 5 M. & W. 387. See, also, Patent Law Amendment Act, s. 43. Where the plaintiff, after giving notice of trial, abandons the action, the defendant, having delivered with his pleas particulars of objections, is entitled to his costs of preparing the particulars and the evidence in support of them. Greaves *v.* Eastern Counties Ry. Co. 28 L. J. Q. B. 290. Otherwise where the plaintiff, after trial commenced, elected to be nonsuited. Honiball *v.* Bloomer, 10 Ex. 538; 24 L. J. Ex. 11.

(*e*) This is sufficient without stating who was the first and true inventor. Heath *v.* Unwin, 10 M. & W. 685; Russell *v.* Ledsam, 11 M. & W. 647.

(*f*) Leaf *v.* Topham, 14 M. & W. 146.

(*g*) If the notice states that the invention was published in books, the books must be named. *Sed quære*, Jones *v.* Berger, 5 M. & G. 208.

(*h*) The place where the invention was used must be named. Jones *v.* Berger, 5 M. & G. 208; The House Tile Co. *v.* Nielson, Webs. Pat. C. 552; 9 Cl. & Fin. 788.

14. That after the alleged letters-patent were granted as alleged they were altered in the following manner [*state how altered*].

[*Other objections may be similarly stated according to the nature of the particular case.*]

Yours, &c.

E. F., defendant's attorney [*or* "agent"].

To Mr. C. D., plaintiff's attorney [*or* "agent"].

See forms, last edition of this work, p. 667. Chitty's Forms, 9th ed. 825: Hull *v.* Bollard, 1 H. & W. 134.

PAYMENT INTO COURT.

Obs. — See *ante*, 447, "Payment into Court" in actions on contract.

By the common law procedure act, 1852 (15 & 16 Vict. c. 76, s. 70), "It shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), and, by leave of the court or a judge, upon such terms as he or they shall think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends."

Payment into court in libel is not effected by the above statute being excepted from it, but is regulated by 6 & 7 Vict. c. 95. This power of payment into court is further extended by the common law procedure act, 1860, 23 & 24 Vict. c. 126, s. 25, to actions of detinue "To the value of the goods alleged to be detained;" but the leave of the court or a judge must be obtained. And by the common law procedure act, 1852, s. 73, "The plaintiff, after a delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action, in respect of which it has been paid in, or he may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded."

In replevin "The plaintiff may in answer to an avowry pay money into court in satisfaction," as in other actions. Common Law Procedure Act, 1860, s. 23. And such payment "Shall not, nor shall the acceptance thereof by the defendant in satisfaction work a forfeiture of the replevin bond." S. 24.

There are several statutes enabling particular persons to pay money into court in particular actions. As in the case of justices, 11 & 12 Vict. c. 44, s. 11; see Aston *v.* Perkes, 15 M. & W. 385; Thompson *v.* Shephard, 4 El. & Bl. 53; assignees of bankrupts, 12 & 13 Vict. c. 106, s. 158; local boards of health, 11 & 12 Vict. c. 140, s. 139.

Payment into court in actions on tort has the same effect as in actions of contract. It admits a cause of action with damages amounting to the sum paid into court. But it does not necessarily admit the cause of action stated in the declaration. Schreger *v.* Carden, 11 C. B. 851; Story *v.* Finnis, 6 Ex. 123; Robinson *v.* Harman, 1 Ex. 850. Thus, if the declaration is general and unspecific, although it admits a cause of action, it does not admit the cause of action sued for, and therefore the plaintiff must give evidence of that cause of action before he can recover larger damages than the sum paid into court. Perren *v.* The Monmouthshire &c. Co. 22 L. J. C. P. 162. On the other hand, if the declaration is specific, so that nothing can be due from the defendant to the plaintiff, unless the defendant admits the particular claim made by the declaration, it admits the cause of action sued for and stated in the declaration. Ib.; [Bacon *v.* Charlton, 7 Cush. 581; Hosmer *v.* Warner, 7 Gray, 186; 2 Chitty Contr. (11th Am. ed.) 1185, 1186, and note (*k*[1]).] If the plea of payment into court be pleaded to part only of the claim, plaintiff will not be allowed to pass over the pleas to the other part without trial, or

Obs. — paying the costs of a *nol. pros.* on them. Rumbelow *v.* Whalley, 16 Q. B. 397.

Pleas in denial will not be allowed to any part of the cause of action covered by the plea of payment into court. Thompson *v.* Jackson, 1 M & G. 242; 8 Dowl. 591; Gales *v.* Holland, 7 El. & Bl. 336; Hart *v.* Denny, 1 H. & N. 609.

The forms in contract, *ante*, 449, may easily be adapted.

PROCESS. See *post*, "Sheriff."

RELEASE.

Obs. — See form in contract, *ante*, 455, which will apply in tort, stating that "after the committing of the grievances in the declaration mentioned, and before, &c."

RELINQUISHMENT OF PLEA.

Obs. — *Ante*, "New Assignment." See a form confessed to be bad after a demurrer to it. M'Intyre *v.* Miller, 13 M. & W. 725; 2 D. & L. 708. By r. 8, H. T. 1853, "The defendant shall not be at liberty to waive his plea, or enter a *relicta verificatione* after a demurrer without leave of the court or a judge, unless by consent of the plaintiff or his attorney." See Davidson *v.* Bohn, 5 C. B. 170.

REPLEVIN.

Obs. — See *ante*, 231, Obs.; 591, Obs. By the common law procedure act, 1852 (15 & 16 Vict. c. 76), s. 67, "No formal defence shall be required in a plea, avowry, or cognizance," and no formal conclusion shall be necessary. By the common law procedure act, 1860 (23 & 24 Vict. c. 126), s. 23, the plaintiff in replevin in answer to an avowry may pay money into court as in other actions; and by s. 24, such payment into court or acceptance thereof by the defendant in satisfaction shall not work a forfeiture of the replevin bond. *Non cepit* is the proper plea where the defendant denies that he was the party distraining; or that he took or had the distress in the place described in the declaration, and relies on a mistaken description of the *locus in quo*: but in this latter case, in order to have judgment for a return of the goods, the defendant should plead that he took the goods or cattle in another place, describing it, not in the place mentioned in the declaration, and then add an avowry of the taking, showing the cause. 1 Saund. 347, note (1). Forms, Bullythorpe *v.* Turner, Willes, 475; 3 Chit. Pl. 7th ed. 293. The plaintiff in this instance must amend his declaration or traverse the taking in the place mentioned in the plea; he cannot traverse the *cause* of taking alleged in the avowry. Ib. *Non cepit* does not enable the defendant to dispute the plaintiff's property in or possession of the goods (see form 2, Dover *v.* Rawlings, 2 M. & Rob. 544), or to *justify* the caption. It is sufficient for the plaintiff to prove on this issue that the defendant originally took, or afterwards had or detained, the goods in the *locus in quo*. But there must be a taking out of the possession of the owner. Mennie *v.* Blake, 6 El. & Bl. 842; 25 L. J. Q. B. 399. See Ib.; 3 Stark. Ev. 3d ed. 970; Com. Dig. Pleader, 3 K. 11, 12, 13. Where the defendant made separate avowries as to a house and close, a plea in bar that the defendant took one joint distress is bad. Phillips *v.* Whitsed, 29 L. J. Q. B. 164.

PLEAS.

1. *Plea of Non Cepit.*

In the ——.

On the —— day of ——, A. D. ——.

C. D. ats. A. B. } And the defendant, by ——, his attorney, [*or* "in person,"] says that he did not take the said cattle, goods, and chattels [*as in declaration*], or either of them, as alleged.

2. *Plea denying the Plaintiff's Property in the Goods.* (*i*)

That the said *goods and chattels* were the goods and chattels of the defendant [*or* "one E. F."], and not of the plaintiff, as alleged.

AVOWRIES, COGNIZANCES, ETC.

Obs. — Where the defendant admits the taking, but justifies it in his own right, he does so by an *avowry*; if in right of another, by a *cognizance*. Many of the forms in trespass, *post*, justifying distresses, &c. may easily be converted into avowries, and *vice versa*.

ANNUITIES.

Avowry, &c. for an Annuity or Rent-charge.

Obs. — See forms, James *v.* Salter, 2 Bing. N. C. 505; 3 Bing. N. C. 544; Richardson *v.* Tomkies, 9 Bing. 51; Caunt *v.* Ward, 7 Bing. 608; [Owens *v.* Wynne, 4 El. & Bl. 579.] Cognizance as bailiff of the grantee of an annuity charged upon the *locus in quo*, and granted by a tenant for life. Miller *v.* Green, 2 C. & J. 142; in error, 8 Bing. 92. The plaintiff might reply that no memorial of the annuity was enrolled. See *ante*, 300; and Hogarth *v.* Penny, 14 M. & W. 494, where, also, see subsequent pleadings. [Darlow *v.* Edwards, 1 H. & C. 547.]

Avowry for a rent-charge. Beaupark *v.* Hutchinson, 7 Bing. 178; Johnson *v.* Faulkner, 2 Q. B. 925. If the plaintiff holds under a demise made prior to the rent-charge, that should be specially replied. Ib.; and see Saffery *v.* Elgood, 1 Ad. & E. 191.

DAMAGE FEASANT.

Avowry or Cognizance for Distress for Damage Feasant. (*k*)

That before the said alleged taking, the said *close* was the close, soil, and freehold of the defendant [*or* "of one E. F."], and because the said cattle were [then wrongfully] in (*l*) the said close eating the grass there and doing damage to the defendant [*or* "to the said E. F."], he the defendant well avows [*or*

(*i*) Bull. N. P. 52, 54; Carth. 244; evidence, 1 M. & R. 301. In order to entitle the defendant to a return of the goods they must be alleged to be his. Com. Dig. Pl. 3 K. 13.

(*k*) Form, Jones *v.* Richard, 5 Ad. & E. 413; [Prichard *v.* Powell, 10 Q. B. 589.] See 1 Saund. 347 *d*, note (6); 2 Saund. 284 *d*; 2 Harr. Ind. tit. Distress. In *trespass* the defendant may rely only upon his *possession* in the above instance, but in replevin a *title* to the close must be shown. If the defendant were the lessee or yearly tenant of the freeholder, state that the latter was seised in his demesne as of fee, see Smith *v.* Adkins, 8 M. & W. 369; and then show that he demised the said place in which, &c. or a certain part of it; see 1 Saund. 347 *d*, note (5); the entry of defendant, and that he was possessed until the said time, when, &c. and conclude as in the text. Avowry by commoner, 3 Chit. Pl. 7th ed. 308. Pleas in bar, Ib.

(*l*) The party distraining must get into the close before the cattle have left it; Clement *v.* Milner, 3 Esp. R. 95; but when the distress is once made, a tender is too late to entitle the plaintiff to maintain replevin. Gulliver *v.* Cozens, 1 C. B. 788. Tender before the distress makes the distress tor-

"as bailiff of the said E. F. well acknowledges"] the taking of the said cattle in the said close and justly [*&c.*] as for a distress for the said damage.

HIGHWAY RATE.

OBS. — Where a constable justifies under a justice's warrant at common law, he must show that the justice had jurisdiction over the subject-matter. Morrell *v.* Martin, 3 M. & G. 594; Jones *v.* Chapman, 14 M. & W. 124; 2 D. & L. 907. As to a surveyor's assessment, see Morrell *v.* Harvey, 4 Ad. & E. 684; 5 & 6 W. 4, c. 50, s. 29.

JUSTICES.

Avowry for a Distress by Justices (under 18 *Geo.* 3, *c.* 19), *for Costs ordered to be paid on Complaint heard before them.*

George *v.* Chambers, 11 M. & W. 149.

LANDLORD AND TENANT.

1. *Common Avowry or Cognizance for Rent in arrear.* (*m*)

That the plaintiff [*or* "one G. H." *according to the fact*], (*n*) for all the time during which the rent hereinafter mentioned to be distrained for was accruing due, and from thence until the time of the said taking, (*o*) held the said

tious. Tender after the distress, and before the impounding, makes the detainer wrongful, and detinue may be brought. After the impounding a tender is of no avail. Thomas *v.* Harries, 1 M. & G. 695; Singleton *v.* Williamson, [7 H. & N. 410.]

(*m*) To remedy the difficulty a landlord was under at common law in stating a title in detail, the statute 11 Geo. 2, c. 19, s. 22, enacted, that "all defendants in replevin may avow or make cognizance generally, that the *plaintiff, or other tenant* of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then due and still remains due; or that the place where the distress was taken was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress and still remains due; without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor." See Poole *v.* Longridge, 2 Saund. 284 *c*; Banks *v.* Angell, 7 Ad. & E. 843. See forms, &c. 3 Chit. Pl. 7th ed. 294; Innes *v.* Colquhon, 7 Bing. 265, and decision there as to the form; Daniel *v.* Gracie, 6 Q. B. 145. See a form where rent partly due from defendant's intestate, and the rest after his death. Braithwaite *v.* Cooksey, 1 H. Bl. 465. The statute 11 Geo. 2, c. 19, s. 22, applies although the rent were payable by special agreement in advance. Charters *v.* Sherrock, 1 Alcock & Napier, 17, 506, Irish. But the statute, though it warrants a general avowry, does not dispense with the necessity of stating the terms of holding; as to the parties who were landlord and tenant, the amount of rent, and when payable. *Infra*, 686, *note* (*q*). It is sometimes useful to avow as at common law, setting out the title and lease, or demise, &c. specially, in order to compel the plaintiff to take issue on a portion only of the defendant's case, and thus admit the rest; but it must be remembered that the plaintiff in replevin may plead in bar several matters, and thus this object is often frustrated. An avowry admits the plaintiff's title to the goods; Clarke *v.* Davies, 7 Taunt. 72; and the seizure or detention by the defendant in the *locus in quo*. An avowry by defendant in his own right as yearly tenant to A., and a cognizance by defendant as bailiff of C., the tenant in fee, will be allowed together. Evans *v.* Davies, 8 Ad. & E. 362. Where the *taking*, or the plaintiff's *title* to the goods, is denied by the landlord, the pleas will be as *ante*, 684, forms 1 and 2. A second avowry or cognizance begins, "and for a further avowry [*or* 'cognizance'] the said C. D. further well avows," &c. In replevin for taking in a house and brewery, where the avowry justified the taking in the house only, Parke B. refused at the trial to allow an amendment supplying the omission of the brewery. Byre *v.* Bowen, 1 Cr. & M. 263.

(*n*) It is necessary to state who the tenant was. Banks *v.* Angell, 7 Ad. & E. 843.

(*o*) If the tenancy expired before the distress, and the distress was founded on 8 Ann. c. 14 (which warrants a distress within six months after the end of the tenancy, if the landlord's interest continue, and the tenant in default remain in possession, as to which see Taylerson *v.* Peters, 7 Ad. & E. 110, the

dwelling (*p*) *house* as tenant thereof to the defendant [*or* "E. F." (*q*)] by virtue of a demise thereof at the yearly rent of £100, (*r*) payable half-yearly [*or* "quarterly"], on the [24th] day of [June] and on the [25th] day of [December] [*this must correspond with the facts* (*r*)] in every year, by even and equal portions; and because the sum of [£150 (*s*) of the rent aforesaid was in arrear from the plaintiff [*or* "the said G. H."] to the defendant [*or* "the said E. F."], he the defendant well avows [*or* "as bailiff of the said E. F., well acknowledges"], the taking of the said [cattle], goods and chattels in the said *dwelling-house*, and justly [*&c.*], as for a distress for the said rent so in arrear, and which still remains (*t*) due and unpaid.

2. *Avowry for Double Rent for holding over after Notice.*

Humberston *v.* Dubois, 10 M. & W. 765; [Johnstone *v.* Huddlestone, 4 B. & C. 922.]

above form will not apply; Williams *v.* Stiven, 15 L. J. Q. B. 321; Com. Dig. Distress, A. 2; and see form in such case, 3 Chit. Pl. 7th ed. 298. If the landlord had no reversionary interest at the time of the distress, and this be pleaded in bar, the plaintiff will succeed. See Preece *v.* Corrie, 5 Bing. 24; Hooker *v.* Nye, 1 Cr., M. & R. 258; and forms, Ib.

(*p*) Page *v.* Church, 10 Moore, 264; Hargreave *v.* Shewin, 6 B. & C. 34.

(*q*) The strictest accuracy is essential in stating of whom the tenant held. See a case of variance, Philpott *v.* Dobbinson, 6 Bing. 104; and see Drew *v.* Avery, 13 M. & W. 399. But this may be avoided where the distress has been for manorial services, as by 21 Hen. 8, c. 19, s. 2, an avowry or cognizance without naming the landlord is good, if the distress be alleged to be within his fee or seigniory; and see Banks *v.* Angell, 7 Ad. & E. 846, as to stating the landlord to be a person unknown. Ib. Coparceners must join in an avowry for rent; tenants in common must sever except on a distress damage feasant; a joint tenant may distrain for the whole rent, but should avow for part only in his own right, and make cognizance as bailiff to the rest; a husband may avow in his own name for rent due to his wife. 2 Bing. 71; 1 Chit. Pl. 7th ed. 593; Harrison *v.* Barnby, 5 T. R. 246. Form of avowry by joint tenant, Pullen *v.* Pilmer, Carth. 328. One or two joint tenants may demise his or their portion to another so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. Cowper *v.* Fletcher, 34 L. J. Q. B. 187. In case of doubt, add a second avowry stating the tenancy under another party, of whom probably plaintiff held. As to a ratification by a landlord of a distress not authorized by him, Taylerson *v.* Peters, 7 Ad. & E. 110. So by an executor. Whitehead *v.* Taylor, 10 Ad. & E. 210.

(*r*) In order to support a distress there must be a demise at a specified *fixed* rent; there can be no distress except for an *agreed* rent; Dunk *v.* Hunter, 5 B. & Ald. 322; and a demise of a marl pit, and 8*d.* a solid yard for all marl got, is sufficiently certain; Daniel *v.* Gracie, 6 Q. B. 145, where see form of avowry; as to right to distrain where there is an agreement for a lease; Anderson *v.* Midland Ry. Co. 30 L. J. Q. B. 94; or for sale. Yeoman *v.* Ellis, 36 L. J. C. P. 326. A variance as to the yearly amount of rent, or the times when payable, would formerly have been fatal; Brown *v.* Sayce, 4 Taunt. 320; Cossey *v.* Diggons, 2 B. & Ald. 546; Smith *v.* Walton, 8 Bing. 235; Sergeant *v.* Chafy, 5 Ad. & E. 356; unless the judge permitted an amendment at the trial, which now would be allowed almost as a matter of course, and if necessary, the conversion of this general avowry into one at common law. Roberts *v.* Snell, 1 M. & G. 577. Where rent is at a certain sum *per annum*, and no express agreement is made in regard to the times of payment, it seems that it is payable yearly, and that an avowry, not stating the time of payment, would be deemed an allegation that the payment was to be annually only. Latch, 264; Laycock *v.* Tuffnell, 2 Chit. R. 531.

(*s*) It is not necessary to prove that all that is here laid was due. The action is defeated if less than the amount distrained for and here claimed was in arrear. Forty *v.* Imber, 6 East, 434; Johnstone *v.* Hudlestone, 4 B. & C. 938. As to whether a jury may find a verdict for a less sum due on an apportionment, Neale *v.* Mackenzie, 2 Cr., M. & R. 84; but reversed on error, 1 M. & W. 747. A man may distrain for one cause and avow for another. Short *v.* Hubbard, 2 Bing. 446; Phillips *v.* Whitsed, 29 L. J. Q. B. 164. It is best to admit a part payment and avow for the sum really due, to avoid the expense of a plea in bar of part not due. 3 Chit. Pl. 7th ed. 477.

(*t*) This allegation is not material or traversable. Clarke *v.* Davies, 2 Marsh. 386; 7 Taunt. 72.

3. *By Executors for Rent due to their Testator.* (*u*)

3 Moore, 638. See 3 & 4 W. 4, c. 42, s. 37; Prescott *v.* Boucher, 3 B. & Ad. 849; Staniford *v.* Sinclair, 2 Bing. 193.

LIEN.

Avowry by Carriers justifying under a General Lien.

Galloway *v.* Bird, 4 Bing. 299. See the pleas of lien, *post*, "Trover."

MORTGAGE DEED.

Avowry where the Right to distrain was created by a Mortgage Deed between Plaintiff and Defendant.

Chapman *v.* Beecham, 3 Q. B. 727. (*x*)

PLEAS IN BAR.

1. *Plea to an Avowry for Rent; Denial of the Tenancy.* (*y*)

That the plaintiff [*or* "the said G. H."] did not hold the said [dwelling-house] as tenant thereof to the defendant, as alleged.

(*u*) A cognizance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator by his direction, but after his death, such distress having been made before probate, but adopted and ratified by the executor. Whitehead *v.* Taylor, 10 Ad. & E. 210.

(*x*) A mortgagor in possession is *præsumptu juris* entitled to distrain as bailiff of the mortgagee. Trent *v.* Hunt, 9 Ex. 14; 22 L. J. Ex. 318.

(*y*) This plea in bar of *non tenuit* puts *the defendant* on proof of the tenancy stated, and that it existed between the parties, and upon the terms stated in the avowry; see 1 Saund. 347, see note (4); 2 Stark. Ev. 3d ed. 970; and therefore he must begin at the trial. Downes *v.* Cooper, 2 Q. B. 256, where see form of this plea with a special inducement showing defendant was estopped by an award from treating plaintiff as his tenant. *Nil habuit in tenementis* is no plea in bar to an avowry for rent under 11 Geo. 2. Sullivan *v.* Stradling, 2 Wils. 208; Alchorne *v.* Gomme, 2 Bing. 54; Damer *v.* Hastings, 4 Bing. 4. See the cases upon the principle that a tenant cannot dispute his landlord's title collected in Chit. jr. Contr. Ind. "Landlord," &c. See Cooper *v.* Blandy, 4 M. & Sc. 562; 1 Bing. N. C. 45, S. C.; Eldridge *v.* Mackenzie, 4 M. & G. 143. Where a third person, and not the party who distrained, demised to the plaintiff, and the party who distrained and avows claims from the person who demised, the plaintiff may, on the above plea in bar, deny the derivative title. 6 Taunt. 202. So where the tenant was not let in by the distrainer, the former may show that the latter held only under an agreement for a lease, and that the legal owner claims the rent. Brookes *v.* Biggs, 2 Bing. N. C. 572. The above plea in bar would also be proper where the landlord's title, and the relationship of landlord and tenant had ceased, and another party had claimed and become the legal owner by mortgage, &c. before the distress; Doe *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065; Waddilove *v.* Barnet, 2 Bing. N. C. 533; Evans *v.* Elliott, 9 Ad. & E. 342; Wheeler *v.* Branscombe, 5 Q. B. 373; provided the rent had been actually paid to the mortgagee. Boodle *v.* Cambell, 2 D. & L. 66; 7 M. & G. 386. If there has been such a binding agreement between the parties for the payment of the rent to the mortgagee as would be an answer to the defendant's claim of rent from the plaintiff, that should be specially pleaded. Wheeler *v.* Branscombe, 5 Q. B. 373; and see Davis *v.* Stacey, 12 Ad. & E. 506. See form of plea, Johnson *v.* Jones, 9 Ad. & E. 909. But a simple plea of payment would suffice. If only a part of the premises has been conveyed away by the landlord, the rent cannot be apportioned in an action of replevin against him. Boodle *v.* Cambell, *supra*. Effect of partial eviction by landlord, &c. upon the right of distress, see Mackenzie *v.* Neale, 1 M. & W. 747. Proof of eviction on *non tenuit*. Hopcroft *v.* Keys, 9 Bing. 613. Special plea of eviction. 3 Chit. Pl. 7th ed. 478; 1 Saund. 204, note (2). An eviction to be a good defence must have happened before the rent became due. Boodle *v.* Cambell, *supra*. See a plea that plaintiff committed a breach of covenant, in consequence of which the superior landlord entered, and compelled defendant to pay

2. *Plea in Bar, Riens in Arrear.* (*z*)

That no part of the said supposed rent in the said avowry and cognizance [*as the case may be*] mentioned was in arrear from the *plaintiff* to the said C. D. [*or* "G. H."], as alleged.

3. *Plea in Bar, denying Defendant was Bailiff.* (*a*)

That the defendant was not the bailiff of the said E. F., as alleged.

4. *Plea of Payment to a Mortgagee of the Premises.*

Johnson *v.* Jones, 9 Ad. & E. 909.

5. *Plea of Payment into Court.* (*b*)

The plaintiff, as to the defendant's avowry [*or* "cognizance"] by him above pleaded, brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the defendant in respect of the matter in the said avowry [*or* "cognizance"] alleged.

6. *Plea in Bar, Denial of the Landlord's Reversionarg Interest.*

See forms, &c. and law, Pascoe *v.* Pascoe, 3 Bing. N. C. 898; and Preece *v.* Corrie, 5 Bing. 24, there cited; 3 B. & Ad. 586; [Smith *v.* Mapleback, 1 T. R. 445.] *Qu.* whether *non tenuit* or *non demisit* would be sufficient. See Pascoe *v.* Pascoe; Hooker *v.* Nye, 1 Cr., M. & R. 258, 260.

7. *Plea in Bar, that the Goods were privileged as being on the Premises in the way of the Tenant's Trade, &c.*

See forms, Muspratt *v.* Gregory, 1 M. & W. 633; Thompson *v.* Mashiter, 1 Bing. 283; and a form in trover, Gibson *v.* Ireson, 3 Q. B. 39; *post*, Pleas in Trespass, "Distress." Plea of privilege, the goods being implements of husbandry, Davies *v.* Aston, 1 C. B. 746; Ib. being in the hands of a commission agent for sale, Findon *v.* M'Claren, 6 Q. B. 891.

8. *Plea in Bar to an Avowry for Rent in Arrear; tender of the Rent and Costs after the taking and before impounding.* (*c*)

See form, Evans *v.* Elliott, 5 Ad. & E. 142; Thomas *v.* Harries, 1 M. & G.

him the rent, Franklin *v.* Carter, 3 D. & L. 213; 1 C. B. 750.

(*z*) This plea admits the tenancy upon the terms stated; Hill *v.* Wright, 2 Esp. R. 669; and the substance of it is, that *no* rent was due, so that the defendant will succeed thereon if any sum were due, though less than the sum distrained for. Evidence of the plaintiff having been compelled to pay other claims paramount to those of the landlord may be given under this plea, and no special plea is *necessary* to admit proof of such payments. Jones *v.* Morris, 3 Ex. 742. But such payments are often specially pleaded. See note (*a*), *infra*. The plaintiff must prove the whole rent was satisfied, and therefore must begin at the trial. Cooper *v.* Egginton, 8 C. & P. 748; 2 Stark. Ev. 3d ed. 974.

(*a*) Evidence of a prior authority to distrain, or of a subsequent approval and recognition of the act, without showing a prior command, will be necessary to support this plea. Trevillian *v.* Pine, 11 Mod. 112; Vin. Ab. Bailiff, D.; 2 Stark. Ev. 3d ed. 975. See Taylerson *v.* Peters, 7 Ad. & E. 110. Authority to receive rents no authority to distrain. Ward *v.* Shew, 9 Bing. 608.

(*b*) See Common Law Procedure Act, 1860, s. 23, and *ante*, Obs. 684.

(*c*) After impounding, and any time before sale, the tenant may tender the rent and expenses, and any detention afterwards is wrongful. Johnson *v.* Upham, 28 L. J. Q. B. 252.

695; and see Loring *v.* Warburton, [El., Bl. & El. 507.] Plea of tender *before* the distress. 3 Chit. Pl. 7th ed. 486. Tender on the land. Ib. 235; Tenant *v.* Field, [8 El. & Bl. 336;] and see replication of tender. Field *v.* Newport &c. Ry. Co. 3 H. & N. 309. Release of the rent. Cooper *v.* Robinson, 10 M. & W. 694.

PLEAS IN BAR TO AN AVOWRY FOR AN ANNUITY BEQUEATHED BY WILL.

1. *Denial of the Will.*

That the said D. R. did not make and publish his last will and testament in writing, as the defendant has in his said avowry alleged.

2. *Denial of the Bequest.*

That the said D. R. did not give and bequeath to the defendant E. R., or her assigns, one annuity of £——, for and during the term of her natural life, if she should so long continue a widow and unmarried, as the defendant has in his said avowry alleged.

3. *That the Testator was non compos.*

That the said D. R. at the time of making and publishing the said will and testament in the said avowry mentioned, was not of sound and disposing mind, memory, and understanding.

4. *That the Annuitant (a Widow) committed Adultery; and Replication, Absence of the Husband for Seven Years without being heard of.*

Wynne *v.* Wynne, 9 Dowl. 397; 2 M. & G. 8.

REVERSION.

Obs. — *Ante*, 593. "Not guilty" admits the tenancy as laid, and that the premises were in the possession of the tenant named, the demise to him by the plaintiff, and that the reversion belonged to the plaintiff. Raine *v.* Alderson, 4 Bing. N. C. 702. It would deny the commission of the acts of injury charged, as waste, nuisance, &c.; Young *v.* Spencer, 10 B. & C. 145; Kidgill *v.* Moor, 9 C. B. 365; but not that they were acts of a wrongful character. Bacon *v.* Smith, 1 Q. B. 364, note (*a*); Frankum *v.* Lord Falmouth, 2 Ad. & E. 452. *Semble*, defendant might plead *liberum tenementum*. Where the acts complained of are *justified*, of course there must be a special plea accordingly; see Griffiths *v.* Jones, 1 M. & W. 731; as if the defendant justify pulling down a chimney, on the ground that it was a public or private nuisance. Sanford *v.* Woods, 7 M. & G. 625. A plea that the damage was done by inevitable accident by the wall of the adjoining house belonging to the defendant falling, and that the defendant repaired it forthwith, was held bad for not alleging that the defendant entered on plaintiff's land without the license of the tenant. Taylor *v.* Stendall, 3 D. & L. 162.

1. *For an Injury to the Plaintiff's Reversionary Interest in Goods; Plea, Denial of its Title.*

That the plaintiff was not the owner or proprietor of the said goods and

chattels, nor did the said supposed reversionary property and interest therein belong to the plaintiff, as alleged.

2. *Plea that the Injury complained of was a Sale by the Defendant, as Sheriff, not in Market Overt. (d)*

Tancred *v.* Allgood, 4 H. & N. 438; The Lancashire Wagon Co. *v.* Fitzhugh, [6 H. & N. 502.]

3. *To a Count for an Injury to Plaintiff's Reversion; Pleas denying the Possession of the Property by the Tenant of the Plaintiff.*

That the said [messuage] was not in the possession of the said A. B. as tenant to the plaintiff, as alleged.

4. *Denial that the Reversion was in the Plaintiff.*

That the reversion of the said [messuage] was not in the plaintiff, as alleged.

[5. *Plea in an Action by a Landlord against his Tenant for removing Fixtures, justifying the Removal of them as Tenant's Fixtures.*

That the said fixtures were tenant's fixtures belonging to the defendant, which he as tenant of the said dwelling-house was lawfully entitled to pull down and remove during his tenancy of the said dwelling-house; and the defendant during his said tenancy carefully pulled down and removed the same, and in so doing unavoidably a little damaged the walls of the said dwelling-house, doing no unnecessary damage thereto, and the defendant before the end of his said tenancy repaired and restored the said walls, which are the alleged grievances.]

SEDUCTION. See "Master and Servant," *ante*, 668.

SERVANTS.

See "Agents," *ante*, 637; "Master and Servant," *ante*, 668.

SHERIFF.

Obs. — As to the effect of the general issue, see R. G. T. T. 1853, r. 16, and Hodges *v.* Patterson, 26 L. J. Ex. 223. It would admit the judgment, the issuing of the writ, the indorsement thereon, its delivery to the defendant, that he was sheriff, and also that he levied the moneys. In an action for falsely returning *nulla bona* to a *fi. fa.*, not guilty denies that the sheriff made the return alleged. Wright *v.* Lainson, 2 M. & W. 739.

The bankruptcy of the debtor before execution, or that he assigned the goods to a third person, would not be admissible under it. Ib.; and Lewis *v.* Alcock, 3 M. & W. 188; 6 Dowl. 389. In an action for falsely returning want of buyers, the general issue would deny that the sheriff was able to sell or raise

(*d*) See *ante*, p. 594, note (*m*).

Obs. the money. Rowe *v.* Ames, 6 M. & W. 747; 8 Dowl. 750. As to what is put in issue on a plea of not guilty in an action for wrongful discharge of a debtor arrested on a *ca. sa.* Wallinger *v.* Gurney, 11 C. B. N. S. 182; 31 L. J. C. P. 55. Not guilty by statute in an action against the high bailiff of the county court. Burton *v.* Legros, 34 L. J. Q. B. 91; White *v.* Morris, 11 C. B. 1015; 21 L. J. C. P. 185. In an action for not arresting on mesne process, the plea of not guilty will not admit evidence to show that the plaintiff directed the officer not to make the arrest under the circumstances. Howden *v.* Standish, 6 C. B. 504.

Under a traverse of the levy the sheriff might show that the goods vested in the assignee before the seizure could be made. Rowe *v.* Ames, *supra.*

As to a plea of leave and license in an action of negligence for carelessly conducting a sale under a *fi. fa.* Wright *v.* Child, L. R. 1 Ex. 358. As to pleas and replications thereto of the production by the execution debtor of a certificate of the registration of a deed under the bankruptcy act, 1861, Lloyd *v.* Harrison, 34 L. J. Q. B. 97; 35 L. J. Q. B. 153; L. R. 1 Q. B. 502; Williams *v.* Rose, 27 L. J. Ex. 12; Dignam *v.* Bailey, 37 L. J. Q. B. 71; and a plea to the damage alleged. Hobson *v.* Thellusson, 36 L. J. Q. B. 302; [L. R. 2 Q. B. 642.]

In an action of trespass, where the plaintiff proved that the sheriff had seized the goods under an execution, and had sold them to the plaintiff, the defendant may show under the plea of not possessed, that such sale was fraudulent, and that he seized under another execution. Ashby *v.* Minnitt, 8 Ad. & E. 121.

Ante, "Sheriff," "Not Guilty," "Not Possessed," "Leave and License," "Nul Tiel Record."

1. *Plea denying the suing out of the Process.*

That he did not sue or prosecute the said writ out of the said court, as alleged.

2. *Plea denying the delivery of Process to Defendant.*

That the said writ was not delivered to the defendant, as alleged.

3. *Plea that Debt was under £20.*

That the plaintiff had not a cause of action to the amount of £20, or upwards, as alleged. (*e*)

4. *Plea to a Declaration for falsely returning Nulla Bona to a Fi. Fa., that the Defendant did not levy.* (*f*)

That he did not, under or by virtue of the said writ of execution, as such

(*e*) According to the statement in the declaration, see 1 & 2 Vict. c. 110, s. 3, and *ante*, declarations, "Sheriff," form 7.

(*f*) See the declaration, form 1, *ante*, p. 596. This plea denies that there was any seizure *under the plaintiff's writ*; Drewe *v.* Lainson, 11 Ad. & E. 538; that is, any seizure of goods liable to execution at the suit of the plaintiff. Heenan *v.* Evans, 3 M. & G. 399; S. C. 1 Dowl. N. S. 204. Therefore it denies also the sale, and that the defendant held the proceeds for the purpose of paying them over to the plaintiff; Ib.; but it *primâ facie* admits a *seizure* under *some* writ; in answer to which the defendant may show that such seizure could not inure to the benefit of the plaintiff, either because there was a writ prior to the plaintiff's which exhausted all the goods; Winter *v.* Freeman, 11 Ad. & E. 539; or because the sheriff was obliged to pay, out of the goods seized, a year's rent to the landlord, under 8 Anne, c. 14, s. 1, which left no surplus; Ib.; and see Cocker *v.* Musgrove, 15 L. J. Q. B. 365; or that the goods of the debtor were his only as trustee. Per Maule J. in Heenan *v.* Evans, *supra.* The plaintiff may show in answer that a prior judgment, which the sheriff contends has exhausted the debtor's goods, was fraudulent against the plaintiff, under 13 Eliz. c. 5, and that the sheriff had notice of that fact, or might have dis-

sheriff as aforesaid, *levy* (*g*) the moneys indorsed on the said writ, and so directed to be levied as aforesaid, or any part thereof, out of the said goods, or out of any part thereof, as alleged.

5. *For not seizing Goods under a Fieri Facias; Plea that there were no such Goods.* (*h*)

That there was not at any time from the time of the delivery of the said writ to him until the said return thereof, any goods or chattels of the said F. W. within the said bailiwick of the defendant, as such sheriff as aforesaid, whereof the said defendant had notice, or could or might or ought to have levied the said moneys so indorsed on the said writ and directed to be levied as aforesaid, or any part thereof, as alleged.

6. *That the Plaintiff directed the Defendants not to execute the Writ.* (*i*)

That after the delivery of the said writ to the defendant as such sheriff as aforesaid, and before the said return thereof, and before the commencement of this suit, the plaintiff ordered and directed the defendant under the said writ not to levy the said moneys on the said goods and chattels, and then discharged the defendant from further executing the said writ on the said goods and chattels, or any of them, as alleged.

7. *Plea to an Action for Wrongful Discharge of a Judgment Debtor, that the Discharge was made under a Written Order from the Plaintiff's Attorney.* (*k*)

Hodges *v.* Paterson, 26 L. J. Ex. 223.

8. *Plea to an Action for Escape of Payment into Court of Part of Claim, and Payment before Action of Residue.*

Hemming *v.* Hale, 7 C. B. N. S. 487.

9. *Plea to an Action for Escape, that the Execution Debtor produced a Certificate of the Registration of a Deed under the* 198*th section of the Bankruptcy Act*, 1861.

Lloyd *v.* Harrison, [L. R. 1 Q. B. 502;] Williams *v.* Rose, L. R. 3 Ex. 5; Dignam *v.* Bailey, L. R. 3 Q. B. 178.

covered it by reasonable diligence. Imray *v.* Magnay, 11 M. & W. 273. It is no plea to this action that the plaintiff after the return of the writ brought a second action on the judgment, and obtained a second judgment thereon. Pitcher *v.* King, 9 Ad. & E. 868.

(*g*) See Stubbs *v.* Lainson, 1 M. & W. 728.

(*h*) Mullett *v.* Challis, 16 Q. B. 240. See Wintle *v.* Freeman, 11 Ad. & E. 540; Heenan *v.* Evans, 1 Dowl. N. S. 204; 3 M. & G. 399. The defendant may show under this plea the exhaustion of the goods by prior claims. See Cocker *v.* Musgrove, [9 Q. B. 223.]

(*i*) As to the facts that will support this plea, see Hunt *v.* Hooper, 12 M. & W. 672; and see Walker *v.* Hunter, [2 C. B. 324.] Leave and license would seem a sufficient plea in this case. See form, Gore *v.* Lloyd, 12 M. & W. 466.

(*k*) By the common law procedure act, 1852, s. 126, it is enacted that a written order under the hand of the attorney in the cause, by whom any writ of *ca. sa.* shall have been issued, shall justify the sheriff, &c. in whose custody the party may be under such writ in discharging such party, unless the party for whom such party professes to act shall have given written notice to the contrary to such sheriff, &c.

10. *Replication to the preceding Plea, that the Debt in respect of which the Judgment was obtained arose after date of the Registration of the Deed.*

Williams *v.* Rose, L. R. 3 Ex. 5; Dignam *v.* Bailey, L. R. 3 Q. B. 178.

11. *Plea to a Declaration for falsely returning want of Buyers, that Judgment upon which Writ was issued was founded on a Warrant of Attorney under Circumstances which took all Interest in the Goods away from Plaintiff.* (*l*)

Wylie *v.* Birch, 4 Q. B. 566.

12. *Plea to an Action for not returning the Writ, that the alleged Damage was caused by the Plaintiff's own Default, and other Pleas.*

Woodman *v.* Gist, 8 C. & P. 214.

13. *Plea to an Action for not levying, that Plaintiff sustained no Damage by reason of the Default of the Defendant.*

Hobson *v.* Thellusson, L. R. 2 Q. B. 642.

14. *Pleas to an Action by a Landlord against a Sheriff for removing Goods taken in Execution, without satisfying a Year's Rent due, ante,* 599, Form 12.

1. *That Defendant had not Notice of any Rent being due.*
2. *That no such Rent was due.* (*m*)

Reed *v.* Thoyts, 6 M. & W. 412; 9 C. & P. 515.

15. *Plea to an Action for taking Plaintiff to Prison, &c. the Plaintiff being willing to go to a House of her own nomination, that Defendant acted on request of Plaintiff.*

Silk *v.* Humphreys, 4 Ad. & E. 959.

(*l*) See *ante,* Obs. 690, and see the cases referred to, *ante,* 691, form 1. See forms of pleas: 1. That the judgment was on a warrant of attorney, and that the execution debtor became a bankrupt, and a fiat issued against him before the sale; and similar pleas showing, 2. That plaintiff had notice of the bankruptcy before the sale, and defendant before the return, and that the assignees had claimed the goods; and 3. That the warrant of attorney was given by way of fraudulent preference; these pleas were held good as showing that the plaintiff *could* have sustained no actual damage by the defendant's breach of duty. Wylie *v.* Birch, 4 Q. B. 566.

(*m*) The fact of the execution is not denied under either of these pleas, and therefore no evidence is necessary to connect the sheriff with the party who seized beyond the declaration of the latter to that effect. Reed *v.* Thoyts, *supra;* and see Barsham *v.* Bullock, 10 Ad. & E. 23. See other forms, Riseley *v.* Ryle, 11 M. & W. 16. In Foster *v.* Cookson, MS. Patteson J. allowed, at chambers, in addition to the above pleas, 1, a denial that the defendant took the goods of the tenant under the writ of execution; and 2, a denial that the execution debtor was tenant to the plaintiff. See those forms in Gore *v.* Lloyd, 12 M. & W. 465. The sheriff is not liable unless the goods have been actually removed. Smallman *v.* Pollard, 6 M. & G. 1001.

16. *Plea to an Action for False Imprisonment, that Plaintiff represented herself to be the Person named in the Writ.*

Dunston *v.* Paterson, [2 C. B. N. S. 495.]

17. *Plea to an Action in Trespass, that Defendant was Sheriff, &c. and that Plaintiff made a Great Noise, &c. at an Election.*

Spilsbury *v.* Micklethwaite, 1 Taunt. 146.

18. *Plea to an Action by a Sheriff against an Attorney for indorsing a Wrong Address on Writ, that the Defendant acted in Good Faith.*

Childers *v.* Wooller, 29 L. J. Q. B. 129.

19. *Pleas of Justification under Process, and Replications thereto.*

See *post*, "Trespass."

SHIPS.

1. *Not Guilty.*

Ante, 636.

2. *Plea to a Declaration for carelessly running down Plaintiff's Vessel, that Defendant was not possessed of the Vessel which did the Injury.* (*n*)

That the said ship was not the defendant's, as alleged.

3. *Plea that the Loss was occasioned by the Fault of a Pilot whose Employment was compulsory.* (*o*)

That the loss and damage complained of were occasioned by the fault or

(*n*) See form, &c. Dunford *v.* Trattles, 1 D. & L. 554; and see Wolfe *v.* Beard, 8 C. & P. 374, and the notes and Obs. *ante*, 600 *et seq.* *Not guilty* would merely deny the carelessness of defendant or his crew, &c. and that it occasioned the injury stated. It would admit that *plaintiff* was possessed of his ship as alleged; and where defendant denies that *he* was owner, &c. of the other vessel, it is necessary to plead that fact separately. See the Obs. *ante*, "Negligence," 564 and 670, as to the collision of carriages, which, for the most part, apply to ships. Where the defendant or the master of his ship was bound under the act of parliament to take, and had a licensed *pilot* on board at the time of the collision, and the vessel was then under the charge of the pilot, the owners and masters are not liable for the damage done to the other vessel by the carelessness, &c. of the pilot. *Ante*, 603, Obs. See a special plea setting out this defence. Lucey *v.* Ingram, 6 M. & W. 302. It would be questionable, however, whether it might not be relied upon under a "plea that defendants were not possessed," &c. as above, because where the defendant's vessel is necessarily in the charge of a pilot, it is not true, as alleged in the declaration, that the defendant had the care, government, &c. thereof; the pilot act being merely declaratory of the common law, which prevents a party being responsible for the act of his agent, when he is compelled to employ that agent. The Agricola, 2 Rob. Adm. Rep. 10. See Abbott, Ship. by Serj. Shee; also, General Steam Navigation Co. *v.* Guillon, 11 M. & W. 895. Though the Thames watermen's act compels the owner of a vessel to navigate it by one selected from that *class*, the owner is nevertheless answerable for the negligence of the navigator. Martin *v.* Timperley, 4 Q. B. 298.

(*o*) As to compulsory pilotage, see Rodriguez *v.* Melhuish, 10 Ex. 110; The Halley, L. R. 2 Adm. 3; The Hanna, L. R. 1 Adm. 283; The Agricola, 2 W. Rob. Ad. 10, 15; The Tyne Improvement Commissioners *v.* The General Steam Navigation Co. L. R. 2 Q. B. 65.

incapacity of a qualified pilot then employed as such, and acting in charge of the said ship of the defendant within a district where the employment of such pilot was and is compulsory by law.

SHOOTING. *Ante*, 603, and *post*, "Trespass to Realty."

SLANDER. See "Libel."

SUPPORT.

Obs. — See *ante*, 604, as to the right of support. The general issue operates only as a denial of the wrongful act, and would admit the possession, and matters stated in the inducement. R. G. T. T. 1853, r. 16.

1. *Plea denying the Plaintiff's Possession.*

That the plaintiff was not possessed of the said [*according to the fact*], as alleged.

2. *Plea denying Plaintiff's Right of Support.*

That the plaintiff was not entitled to have the said [*according to the fact*] supported by the land adjacent or subjacent [*according to the allegations of the declaration*].

[3. *Plea to an Action of Trespass justifying under a Right of Support and of Entry to maintain and repair the Support to Defendant's House.*

That at the time of the alleged trespasses he was possessed of a dwelling-house adjoining the said close and wall of the plaintiff, and the respective occupiers of the said dwelling-house for twenty [*or* forty] years before this suit enjoyed as of right and without interruption the right and easement of having certain parts of the said dwelling-house built into and supported by certain parts of the said close and wall of the plaintiff, and of breaking and entering the said close and wall of the plaintiff for the purpose of repairing and maintaining the said parts of the said dwelling-house, and of doing there all things necessary in that behalf from time to time as occasion should require; and the said trespasses were an exercise by the defendant of the said said right.]

SURGEONS.

Obs. — In an action against a medical man for neglect, see *ante*, 607, the plea of not guilty would put the plaintiff upon proof of the breach of duty, but not of the retainer, which, if disputed, must be denied by a special plea. See "Agents," "Apothecaries," "Physicians," and Gladwell *v.* Steggall, 5 Bing. N. C. 793.

TENDER OF AMENDS.

OBS. — In general a *tender* before action cannot be pleaded in an action *ex delicto*. But in many cases, by statute, such as the criminal law consolidation act, 24 & 25 Vict. c. 66, s. 113; Ib. c. 97, s. 71; Ib. c. 99, s. 3; 11 & 12 Vict. c. 44, s. 11, a tender of amends before action may be effectually made and pleaded. According to the decision in Jones *v.* Gooday, 9 M. & W. 744; 11 L. J. Ex. 297, the defendant need not pay the money tendered into court, or, if the statute gives him the privilege of pleading the general issue, plead tender of amends. See plea of tender of amends in an action for an irregular *distress*, *ante*, 646, form 3, and note (*d*).

Tender of Amends in an Action against a Railway Company for Neglect, &c. (*p*)

That the said acts and grievances in the declaration mentioned were committed in the execution of an act of parliament passed in the —— year of the reign of her majesty Queen Victoria, intituled "An act for" [*state title of act*], and after the committing of the said grievances, and before action, the defendant tendered and offered to pay to the plaintiff £——, as amends for the said grievances so committed, the same being sufficient amends for the said grievances, and which the plaintiff refused to accept and receive.

TRESPASS.

I. — TO THE PERSON.

OBS. — See *ante*, 635. Not guilty in trespass to persons only denies the fact of the defendant having done or caused the act complained of. R. G. T. T. 1853, r. 16; Boss *v.* Litton, 5 C. & P. 407; Goodman *v.* Taylor, Ib. 410; Pearcey *v.* Walter, 6 C. & P. 232. In an action for assault, leave and license may be given in evidence under not guilty. Christopherson *v.* Bare, 11 Q. B. 473. But no matter which goes to excuse the act of the defendant can be given in evidence in bar of the action, under not guilty. Hall *v.* Fearnley, 3 Q. B. 919.

A person who is *primâ facie* a trespasser must justify specially. Bryant *v.* Clutton, 1 M. & W. 408. The chancellor sued in trespass for committing a solicitor to a bankrupt commission for not obeying an order, need plead only not guilty. Dicas *v.* Lord Brougham, 6 C. & P. 249. See Buron *v.* Denman, 2 Ex. 167.

If the trespass is the result of the plaintiff's own fault, such as by slipping off a pavement so that defendant unintentionally drove over him, this defence should be specially pleaded; but if it arose from superior agency, it would be admissible under the general issue. Hall *v.* Fearnley, 3 Q. B. 919. See form of plea, Cotterill *v.* Starkie, 8 C. & P. 694. It would seem, also, that the plaintiff's negligence should be specially pleaded where the defendant admits a trespass. Knapp *v.* Salisbury, 2 Camp. 500. See Christopherson *v.* Bare, *ubi sup.* If *the plaintiff* drove against *the defendant*, that may be shown under not guilty. Pearcey *v.* Walter, 6 C. & P. 232. Plea that the defendant's horse took fright and ran against plaintiff. Wakeman *v.* Robinson, 1 Bing. 213.

The mere touching a plaintiff for the purpose of attracting his attention is not an assault for which the defendant can be sued. Coward *v.* Baddeley, 28 L. J. Ex. 260. There must be a hostile intention to constitute an assault. Ib. The defendant cannot, under the plea of not guilty, give in evidence matter which amounts to a justification, in mitigation of damages, but he may give in

(*p*) See a form of plea of tender of amends and disclaimer of title, Williams *v.* Price, 3 B. & Ad. 695.

OBS. evidence for such purpose matter which cannot be pleaded as a justification. Linford *v.* Lake, 3 H. & N. 276; 27 L. J. Ex. 334. See Rowcliffe *v.* Murray, 1 Cr. & M. 513; Watson *v.* Christie, 2 B. & P. 225, note.
"Master and Servant," 718, form 2, "Notice of Action," *ante*, 674.

1. *Not Guilty.*

Ante, 636.

2. *Son Assault Demesne.* (*q*)

That the plaintiff first assaulted [and beat] the defendant, who thereupon necessarily committed the alleged assault [*or* trespass, *or* did what is complained of] in his own defence.

[2*a*. *Another Form.*

And the defendant comes and says the plaintiff first assaulted him, and he only defended himself.]

3. *Plea that the Defendant assaulted the Plaintiff in endeavoring to prevent him from assaulting, &c. a Third Person, and to preserve the Peace.* (*r*)

That the plaintiff first assaulted E. F. (*s*) "the son," *or* "wife," *or* "servant" of the defendant [*as the case may be*], and was continuing to do so, whereupon the defendant gently (*t*) laid his hands on the plaintiff, in order "to preserve the peace [*if the plaintiff was assaulting the defendant's son, &c. instead of these last words say*, "to defend the said E. F., the son of the defendant"], doing no more than was necessary for that purpose, which is the alleged assault.

(*q*) Common Law Procedure Act, 1852, sch. B, 45. If the plea be pleaded to part only of the declaration, it must be limited accordingly. Take care that the plea be not made to answer mere matter of aggravation. See an instance, Griffiths *v.* Dunnett, 8 Scott N. R. 836. Where there are several assaults there should be a separate plea of *son assault demesne* to each count, if each assault be justified in self-defence. Declaration, that defendant assaulted plaintiff and wrenched a stick from his hands, and with the said stick and with his fists gave the plaintiff blows, &c. Plea, as to the assaulting the plaintiff with the stick and with his fists giving him blows, &c. *son assault demesne*. Held, after verdict, that the plea sufficiently justified the battery with the stick as well as the assault. Blunt *v.* Beaumont, 2 Cr., M. & R. 412. A *wounding* may be justified in *self*-defence; but in defence of the possession of *property* the plea must be only *molliter manus imposuit*, unless there be resistance, &c. on the plaintiff's part. Ib.; Alderson *v.* Waistell, 1 C. & K. 358. If a man be attacked, he has a right to defend himself by striking blows in return, but not to *revenge* by subsequently striking an unnecessary blow. Reg. *v.* Driscoll, 1 C. & M. 214.

(*r*) See another similar form, stating instead of the name here, "a certain boy whose name is to the defendants unknown;" and replication that the boy was plaintiff's son, and that he was moderately correcting him. Winterbourne *v.* Brooks, 2 Car. & K. 16. It is said to have been decided that merely to *collar* a man to prevent his fighting with another is an assault or battery. Griffin *v.* Parsons, 1 Sel. N. P. 27 (n). Take care not to plead this plea to the *whole* of a count, if it contain allegations which the defendant cannot justify by the plea. See a form of plea that plaintiff assaulted the defendant, who therefore gave him into custody. Coward *v.* Baddeley, 28 L. J. Ex. 260; Derecourt *v.* Corbishley, 5 El. & Bl. 188; 24 L. J. Q. B. 313.

(*s*) See plea justifying an assault by a captain of a vessel to prevent plaintiff, a passenger, fighting with another passenger. Noden *v.* Johnson, 16 Q. B. 218; 20 L. J. Q. B. 95; and see Scruton *v.* Taylor, 8 Dowl. 110.

(*t*) See Com. Dig. Pleader, 3, m. 15, Burn's Justice, tit. Assault; Bone *v.* Daw, 3 Ad. & E. 712; Barfoot *v.* Reynolds, 2 Str. 953.

4. *Replication of Excess, to a Plea of Son Assault Demesne.* (u)

That the defendant committed the trespasses in the said declaration mentioned to a greater degree and extent, and with more force than was necessary for the purpose in the plea mentioned.

[5. *Retaking a Runaway Apprentice.*

And the defendant comes and says the plaintiff was his apprentice, and deserted and run away from him, and he retook the plaintiff and forcibly brought him back, using no more force than was necessary.]

6. *Justification by a Railway Company for arresting a Passenger.* (x)

Chilton *v.* London & Croydon Ry. Co. 16 M. & W. 212.

7. *Plea of Justification to an Action for Assault and False Imprisonment, that Defendant was an Attorney, and as such sued out a Writ of Alias Capias, under which Plaintiff was arrested; and Replication thereto, that the Writ was irregular.*

Codrington *v.* Lloyd, 8 Ad. & E. 449.

8. *Plea justifying Imprisonment under a Warrant of a Stipendiary Magistrate.*

Bancroft *v.* Mitchell, L. R. 2 Q. B. 549.

9. *Justification of an Assault in Defence of Possession of Personalty.* (y)

[That before and at the time of the alleged trespasses the plaintiff had wrongfully in his possession goods of the defendant [*or* "of J. K."], that is to say [*naming the goods*], without the leave and against the will of the defendant] [*or* "of the said J. K."], and the plaintiff was then about wrongfully and unlawfully to take and carry away the said goods and convert them to his own use; and the defendant [as the servant of the said J. K. and by his command] then requested the plaintiff to refrain from carrying away and converting the said goods and to give up the possession thereof to the defendant, which the plaintiff then refused to do; and thereupon the defendant [as the servant of the said J. K. and by his command] gently laid his hands upon the plaintiff in order to take [and took] the said goods from him, doing no more than was necessary for that purpose, which are the alleged trespasses.

Like pleas. Morant *v.* Chamberlain, 6 H. & N. 540; Wisdom *v.* Hodson, 3 Tyrwh. 811; Chambers *v.* Miller, 13 C. B. N. S. 125; Hudson *v.* Slade, 3 Fos. & Finl. 390.]

(u) Where the plaintiff does not proceed for a totally *different* trespass to that attempted to be justified, but contends that the defendant, though justified to some extent, was guilty of *excess*, he should not new assign, but *reply* as above. See form and rejoinder, Bone *v.* Daw, 3 Ad. & E. 711; and observations of Patteson J. Ib.; Penn *v.* Ward, 2 Cr., M. & R. 338. Under a joinder of issue upon the plea in form 2, excess may be shown without a special replication. Dean *v.* Taylor, 11 Ex. 68.

(x) Plea justifying arrest for refusing to give up a ticket. Eastern Counties Ry. Co. *v.* Broom, 6 Ex. 314.

(y) Form, Blades *v.* Higgs, 10 C. B. N. S. 713.

10. ***Replication to a Plea of Justification under a Ca. Sa. in an Action against the Party, Plaintiff in a former Action, that the Writ was irregular.***

Collett *v.* Foster, 2 H. & N. 356.

11. ***The like, that the Arrest was irregular.***

Sandon *v.* Jervis, El., Bl. & El. 935.

12. ***Justification of an Assault, &c. in resisting a Rescue of Cattle distrained Damage Feasant.*** (*z*)

That at the time of the distress hereinafter mentioned the defendant was lawfully possessed of a certain close called ——, situate in the parish of ——, in the county of ——, and that divers cattle were in the said close doing damage; wherefore the defendant took the said cattle in the said close so doing damage there in the name of a distress, and drove the same out of the same close towards the common pound, to impound the same therein as a distress for the damage so by them done; and that whilst he was driving the said cattle so distrained towards the said common pound, and before the said cattle were impounded therein, the plaintiff, with force and arms, did endeavor to rescue and take the said cattle out of the custody and possession of and against the will of the defendant; whereupon the defendant, for the preservation of the said distress and in defence of his possession thereof, gently laid his hands on the plaintiff and did resist and oppose the plaintiff in order to prevent him from rescuing the said distress.

DEFENCE OF A HOUSE, &c.

OBS. — In pleas of this kind, care must be taken that the cause or ground of justification warrants or covers all the trespasses charged in the declaration to which the plea is pleaded. A *wounding* cannot be justified merely in defence of possession. Gregory *v.* Hill, 8 T. R. 299; Com. Dig. Pleader, 3 M. 16; Oakes *v.* Wood, 2 M. & W. 791. *Aliter*, if plaintiff attempt to enter the house with force, or assault the defendant or his family in attempting to remove him. Ib. An *imprisonment* can only be justified, if, being in the defendant's house, the plaintiff *assault* the defendant after being requested to leave; Reeve *v.* Taylor, 4 Nev. & Man. 469; Bone *v.* Daw, 3 Ad. & E. 711; or make *an affray* or other breach of the peace; Timothy *v.* Simpson, 1 Cr., M. & R. 757; 6 C. & P. 499; Derecourt *v.* Corbishley, 5 El. & Bl. 188; 24 L. J. Q. B. 312, continued in presence of the defendant, or which he has reasonable ground to expect the plaintiff will renew. Baynes *v.* Brewster, 2 Q. B. 375. Otherwise the mere fact of a party refusing to leave a house when requested will not justify giving him in charge to a policeman; Wheeler *v.* Whiting, 9 C. & P. 269; unless his *acts* amount to a breach of the peace. Wooding *v.* Oxley, 9 C. & P. 1.

A plea which professes to justify several assaults and false imprisonments laid in *separate counts*, must show *distinct* occasions upon which the defendant was justified in committing *each* particular trespass. Therefore in M'Curday *v.* Driscoll, 1 Cr. & M. 618, a plea was held bad, which was pleaded to *several* counts of the above description, and after justifying under process, alleged that the plaintiff forcibly resisted the execution of the process, wherefore the defendants, in order to arrest the plaintiff and to overcome his resistance, committed the trespasses. Bailey B. observed, "There are six assaults and

(*z*) See Field *v.* Adams, 12 Ad. & E. 649; and see another plea justifying in defence of possession of a steam vessel. Dean *v.* Hogg, 6 C. & P. 54.

Obs. four imprisonments laid in the declaration; the party justifying is bound to cover the whole. I see no reason which you give for assaulting him six times. You profess to justify four imprisonments; you should have shown that circumstances existed by which you had a right to imprison him, whereupon you imprisoned him once; and then that such and such circumstances occurred whereby you had a right to imprison him again, wherefore you imprisoned him on the second occasion, and so throughout; but here you do not show any different occasions." On the other hand, it is sufficient to prove so much of a plea as substantially sustains the cause of justification, and covers the trespasses which the plea professes to answer. In Atkinson *v.* Warne, 1 Cr., M. & R. 827; 3 Dowl. 483; to a declaration for assault and imprisonment, the plea justified the apprehension of the plaintiff on a charge of felony, alleging his *resistance*, wherefore defendant beat him, &c. The evidence supported the justification as to the arrest for felony; but the plaintiff's resistance was not proved. The court held that the verdict was right, the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged.

1. *Justification by Defendant that the Assault was committed in Defence of his own House or Land.* (*a*)

That he was possessed of land (*b*) [*or* "a dwelling-house"], whereon the plaintiff was trespassing and doing damage; whereupon the defendant requested (*c*) the plaintiff to leave the said land [*or* "house"], which the plaintiff refused to do, and thereupon the defendant gently (*d*) laid his hands on the plaintiff in order to remove him, doing no more than was necessary for that purpose, which is the alleged trespass [*if a wounding is to be justified, add*]; and thereupon the plaintiff, being still in the said house, resisted and assaulted (*e*) the defendant, who thereupon necessarily committed the said trespasses in his own defence, and in defence of the possession of his said house.

(*a*) [Like pleas, Weaver *v.* Bush, 8 T. R. 78; Gregory *v.* Hill, 8 T. R. 299; Wisdom *v.* Hodson, 3 Tyrwh. 811; Timothy *v.* Sampson, 1 Cr., M. & R. 757; Webster *v.* Watts, 11 Q. B. 311.]

(*b*) This is necessary; Roberts *v.* Taylor, 1 C. B. 117; as to whether a *right* to the possession will suffice, see Newton *v.* Harland, 1 M. & G. 644; Harvey *v.* Bridges, 14 M. & W. 437. Possession is not proved by showing that the defendant was a lodger and possessed of some rooms only. Monks *v.* Dykes, 4 M. & W. 567.

(*c*) Where the first entry is peaceable, there must be a request to leave; Tulley *v.* Read, 1 C. & P. 6; Jelley *v.* Bradley, 1 Cr. & M. 270; plea showing forcible entry, &c. Weaver *v.* Bush, 8 T. R. 78; Polkinhorn *v.* Wright, 8 Q. B. 197.

(*d*) This justifies the battery. Titley *v.* Foxall, 2 Ken. 308. A necessary degree of *beating* and pushing and pulling about may be justified under the *molliter manus imposuit*, but if there were an actual resistance, and in consequence thereof any *wounding*, or a greater degree of violence on the defendant's part than would otherwise have been justifiable, it is proper to state the facts accordingly. Oakes *v.* Wood, 3 M. & W. 151; Reeve *v.* Taylor, 4 N. & M. 470; Bush *v.* Parker, 1 Bing. N. C. 72. A *wounding*, or the striking several blows, and several times knocking down (Gregory *v.* Hill, 8 T. R. 299; Johnson *v.* Northwood, 1 Moore, 420; 7 Taunt. 689), cannot be justified merely to expel a person, without showing resistance, &c. The expulsion may be justified, but not an *imprisonment*, unless there be a breach of the peace, &c. Green *v.* Bartram, 4 C. & P. 308. See Wheeler *v.* Whiting, 9 C. & P. 262. See, also, Timothy *v.* Simpson, 1 Cr., M. & R. 757; Howell *v.* Jackson, 6 C. & P. 733.

(*e*) This is necessary to justify a wounding; Oakes *v.* Wood, 3 M. & W. 151; Bush *v.* Parker, 1 Bing. N. C. 72; or it may be justified by showing that plaintiff *forcibly* attempted to enter the house, Ib., from, &c. Polkinhorn *v.* Wright, 8 Q. B. 197. An imprisonment may also be justified under such circumstances; Cohen *v.* Huskisson, 2 M. & W. 477; Grant *v.* Moser, 5 M. & G. 123; as it may if plaintiff make an affray or breach of the peace; Timothy *v.* Simpson, 1 Cr., M. & R. 757; Baynes *v.* Brewster, 2 Q. B. 735; but not for *merely* refusing to leave the house. Wheeler *v.* Whiting, 9 C. & P. 269. See forms and law, Timothy *v.* Simpson, 1 Cr., M. & R. 757. Form showing that plaintiff caused a riot. Ingle *v.* Bell, 1 M. & W. 516;

2. *Justification by Defendant as Servant of the Occupier of a Dwelling-house.* (*f*)

That at the time of the said alleged trespasses one A. B. was possessed of a dwelling-house, wherein the plaintiff was trespassing, making a disturbance against the will of the said A. B., whereupon the defendant, as the servant of A. B., and by his command, requested the plaintiff to cease making the said disturbance, and to depart from and leave the said dwelling-house, which the defendant refused to do, whereupon the defendant, at the command of the said A. B., and in defence of A. B.'s possession of the said dwelling-house, gently laid his hands upon the plaintiff to remove, and did remove him from the said dwelling-house, using no more force than was necessary for that purpose, which is the alleged trespass.

3. *Replication to a Plea of Self-defence, that the Assault was committed in removing Defendant from Plaintiff's Land.* (*g*)

That the plaintiff was possessed of land, whereon the defendant was tres passing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do, and thereupon the plaintiff gently laid his hands on the defendant, in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff.

OTHER FORMS JUSTIFYING IN DEFENCE OF PROPERTY, &c.

1. *Expulsion from a Public House.*

Howell *v.* Jackson, 6 C. & P. 723; Webster *v.* Watts, 11 Q. B. 311; [Oakes *v.* Wood, 2 M. & W. 791; Ingle *v.* Bell, 1 M. & W. 517.]

2. *From a Select Vestry.*

Dobson *v.* Fessy, 7 Bing. 305; 5 M. & P. 112.

3. *From a Church for Indecent Behavior during Service.*

Worth *v.* Terrington, 13 M. & W. 781; 2 D. & L. 352; and Hartley *v.* Cook, 9 Bing. 728; 3 M. & Sc. 230; Williams *v.* Glenister, 2 B. & C. 699.

4. *Justifying Assault in turning Clerk out of Vestry.*

Jackson *v.* Courtenay, 8 El. & Bl. 8.

Cohen *v.* Huskisson, 2 M. & W. 477. Effect of inability to prove the riot. Ib. Other forms, &c. Oakes *v.* Wood, 2 M. & W. 791; Howell *v.* Jackson, 6 C. & P. 733; Grant *v.* Moser, 2 Dowl. N. S. 923; 5 M. & G. 123; Wooding *v.* Oxley, 9 C. & P. 1; Baynes *v.* Brewster, 2 Q. B. 375.

(*f*) Pigott *v.* Kemp, 1 Cr. & M. 197. See Bardons *v.* Selby, 1 Cr. & M. 500; [Bush *v.* Parker, 1 Bing. N. C. 72; Holmes *v.* Bagge, 1 El. & Bl. 782; Hayling *v.* Okey, 8 Ex. 531; Morant *v.* Chamberlain, 6 H. & N. 540.] It would not be a good replication if the plaintiff showed *title* to, and not mere possession of the house, &c. Vivian *v.* Jenkin, 3 Ad. & E. 741. Where the plaintiff relies on *excessive* violence on defendant's part, as an answer to the justification, he should new assign or reply such excess. *Ante*, 698, form 4. As to evidence to support this plea, Jelley *v.* Bradley, 1 Cr. & M. 270.

(*g*) Common Law Procedure Act, 1852, sch. B, 53.

5. *From a Police Office.*

Collier *v.* Hicks, 2 B. & Ad. 663.

6. *From a House, and Law as to the Right of a Landlord to expel a Tenant holding over.*

Newton *v.* Harland, 1 M. & G. 644; Harvey *v.* Brydges, 14 M. & W. 437; and see Wright *v.* Burroughs, [3 C. B. 685;] Davison *v.* Wilson, 11 Q. B. 890.

7. *To prevent Forcible Entry into House.*

Weaver *v.* Bush, 8 T. R. 78; [Grant *v.* Moser, 5 M. & G. 123. Or into the defendant's close. Looker *v.* Holcomb, 4 Bing. 183; Polkinhorn *v.* Wright, 8 Q. B. 197.]

8. *The like into a Close; and Replication of an Agreement entitling Defendant to cut Teazles.*

Kingsbury *v.* Collins, 4 Bing. 202.

9. *Expulsion of Plaintiff, who was Defendant's Servant, from his House, which he refused to leave.*

Donaldson *v.* Williams, 1 C. & Mar. 345.

10. *From a Railway, and justifying taking Plaintiff before a Magistrate, under* 3 *&* 4 *Vict. c.* 97, *for trespassing on the Railway.*

Manning *v.* South Eastern Ry. Co. 12 M. & W. 237.

11. *Justification of an Assault in Defence of Defendant's Sheep, which Plaintiff with a strong hand attempted to take.*

Alderson *v.* Waistell, 1 C. & K. 358.

12. *Similar Plea.*

Polkinhorn *v.* Wright, 15 L. J. Q. B. 70.

FELONY, OR SUSPICION THEREOF.

Obs. — There is a material distinction between arrest without warrant by *private individuals*, and arrests by *peace officers* on *suspicion* of an offence. In order to justify the former in causing the imprisonment of a person *without a warrant*, he must not only make *out a reasonable ground of suspicion*, but must prove that a *felony has been actually committed* by some one. West *v.* Baxendale, 9 C. B. 141; Ex parte Kran, 1 B. & C. 258. Thus, a constable cannot legally take a person into custody on a charge of felony made by another, if the charge rests on no reasonable ground, or on grounds which are unreasonable. Therefore, where on the statement made to the constable it ought to have appeared (from the lapse of time and other circumstances) doubtful, whether a felony had been committed, and that there was no reason for suspecting the person charged, the arrest was held unjustified; Hogg *v.* Ward, [3 H. & N. 417;] Allen *v.* Wright, 8 C. & P. 522; Matthew *v.* Biddulph, 3 M. & G. 390; 1 Dowl. N. S. 216; except in the case of hue and cry on an indictment found against the party; whereas a *constable*, having reasonable ground on a

Obs. charge preferred by another person to suspect that *a felony* has been committed, is authorized to arrest the suspected party without warrant, and take him before a magistrate or other proper authority, although *no felony* has been committed. Beckwith *v.* Philby, 6 B. & C. 637; Samuel *v.* Payne, Doug. 359; White *v.* Taylor, 4 Esp. 80; Cald. 291. If a constable without charge, and of his own accord, takes a person into custody on suspicion, he must, in general, like a private individual, prove that a crime was actually committed by some one; Hobbs *v.* Branscombe, 3 Camp. 420; except in certain cases where by statute suspicious persons may be arrested. See *infra*. The question what is reasonable ground for suspicion, is a mixed proposition of law and fact. Whether the circumstances alleged to show it reasonable or not are true and existed is a matter of fact; but whether, supposing them true, they amount to a reasonable ground for suspicion, is a question of law. Davis *v.* Russell, 5 Bing. 354; Chit. Burn's Just. tit. Arrest.

The power of arresting without warrant is confined to the party suspecting; A. cannot therefore arrest B. because C. has just cause to suspect B. of felony; Bac. Abr. Trespass, D. 3; and see 2 Hawk. P. C. c. 13, s. 11; but a private person may arrest persons actually fighting, or who are coming to the assistance of others fighting, but not after the affray is over, unless a party have received a dangerous wound in it. So a private person may arrest one on the point of committing treason or felony. Ib.

A plea of justification by a private individual must state facts showing the ground of suspicion (that the court may judge of its reasonableness). Thus it is sufficient to prove such facts as constitute a reasonable and probable cause for the charge, although the defendant may have acted not merely on those facts which are proved, but also on others, the truth of which, although alleged in this plea, are either not proved or are disproved. Hailes *v.* Marks, 30 L. J. Ex. 389. In Mure *v.* Kaye, 4 Taunt. 34, the plea justified an imprisonment only by stating that a forgery had been committed, and that afterwards the plaintiff was "suspiciously possessed" of the document, and did "in a suspicious manner" dispose of the same to A. B., and then "in a suspicious manner" left England; wherefore defendant had reasonable cause to suspect, and did suspect, plaintiff, &c. and this plea was held bad on general demurrer.

There is an important distinction between *felonies* and *misdemeanors* in reference to a constable's *powers of arrest*. In the case of *treason* and felony, a constable may, by virtue of his office and without warrant, arrest a party upon a reasonable charge or suspicion of these offences, although in fact it eventually appear that *none was committed*, and the constable had *no view* of, or did not see, any part of the transaction. Hale P. C. 587; 1 East P. C. 303; Burn's Just. tit. Constable, iv.; Lewis *v.* Arnold, 4 C. & P. 354. A constable may and is bound at his peril to arrest for felony upon a reasonable suspicion arising from facts within his own knowledge or communicated to him by others; and upon a reasonable charge of felony he is protected and justified in arresting, although before he can take the suspected person before a magistrate he discovers that no offence has been in fact committed, and therefore discharges him without going before a justice. Ledwich *v.* Catchpole, Cald. 291; White *v.* Taylor, 4 Esp. 80; Stonehouse *v.* Elliot, 6 T. R. 315; Rex *v.* Akenhead, Holt N. P. R. 473.

But in the case of *affrays* (see Burn's Just. tit. Constable, iv.; Arrest, iii. 3; Coke *v.* Nethercote, 6 Car. & P. 723; and the authorities collected in Timothy *v.* Simpson, 1 Cr., M. & R. 760) and breaches of the peace, &c. it appears that a constable has no power to arrest without warrant, even on a positive charge, if the affray did not take place in his presence, and was quite over when he arrived, and there was no chance of its renewal. For it is a constable's duty to preserve or prevent a breach of the peace, not to punish it, and his arresting after the affray has ended cannot conduce to the former object. So a constable at common law is not justified in imprisoning a person in the belief that he has committed a misdemeanor. Griffin *v.* Coleman, 28 L. J. Ex. 134. If there be an affray, a person who witnesses it may, on the spot where it was committed, and while there is danger that it will be continued or renewed, deliver the affrayers in charge to a constable; and consequently the latter may, although he did not witness the original affray, legally

Obs. arrest the party so given in charge in such case. Timothy *v.* Simpson, *ubi supra*. See R. *v.* Light, 27 L. J. M. C. 1. And if an affray has happened, and a wound has been given which there is reasonable ground to suppose may end in felony, a constable may take the party who has given such wound into custody. Cowpey *v.* Henley, 2 Esp. R. 540; Price *v.* Healey, 10 Cl. & Fin. 28. But where a person assaulted a police constable, who went away, and after two hours' time returned with assistance, he was held not to be justified in arresting him after that interval. R. *v.* Walker, 23 L. J. M. C. 123.

If A., having no right to apprehend B., *direct* a police officer to take B., and he do so, B. may maintain trespass; but if A. merely make a statement to the officer, leaving it to him to act or not, as he thinks proper, trespass does not lie against A. Hopkins *v.* Crowe, 7 C. & P. 375.

A plea, justifying an arrest for an affray without warrant, must contain a direct averment that there was an affray or breach of the peace continuing at the time of the arrest, or a well founded apprehension of its renewal. Price *v.* Seeley, 10 Cl. & Fin. 28. See form of plea defective in these respects, Baynes *v.* Brewster, 2 Q. B. 375.

Military and naval officers, &c. acting officially, 6 Geo. 4, c. 108, s. 97; constables, 7 Jac. 1, c. 5; special constables, 1 & 2 W. 4, c. 41; the metropolitan police, 10 Geo. 4, c. 44, s. 41, 2 & 3 Vict. c. 47, s. 5; the Thames police, 3 & 4 W. 4, c. 19; the horse patrol, 6 & 7 W. 4, c. 50, s. 1; and police constables, &c. in corporate boroughs, 5 & 6 W. 4, c. 76, s. 19; and persons acting in their aid, may in actions against them for anything done in the execution of their office, plead the general issue and give the special matter in evidence. *Ante*, 405. It is, however, often judicious for these parties to plead specially, in order to compel the plaintiff to new assign, &c. if he rely on excess, &c. or to admit a warrant if there be one. These persons should take care not to join in a defective special plea with a co-defendant not privileged to plead the general issue. See Hodges *v.* Chapman, 2 Bing. 523. A private individual giving a party in charge is not in general privileged by these enactments. See Nathan *v.* Cohen, 3 Camp. 257; M'Cloughan *v.* Clayton, Holt N. P. R. 478.

It is unwise to plead a justification directly charging a party with felony, unless there is probable ground for proving it, as the placing an unfounded plea of this nature on the record is matter of aggravation of damages. Warwick *v.* Foulkes, 12 M. & W. 507. A plea stating only ground of suspicion stands on a different footing. Per Lord Abinger, Ib.

A plea, justifying on the ground that a felony has actually been committed, must be tried as though the plaintiff were undergoing a trial for it in the criminal court, and therefore the evidence of a witness who admits that he stole property at the same time should receive confirmation, as though he were an accomplice. Richards *v.* Turner, 1 Car. & Marsh. 414.

The question of reasonable and probable cause on a plea of justification is one of law and not of fact, in an action for false imprisonment. Hailes *v.* Marks, 30 L. J. Ex. 389.

The plea may be amended either by striking out so much as is not proved, or by correcting the plea in accordance with the evidence. Ib.

1. *Plea justifying an Arrest, &c. on Suspicion of Felony.* (*h*)

That before any of the alleged trespasses the defendant's goods were feloniously stolen by some person unknown to the defendant, and the said goods were shortly afterwards found concealed in the plaintiff's house [*state the grounds of suspicion as that*, "who falsely said he had bought the same of A. B."], whereupon the defendant, having reasonable and probable cause for suspecting, and suspecting that the plaintiff had feloniously stolen the said goods, gave him into the custody of a constable duly authorized, and caused

(*h*) Other forms, Hailes *v.* Marks, [7 H. & N. 56;] Currie *v.* Almond, 5 Bing. N. C. 224; [Smith *v.* Shirley, 3 C. B. 142; West *v.* Baxendale, 9 C. B. 141; Perryman *v.* Lister, L. R. 3 Ex. 197; Perkins *v.* Vaughan, 4 M. & G. 988; Wright *v.* Court, 4 B. & C. 596.]

him to be imprisoned [*as in declaration*], so that he might be dealt with according to law, which are the alleged trespasses.

2. *Plea justifying an Arrest, &c. of Felony committed by the Plaintiff.* (*i*)

That at the time of the alleged trespasses the plaintiff had stolen certain goods of the defendant [*or* A. B.], whereupon the defendant gave the plaintiff into the custody of a constable, duly authorized, and caused him to be imprisoned [*as in the last form*].

3. *Plea that a Burglary had been committed in Defendant's House, that Plaintiff was found in a Suspicious Manner near the House, wherefore Defendant gave him in charge of a Constable, and caused him to be taken before a Magistrate, who remanded him, &c.*

That before any of the alleged trespasses a burglary had been committed in the defendant's house by certain persons to the defendant unknown, and the said persons made their escape from the said house; whereupon the defendant raised a hue and cry after and went in quest of the said offenders, and in making such search did, immediately after the said offence was committed, find and discover the plaintiff near to the said dwelling-house, and in a certain lane, not being the main high road, close to the said house, at an unseasonable hour in that behalf for persons to be abroad; and the said lane being in the direction which it was probable the said offenders had taken in making their said escape, the defendant then and there interrogated the plaintiff, and inquired of him who he was and where he was going, and required him to give some account of himself, and to state what he was about; and thereupon the plaintiff stated to the defendant that [*state particulars*], and the plaintiff did not nor would in any other or more satisfactory manner give an account of himself, and on being then further interrogated by the defendant respecting the said matters, hesitated and prevaricated and contradicted himself in regard to the same; wherefore the defendant, having reasonable and probable cause of suspicion, and suspecting, by reason of the premises, that the plaintiff was guilty of or concerned in the said burglary and felony, gave the plaintiff for the cause aforesaid into the custody of a constable duly authorized, in order to carry and convey him before a justice of the peace of and for the said county, to answer the premises, and to be there dealt with according to law, which are the alleged trespasses.

[*If handcuffing is to be justified, proceed thus:*] And because it was dark, and the said offenders so unknown to the defendant and the said constable were not far distant, and the plaintiff expressed his unwillingness to accompany the defendant and the said constable, and there was reason to suppose, and the defendant and the said constable supposed, that the plaintiff might attempt to escape from their custody, or that the said offenders would attempt to rescue the plaintiff from such custody of the defendant and the said constable, they, in order to prevent such escape and rescue, and, as was reasonable and

(*i*) [Like pleas; Merry *v.* Green, 7 M. & W. 623; Warwick *v.* Foulkes, 12 M. & W. 507; justifying additional evidence on the ground of plaintiff's resistance. See Atkinson *v.* Warne, 3 Dowl. 483; 1 Cr., M. & R. 827.]

necessary for that purpose, put the said *handcuffs* (*j*) upon the wrists of the plaintiff, and kept the same upon his wrists until the plaintiff was taken to the said prison, as in the declaration first mentioned.

[*If an imprisonment before taking plaintiff before a justice is to be justified, proceed:*] And because it was early in the morning, and an unseasonable time for the defendant to carry the plaintiff before such justice as aforesaid, the defendant and the said constable, for that reason and for the cause aforesaid, necessarily and unavoidably conveyed the plaintiff to and imprisoned the plaintiff, and kept and detained him in the said prison [*or* "station-house"] in the declaration first mentioned, until a convenient and fit time of the next day, and afterwards, as soon as conveniently could be, the said constable carried the plaintiff in his custody to the said police-office before M. W. Esq., being one of her majesty's justices assigned to keep the peace of and for the county aforesaid, and also to hear and determine divers felonies and misdemeanors therein committed, to answer the premises and to be there dealt with according to law.

[*If a remand is to be justified, proceed thus:*] And the said justice did thereupon order the plaintiff to be remanded until the then next following day for examination, then to be brought up for examination touching the premises; whereupon the said constable aforesaid at the instance of the defendant did thereupon necessarily and unavoidably again imprison the plaintiff, and keep and detain him in prison until the then following day, when the plaintiff was again carried and conveyed by the constable, and by the defendant in his aid and assistance, and at his instance, before the said justice for further examination, according to the said order of him the said justice, and again examined by the said justice touching and concerning the said premises.

[*If a further imprisonment under the warrant of the justice is to be justified, proceed thus:*] And thereupon the said justice made his warrant in writing under his hand and seal, directed to the keeper of the New Prison, Clerkenwell, or his deputy, and thereby required such keeper or his deputy to receive into his custody the body of the plaintiff therewith sent him, brought before the said justice, and charged before him upon the oath of the defendant on suspicion of having been concerned with others in burglariously breaking the dwelling-house of the defendant; and by the said warrant the said justice then commanded the said keeper or his deputy safely to keep the plaintiff in his said custody for reëxamination on Monday then next, which said warrant the said justice then delivered to the said constable; whereupon the plaintiff was then, under and by virtue of the said warrant, carried and conveyed, as in the declaration mentioned, to the said Clerkenwell prison, and there necessarily and unavoidably imprisoned and kept and detained in prison according to the said warrant, until the Monday then next, when he the plaintiff was carried and conveyed before the said justice for reëxamination according to the said warrant, and the plaintiff was then again examined by and before the said justice touching and concerning the said premises, and the plaintiff was then, after a further investigation of the said matters, discharged out of custody by the said justice, which are the alleged trespasses.

(*j*) A constable cannot justify handcuffing a prisoner unless he has *attempted* to escape, or unless it be *necessary* to handcuff him in order to prevent him doing so. Wright *v.* Court, 4 B. & C. 596, where see a form. See, also, Broughton *v.* Jackson, 21 L. J. Q. B. 265.

4. *That a Gun had been stolen and pawned, and Reasonable Ground of Suspicion against Plaintiff.* (*k*)

Hall *v.* Booth, 3 Nev. & M. 316.

[5. *Other Pleas justifying Arrest, &c. on Grounds of Suspicion of Crime.*

Hailes *v.* Marks, 7 H. & N. 56; Perryman *v.* Lister, L. R. 3 Ex. 197; West *v.* Baxendale, 9 C. B. 141; Smith *v.* Shirley, 3 C. B. 142.]

6. *Plea justifying Arrest, Handcuffing, and Detention, on Suspicion of Felony.*

Wright *v.* Court, 4 B. & C. 596; Broughton *v.* Jackson, 21 L. J. Q. B. 265.

7. *The like, on Suspicion that Plaintiff had stolen a Horse.*

Hedges *v.* Chapman, 2 Bing. 523.

8. *Other Forms.*

Hall *v.* Booth, 3 N. & M. 316; 3 Chit. Pl. 7th ed. 327–337.

9. *Plea showing Felony committed.*

Warwick *v.* Foulkes, 12 M. & W. 507; Atkinson *v.* Warne, 3 Dowl. 483; 6 C. & P. 687; Merry *v.* Green, 7 M. & W. 623.

10. *That Plaintiff forged an Acceptance.*

Perkins *v.* Vaughan, 4 M. & G. 988. (*l*)

11. *Plea justifying Imprisonment by a Military Officer abroad, the Plaintiff acting mutinously; Replication, &c.*

Bradley *v.* Arthur, 4 B. & C. 292.

12. *Plea by Overseers justifying imprisoning the Plaintiff on the Ground of his being a Dangerous Lunatic.*

Eliot *v.* Allen, 1 C. B. 18.

13. *Plea that the Plaintiff was a Dangerous Lunatic.*

Fletcher *v.* Fletcher, [1 El. & El. 420; Look *v.* Dean, 108 Mass. 116. Plea justifying the removal of a lunatic prisoner. Gore *v.* Grey, 13 C. B. N. S. 138.]

JUSTIFICATION OF ASSAULT, &c. TO PRESERVE THE PEACE.

1. *Plea of Justification of an Assault and Battery, to prevent Defendant and another Person from fighting, &c.*

3 Chit. Pl. 7th ed. 320; Scruton *v.* Taylor, 8 Dowl. 110.

(*k*) If the plea justify entering a house to take plaintiff, the *purpose* for which the house was entered must be distinctly stated. Smith *v.* Shirley, 15 L. J. C. P. 230.

(*l*) As to the pleas that will be allowed together, Currie *v.* Almond, 5 Bing. N. C. 224.

2. *The like, in Defence of Third Person.*

[That at the time of the alleged trespasses the plaintiff made an assault upon J. K. and was beating him, in breach of the peace, whereupon the defendant gently laid his hands on the plaintiff in order to preserve the peace, and to prevent the plaintiff from further beating the said J. K., doing no more than was necessary for that purpose, which are the alleged trespasses. Bone *v.* Daw, 3 Ad. & E. 712.

3. *Plea justifying an Imprisonment, to prevent an Assault on the Defendant and to preserve the Peace.*

That immediately before the alleged trespasses the plaintiff assaulted and beat the defendant, in breach of the peace, and was about further to assault and beat the defendant and to break the peace, whereupon the defendant, to prevent the plaintiff from further assaulting and beating him, and to preserve the peace, gave the plaintiff into custody to a policeman duly authorized in that behalf, in order that he might be dealt with according to law [and the said policeman accordingly took the plaintiff into custody, and conveyed him in custody to, and imprisoned him for a reasonable time at, the said police station, for the purpose of taking him before a police magistrate] in respect of the premises, which are the alleged trespasses.

Like pleas. Scruton *v.* Taylor, 8 Dowl. 110; Derecourt *v.* Corbishley, 5 El. & Bl. 188; Coward *v.* Baddeley, 4 H. & N. 478.]

4. *Plea that the Plaintiff was making a Disturbance in a Church.*

Williams *v.* Glenister, 2 B. & C. 699.

5. *Plea justifying the Removal of the Plaintiff from a Club from which he had been expelled.*

Innes *v.* Wylie, 1 C. & K. 257.

6. *Plea justifying Arrest to compel Plaintiff to quit Defendant's House,* [*and because the Plaintiff was committing a Breach of the Peace.*]

Timothy *v.* Simpson, 1 Cr., M. & R. 757; 6 C. & P. 499; [Ingle *v.* Bell, 1 M. & W. 517; Cohen *v.* Huskisson, 2 M. & W. 477; Webster *v.* Watts, 11 Q. B. 311.]

7. *The like because Plaintiff attempted forcibly to enter and caused a Riot near Plaintiff's House.*

Ingle *v.* Bell, 1 M. & W. 516; Cohen *v.* Huskisson, 2 M. & W. 477; Grant *v.* Moser, 5 M. & G. 123.

8. *Plea under the Metropolitan Police Act* (2 & 3 *Vict. c.* 47), *justifying giving Plaintiff into Custody for annoying the Defendant and his Family by ringing the Door-bell without Lawful Excuse.*

Simmons *v.* Millingen, 2 C. B. 524.

JUSTIFICATION UNDER CIVIL PROCESS.

1. *Plea to an Action of Imprisonment, &c. against the Execution Creditor and the Sheriff.* (*m*)

That before the said trespasses and before this suit, the defendant A. B. (*the execution creditor*) recovered by a judgment against the plaintiff in the court of [queen's bench] at Westminster the sum of £——, and thereupon, such judgment being in full force and unsatisfied, the said defendant A. B. sued and prosecuted out of the said court of [queen's bench] a writ of *capias ad satisfaciendum* directed to the defendant C. D., sheriff of the county of ——, by which said writ the defendant C. D. was commanded to take the plaintiff, if found in his bailiwick, and safely keep him and render his body before the justices of [queen's bench] at Westminster, immediately after the execution of the said writ, to satisfy the defendant A. B. the said sum of £——, with interest upon the same at four per cent. per annum from the date of the said judgment, and the said writ was duly indorsed, directing the said defendant C. D. to levy such sum and interest, with the sheriff's poundage, officer's fees, and other expenses of the execution, and the defendant C. D. delivered the said writ to E. F., his bailiff, to be executed, and the said E. F. accordingly, and within the said bailiwick, took the plaintiff and detained him in custody, which are the alleged trespasses.

2. *Replication to a Plea of Justification under a Ca. Sa. that the Judgment Creditor had by Deed released the Plaintiff from the said Judgment, &c. and gave Notice thereof to the Defendant, and Rejoinder thereto.* (*n*)

Barker *v.* St. Quintin, 12 M. & W. 441.

3. *Replication to a Plea of Justification under a Ca. Sa. that the Sum due under the Judgment had been paid.*

Futcher *v.* Hinder, 28 L. J. Ex. 28.

4. *Under Writ of Detainer, and Replication no Affidavit of Debt, and other Pleadings, &c.*

Young *v.* Beck, 1 Cr., M. & R. 448; 3 Dowl. 280.

5. *Plea Molliter Manus Imposuit, to serve Plaintiff with a Writ, Replication, &c.*

Harrison *v.* Hodgson, 10 B. & C. 445.

(*m*) See *ante*, "Sheriff." See other forms, Codrington *v.* Lloyd, 8 Ad. & E. 449; Kirbey *v.* Dendy, 1 M. & W. 331. See a form of justification where the person taken had represented herself to be the person against whom the writ was directed; Dunston *v.* Paterson, 2 C. B. N. S. 495; 26 L. J. C. P. 267; with a new assignment and rejoinder thereto; Ib.; but where a wrong person of the same name is taken without any misrepresentation, the sheriff is liable. Childers *v.* Wooler, 29 L. J. Q. B. 129. And as to a similar justification under a *capias* issued by order of a judge, under 1 & 2 Vict. c. 110, s. 3, see Com. Dig. Pleader, 3 M. 24; Cheasely *v.* Barnes, 10 Ex. 82; Shortland *v.* Govett, 6 B. & C. 488.

(*n*) And see Walker *v.* Hunter, 2 C. B. 324. A rejoinder that the release was in order to cheat the attorney of his costs was held bad. Barker *v.* St. Quintin, *ubi sup.*

6. *By an Attorney.*

Oakley *v.* Davis, 16 East, 82; and see Hunt *v.* Hooper, 12 M. & W. 672.

7. *Under an Attachment out of the Queen's Bench.*

Phillips *v.* Howgate, 5 B. & Ald. 220.

8. *The like out of Chancery, and Replication, &c.*

Smith *v.* Egginton, 7 Ad. & E. 167.

9. *Commitment for Contempt of Court of Bankruptcy.*

Van Sandau *v.* Turner, 6 Q. B. 773; Green *v.* Elgie, 5 Q. B. 99.

10. *Justification under Process of a County Court.* (*o*)

Walley *v.* McConnell, [13 Q. B. 903; Kinning *v.* Buchanan, 8 B. & C. 271; Hayes *v.* Keene, 12 C. B. 233.]

11. *Replication that the Judgment under which the Defendant justifies was set aside by Rule of Court.* (*p*)

Jones *v.* Williams, 8 M. & W. 349.

[12. *Plea justifying under a Capias in which the Plaintiff was misnamed, averring that the Plaintiff was commonly known by the name in the Capias, and was the Person intended.*

De Mesnil *v.* Dakin, L. R. 3 Q. B. 18.]

JUSTIFICATION UNDER CRIMINAL PROCESS.

Justification under a Judge's Warrant on an Indictment for Perjury.

Gladwell *v.* Blake, 1 Cr., M. & R. 636. (*q*)

II. PERSONALTY.

1. *Not Guilty.*

Ante, 635.

Obs. — In an action of trespass for taking goods in execution under a judgment which has been set aside for irregularity, evidence is not admissible under the

(*o*) See Davis *v.* Fletcher, 22 L. J. Q. B. 429.

(*p*) In this case both the attorney and plaintiff in the suit are trespassers. Codrington *v.* Lloyd, 8 Ad. & E. 449. Brown *v.* Jones, 15 M. & W. 191, where see other forms of similar replications. It is necessary in a replication, showing that the *capias* under which the defendant justifies was set aside, to show the *grounds* on which it was so set aside; Prentice *v.* Harrison, 4 Q. B. 857; because if the writ were erroneous, and set aside on that ground, no action would lie. Ib. But an allegation that the writ was "irregularly" issued is sufficient. Rankin *v.* De Medina, 1 C. B. 183; 2 D. & L. 813; Brown *v.* Jones, *supra*. A writ of execution issued on a judgment more than a year old, without a *sci. fa.* is only voidable, and until avoided, is a justification to parties who caused it to be executed. Blanchenay *v.* Burt, 4 Q. B. 707; [Huffer *v.* Allen, L. R. 2 Ex. 15.] Replication that the plaintiff was in his dwelling-house, and that the outer door was closed until defendant broke it open for the purpose of arresting him. Newton *v.* Holford, 1 C. B. 141. Or the writ or warrant may be denied. See Jarmain *v.* Hooper, 6 M. & G. 30.

(*q*) The plea there was held bad after verdict for not showing that the constable acted within his jurisdiction; and see Grant *v.* Moser, 5 M. & G. 123.

OBS. plea of not guilty, to show that since action brought the proceeds of the execution have been paid over to the plaintiff. Rundle *v.* Little, 6 Q. B. 174; 13 L. J. Q. B. 311.

2. *Plea of Payment into Court*, 682.

3. *Denial that the Goods are the Plaintiff's.*

That the said goods and chattels were not nor was any part thereof the goods and chattels of the plaintiff, as alleged.

OBS. — This must be specially pleaded as not guilty admits it. Under this plea the plaintiff will establish a *primâ facie* case by proving that he was actually (Young *v.* Hitchens, 6 Q. B. 606) or constructively by his agent, servant, &c. (Bertie *v.* Beaumont, 16 East, 33), or by relation, as executor, &c. (Thorpe *v.* Stallwood, 5 M. & G. 760), *in possession* of the goods. Carnaby *v.* Welby, 8 Ad. & E. 872; 1 Chit. Pl. 7th ed. 195, *ante*. See the observations to the similar plea in trespass to realty, *post*, 716.

In answer, the defendant may show that *he* has a better right, and that the plaintiff's right was acquired by a fraudulent conveyance (Ashby *v.* Minnitt, 8 Ad. & E. 121), or that his right of *possession* is stronger than the plaintiff's, because the defendant has a lien on the goods; Richards *v.* Symons, 15 L. J. Q. B. 35; or that a third person had a better right than the plaintiff, *and* that such third person authorized the defendant's acts of trespass; Ashmore *v.* Hardy, 7 C. & P. 501; Nelson *v.* Cherril, 8 Bing. 316; but the fact that a third person had a better title to the goods than the plaintiff, is no defence in answer to the plaintiff's *primâ facie* case of possession, unless such third person is shown to have authorized the defendant in his act of trespass. Carter *v.* Johnson, 2 Mood. & Rob. 263; 2 Saund. 47 *c*, *d*. See Gadsden *v.* Barrow, 9 Ex. 514; 23 L. J. Ex. 134. As to setting up the *jus tertii*, see Sheridan *v.* New Quay Company, 4 C. B. N. S. 618; Cheesman *v.* Exall, 6 Ex. 341; Thorne *v.* Tilbury, 3 H. & N. 534; Biddle *v.* Bond, 34 L. J. Q. B. 137; 6 B. & S. 225. A plea by a sheriff was held bad as an argumentative denial of the plaintiff's property, which justified seizing the goods under a *fi. fa.* against a third person. Harrison *v.* Dixon, 12 M. & W. 142; 1 D. & L. 454.

4. *Justification for seizing Cattle, Goods, &c. — Damage Feasant, &c.*

Ante, 646, 647; [Goodwyn *v.* Cheveley, 4 H. & N. 631.]

5. *Plea of Plaintiff's Bankruptcy, in Trespass for taking Goods.*

Brewer *v.* Day, 11 M. & W. 628.

OBS. — Where the personal injury to a bankrupt is the primary cause of action, such as trespass for entering his house, seizing his goods, and annoying his family (before his bankruptcy), the assignees cannot sue for it, but the bankrupt may. Rogers *v.* Spence, 13 M. & W. 571; 12 Cl. & Fin. 720. But a cause of action which is exclusively confined to injury to property will pass to the assignees, but there is a difficulty when there is a mixed case of injury to the person and injury to property. It may be that in such a case the law will give an action to the bankrupt for the personal injury, and an action to the assignees for the injury done to the property. Per Lord Campbell, Rogers *v.* Spence, *ubi sup.* A right of entry vested in husband and wife, in right of the wife, passes to the assignees of the husband if he become bankrupt. 6 Bing. 689. See Ruchbell *v.* Alexander, 30 L. J. C. P. 268. See the observations in *trover* by and against assignees of a bankrupt, which are for the most part applicable in trespass, *post*, 726, 727. Forms by a sheriff sued by assignees, *post*, 727, form 2.

6. *Plea justifying driving Plaintiff's Sheep into a Highway because they were in Defendant's Close; Replication, Defect of Fences between the Close from which they escaped and the Plaintiff's, which Defendant was bound to repair.*

Carruthers *v.* Hollis, 8 Ad. & E. 113; Goodwyn *v.* Cheveley, 4 H. & N. 631.

7. *Plea justifying the Removal of Goods encumbering Defendant's Premises.* (*r*)

That at the time of the said trespass he was lawfully *possessed* (*s*) of a certain close, (*t*) and the said goods and chattels were then wrongfully in the said close, encumbering the same, and doing damage there to the defendant, whereupon the defendant took the same and removed and carried them to a small and convenient distance, (*u*) *and there left the same for the plaintiff's use,* (*v*) doing no more damage than was necessary, which is the alleged trespass.

[8. *Plea that the Plaintiff had mixed up his Goods with those of the Defendant so that they could not be separated, and the Defendant unavoidably committed the alleged Trespasses in taking possession of his own Goods.*

Wyatt *v.* White, 5 H. & N. 371.]

PLEAS OF JUSTIFICATION IN ACTIONS AGAINST SHERIFFS. (*x*)

JUSTIFICATION UNDER CIVIL PROCESS.

1. *Plea by a Sheriff, his Bailiffs, and an Execution Creditor, sued together for breaking, &c. a House and seizing Goods, a Justification under a Fi. Fa.* (*y*)

The following form setting out the payment, the writ, and the warrant thereon, is applicable when the sheriff, the officers, and the execution creditor, all join in the plea. If only the sheriff and officers join, (*z*) say

"That before [*&c.*], a certain writ of our lady the queen, called a *fieri*

(*r*) See forms, Neville *v.* Cooper, 2 Cr. & M. 329; Pratt *v.* Pratt, 2 Ex. 413; [Melling *v.* Leak, 16 C. P. 652;] Drewell *v.* Fowler, 3 B. & Ad. 735; Ackland *v.* Lutley, 9 Ad. & E. 879, and in the cases cited *infra*, in the notes. See form in trespass for stopping, &c. wagon and horses, and replication that plaintiff went upon the close to remove corn, as outgoing tenant, under a custom of the country. Holding *v.* Piggott, 7 Bing. 465.

(*s*) Or the defendant may show *title* in fee in himself, or in another person, alleging a demise from him, as in Vivian *v.* Jenkin, 3 Ad. & E. 741.

(*t*) It is not necessary to *name* the close. See Bond *v.* Downton, 2 Ad. & E. 26.

(*u*) If A. wrongfully places goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building for the purpose of removing and depositing the goods there for A.'s use. Rea *v.* Sheward, 2 M. & W. 424.

(*v*) This plea is disproved if it be shown that defendant locked up the goods in the place where they were seized, and took away the key. James *v.* Lewis, 7 C. & P. 343.

(*x*) If the sheriff's defence be that the bailiff's act be not binding on him (as to which see 1 Chit. Pl. Ind. "Sheriff") either by reason of its having been done after a supersedeas has issued, Brown *v.* Copley, 7 M. & G. 558, or because he has exceeded his authority, the plea of not guilty will suffice for him; so it will suffice when he is sued for an act done *judicially*, as issuing process out of a county court of which he is judge. Ib.; and Tunno *v.* Morris, 2 Cr., M. & R. 298; and see Dicas *v.* Lord Brougham, 6 C. & P. 249.

(*y*) See, in general, as to the mode of framing these pleas, 1 Saund. 296, 298; 1 Chit. Plead. 7th ed. 760; Com. Dig. Pleader, 3 M. 24.

(*z*) If there be any doubt as to the writ

facias, was issued out of the court of [queen's bench] at Westminster, directed to the sheriff of the county of ——, by which said writ" [*&c. as in the text from the asterisk*].

The officer, if pleading alone, need only begin with the warrant, thus —

"That before [*&c.*], one R. S., then being the sheriff of the county of [Surrey], to wit, on [*&c.*], made his certain warrant in writing" [*&c. as in the text from the* †].

If the attorney be joined in the action, say, after the statement of the judgment, at the place in the text marked **

"That before and at [*&c.*], the defendant A. P. [*the attorney*] was an attorney of the court of [queen's bench] at Westminster, and that as such attorney, and by virtue of a retainer in that capacity by the said A. B. [*the execution creditor*], which said retainer was given to him by the said A. B. after the recovery and entering up of the said judgment as aforesaid [see Bevins *v.* Hulme, 15 M. & W. 88], and before the said time when [*&c.*], he the said A. P., as such attorney as last aforesaid, for the obtaining satisfaction for the said A. B., of the money so recovered as aforesaid, sued and prosecuted" [*&c. as in the text, confessing all the facts as done by him*] "as such attorney, and by virtue of the retainer last aforesaid." See Com. Dig. Pleader, 3, M. 24; Britton *v.* Cole, 1 Salk. 409.

2. *Plea of Justification under a Fi. Fa.* (*a*)

That before the alleged trespasses, and before this suit, (*b*) the defendant A. B. [*the execution creditor*] recovered, by a judgment against the plaintiff in the court of [queen's bench] at Westminster, the sum of £——,** and thereupon, the said judgment being in full force and unsatisfied, the said A. B. sued and prosecuted out of the said court of [queen's bench] a writ of *fieri facias*, directed to the sheriff (*c*) of the county of ——, by which said writ he was commanded * that of the goods and chattels of the said plaintiff (*d*) in his bailiwick [*&c. set out the writ of execution,* (*e*) *the indorsement to levy, and the delivery to the sheriff* (*f*) *to be executed as ante,* 596, *and proceed thus:*] and

being irregularly issued, the sheriff and officers should not join the execution creditor in this plea; and, on the other hand, the execution creditor should keep aloof from the officer, if the latter have been guilty of any excess in executing the writ. See Britton *v.* Cole, 2 Stra. 1184; S. C. 1 Salk. 408, 409.

(*a*) Not guilty, denial that the goods were the plaintiff's, and denial of plaintiff's possession of the house may be expedient, and may be pleaded together. Carnaby *v.* Welby. 8 Ad. & E. 872.

(*b*) The plaintiff's possession of the house, &c. might also be denied, as *post*, 717, 718. All these pleas were pleaded in Carnaby *v.* Welby, 8 Ad. & E. 872. If the sheriff has seized the goods of A. B. under a *fi. fa.* against him, and C. D. bring an action for such seizure, claiming the property in the goods under a bill of sale, or conveyance from A. B., which there is reason to believe is collusive or fraudulent, the plea denying that the goods are plaintiff's will let in such defence. *Ante*, 711, form 3; Nicholls *v.* Bastard, 2 Cr., M. & R. 659, per Parke B.; Harrison *v.* Dixon, 12 M. & W. 142; 1 D. & L. 454.

(*c*) If in London, say "Sheriffs." In Middlesex or any other county, "Sheriff." See Moore *v.* Magan, 16 L. J. Ex. 57.

(*d*) As to the averment of identity between the plaintiff and the person against whom the writ issued, see Fisher *v.* Magnay, 5 M. & G. 779; 2 D. & L. 40. Evidence to support such allegation, Jarmain *v.* Hooper, 6 M. & G. 827.

(*e*) It is necessary to state the process specially. 1 Saund. 298, note (1).

(*f*) The allegation of the delivery of the writ to the sheriff is not strictly necessary. 1 Saund. 298.

thereupon the defendant R. S. [*the sheriff*], as and being such sheriff as aforesaid, afterwards and before the return of the said writ of [*&c.*], and whilst the same was in force, duly made his warrant, (*g*) † directed to the defendants K. and G. [*the bailiffs*], bailiffs of the said sheriff, and thereby commanded them that [*set out the warrant*], which said warrant, afterwards and before the return of the said writ, was delivered to the defendants K. and G. [*the bailiffs*], to be executed; (*h*) and thereupon the said K. and G. (*i*) did then, by virtue of the said writ and warrant, and within the said bailiwick of the said sheriff, enter (*k*) peaceably and quietly into the said messuage or dwelling-house, in which [*&c.*] [the outer door thereof being then open], (*l*) in order to seize and take, and did then seize and take in execution the said goods and chattels of the plaintiff, the same then being in the said messuage or dwelling-house for the purpose of levying the moneys so directed to be levied as aforesaid, which are the alleged trespasses.

3. *Plea to Declaration for entering House and taking Goods, that the Goods therein were the Property of Plaintiff and M. G., that Defendant recovered a Judgment against M. G., justifying the Sale of a Moiety under a Fi. Fa. against him.* (*m*)

That before and at the said time when [*&c.*], the plaintiff and one M. G. were jointly possessed of the said goods and chattels in the declaration mentioned as of their own proper goods and chattels, and that heretofore and before the said time when [*&c.; here state the recovery of the judgment against M. G., the*

(*g*) It is only necessary to state the warrant when the officers justify; the execution creditor or the sheriff may state at once that the latter seized and entered, &c. under and by virtue of the said writ, &c. without mentioning the warrant. See Com. Dig. Pleader, 3 M. 24. Seal of office not necessary to be stated. 2 Saund. 305, note (13); Bull. N. P. 83; Padfield *v.* Cabell, Willes, 411.

(*h*) If the entry into plaintiff's house was under a *fi. fa.* against a *third* person, insert here, "And the said defendants further say, that before and at the same time when, &c. divers goods and chattels of the said [*third person*], liable to be taken in execution in that behalf under the said writ and warrant, were in the said dwelling-house in which, &c." This averment is essential. Cooke *v.* Birt, 5 Taunt. 76; White *v.* Wiltshire, Palm. 52; Johnson *v.* Leigh, 6 Taunt. 246. Of course in the former part of the plea the judgment and execution must be stated to have been against the third person, and in the latter the seizure will be stated to be of the goods of such third person. See 1 Chit. Arch. 12th ed. 623; and see form of plea in Carnaby *v.* Welby, 8 Ad. & E. 872. If the action be brought by the third person, who claims also the goods, plead justifying as above the entering the house, and as to the goods, deny the plaintiff's property in them. Similar justification under a *ca. sa.*, defendant having reasonable ground to believe that the debtor was in the house. Whalley *v.* Williamson, 7 C. & P. 294.

(*i*) If one only be a bailiff, say, "the said R. as such bailiff as aforesaid, and the said G. as his servant in that behalf, and at his command, &c."

(*k*) If the plaintiff's interest in the house be leasehold, the term remains in him, notwithstanding the lease may be seized, and therefore the sheriff cannot justify staying in an unreasonable time after such seizure. Playfair *v.* Musgrove, 14 M. & W. 289. But such continuance in possession must be newly assigned. Ib.

(*l*) This is a necessary allegation. 11 Moore, 40. Law of breaking open doors, &c. Cooke *v.* Birt, 5 Taunt. 769; Whalley *v.* Williamson, 7 C. & P. 294; 1 Chit. Arch. 12th ed. 622–624; 1 Bing. N. C. 721. See form of plea by a sheriff justifying breaking open an outer door, because he could not otherwise remove from the house goods which he had seized. Pugh *v.* Griffiths, 7 Ad. & E. 840. As to what amounts to breaking an outer door, see Whalley *v.* Williamson, *supra*.

(*m*) See Johnson *v.* Evans, 7 M. & G. 240; 1 D. & L. 935. In an execution against one of two joint tenants, sheriffs should *seize* the whole of the property which is the subject of the joint tenancy, but *sell* only defendant's moiety undivided. Johnson *v.* Evans, 1 D. & L. 935; and see, also, Garbett *v.* Vale, 5 Q. B. 408; Burnell *v.* Hunt, Arch. by Chit. 12th ed. 660.

issuing of the writ of fi. fa., reciting it, stating the indorsement on the writ, and the delivery thereof to the sheriff as ante]; by virtue of which said writ the defendant, as sheriff as aforesaid, afterwards entered into the said dwelling-house in which [*&c.*] by the outer door, the said outer door then being open, in order to levy the damages aforesaid of one undivided moiety of the said goods and chattels in the declaration mentioned, the same goods and chattels then being in the said dwelling-house, and did necessarily seize and take and carry away the said goods and chattels (*m*) for the purpose aforesaid, as it was lawful for the defendant to do, and sold the said moiety belonging to the said M. G. of the said goods and chattels in satisfaction of the said damages, which are the supposed trespasses in the declaration mentioned.

4. *Similar Justification under a Fi. Fa. issued on an Award.*

Jones *v.* Williams, 8 M. & W. 357. (*n*)

5. *Justification under Process of Inferior Courts.*

Green *v.* Davis, 3 B. & Ald. 601; Dyson *v.* Wood, 3 B. & C. 449, Manor Court; Lowell *v.* Champion, 6 Ad. & E. 407.

[6. *Plea that the Trespass was committed under Civil Process, which was subsequently set aside upon the Terms that the Plaintiff should bring no Action.*

Perkins *v.* Plympton, 7 Bing. 676.

7. *Replication to a Plea of Justification under a Fieri Facias.*

OBS. — The plaintiff may join issue upon the plea or specifically deny the judgment, writ, or warrant, according to the facts; or admitting them, reply as to the *residue*. Form, &c. Carnaby *v.* Welby, 8 Ad. & E. 874. Where there has been *excess*, &c. it should be replied or new assigned. The plaintiff might reply (as against all but a sheriff or his bailiff), that the writ of execution was set aside by rule of court. Form, &c. Jones *v.* Williams, 8 M. & W. 356. Excuse for breaking open an outer door. Pugh *v.* Griffith, 7 Ad. & E. 840. Where the *fieri facias* is against the goods of a third person and the defendants entered plaintiff's house, a replication "that the goods were and each of them was the goods of the plaintiff," denying that the judgment debtor had any goods in plaintiff's house, would be a good answer to the plea, but would admit the judgment and execution. See Jones *v.* Brown, 1 Bing. N. C. 489, per Tindal C. J. Form of replication that a writ of error was allowed before the *fieri facias*. Belshaw *v.* Marshall, 4 B. & Ad. 336; and see Perkins *v.* Pympton, 7 Bing. 676.

8. *Plea by a Sheriff to Trespass by Assignees of a Bankrupt, for seizing the Bankrupt's Goods, that the Defendant seized under a Fi. Fa. before Fiat, and without Notice of a Prior Act of Bankruptcy.*

Cheston *v.* Gibbs, 12 M. & W. 111; 1 D. & L. 420.

(*n*) This form was held bad, for not showing that the execution was by rule of court, calling upon the defendant to perform the award. As to which see Doe *v.* Arney, 8 M. & W. 565; 2 Chit. Arch. *in voc.*

Obs. — Similar forms in Edmunds *v.* Lawley, 6 M. & W. 286; Moore *v.* Phillips, 7 M. & W. 536; Whitmore *v.* Robertson 8 M. & W. 463; Unwin *v.* St. Quintin, 11 M. & W. 277; 2 Dowl. N. S. 796; and Belcher *v.* Magnay, 12 M. & W. 102; 1 D. & L. 420; Aldred *v.* Constable, 6 Q. B. 370. These forms were in *trover*, but may easily be adapted to *trespass*. It would seem that this defence might be taken under the plea of "no property" (*ante*, 685), in those cases where the sheriff has actually sold the goods before adjudication, as in such case the *property* is changed, but if the trespass be merely the *seizing*, then, though the sheriff is justified in seizing, yet inasmuch as the *property* remains in the bankrupt, and is in the assignees by relation, the sheriff should plead specially. See the Obs., per Parke B. in Samuel *v.* Duke, 3 M. & W. 622, which seem applicable in *trespass* though not in *trover*, *post*, 723; and see Edwards *v.* Hooper, 3 M. & W. 363.

9. *Replication as against a Party sued with the Sheriff, that the Judgment was on a Warrant of Attorney given by way of Fraudulent Preference.*

Aldred *v.* Constable, 4 Q. B. 676.

10. *Replication that the Judgment was on a Warrant of Attorney that the Fiat issued within Two Months of the Execution and Sale, and that the Sheriff sold with Notice of the Act of Bankruptcy and Fiat.*

Cheston *v.* Gibbs, 12 M. & W. 111; and similar form in Whitmore *v.* Robertson, 8 M. & W. 466.

11. *Similar Replication that the Judgment was on a Cognovit given by way of Fraudulent Preference.*

Scott *v.* Lewis, 7 C. & P. 347; and similar form that it was on a warrant of attorney given by way of fraudulent preference, Rawdon *v.* Wentworth, 2 Dowl. N. S. 287; 10 M. & W. 36.

12. *Plea by a Bailiff that he acted under an Attachment out of the County Court to compel the Plaintiff to appear there by seizing his Goods; Replication, a Supersedeas issued.*

Brown *v.* Copley, 7 M. & G. 558.

III. REALTY. *Ante*, 615.

Obs. — Not guilty in trespass to realty. See *ante*, 635. By R. G. T. T. 1853, r. 19, "In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place, which if intended to be denied, must be traversed specially."

The plea of not guilty, in this action, therefore, admits the plaintiff's *title and possession*, and simply denies the alleged fact, that the defendant, by himself or his servant or cattle, as the charge may be, committed the trespasses laid in the declaration, and no *excuse* or *justification* can be set up under it.

PLEAS DENYING PLAINTIFF'S TITLE.

Obs. — The plea denying the plaintiff's possession means that the plaintiff had not at the time of the trespass such a *possession* of the close, &c. as will enable him to maintain that action. Heath *v.* Millward, 2 Bing. N. C. 98; Wheeler *v.* Montefiore, 2 Q. B. 133. It is negatived by the plaintiff proving an actual possession in himself; see 1 Chit. Pl. 7th ed. 196; however slight, such as by overseers who inclose a waste; Matson *v.* Cook, 4 Bing. N. C. 392; by a ten-

Obs. ant (even against his landlord) who enters land under an agreement for a lease; Alexander *v.* Bonnin, 4 Bing. N. C. 799; or by a female servant in possession of her bedroom; Lewis *v.* Ponsford, 8 C. & P. 687; and as against a wrong-doer the mere possession will suffice, though such possession would not avail against one having a better title; 1 Chit. Pl. 7th ed. 198; Parnell *v.* Young, 3 M. & W. 288; Heath *v.* Millward, 2 Bing. N. C. 98; thus a possessory right sufficient to sustain trespass may be resorted to, even after it has appeared that the plaintiff has in fact no legal title. Every *v.* Smith, 26 L. J. Ex. 344.

But the mere *right* to possession is not sufficient without entry; Litchfield *v.* Ready, 5 Ex. 939; Turner *v.* Cameron's Coal &c. Co. 5 Ex. 932; and if plaintiff prove no more than that, he will be defeated on this plea; thus as lessee before entry cannot support trespass; see 3 Stark. Ev. tit. Trespass; 1 Chit. Pl. 197; but the entry of an heir relates back to the time of the right of entry. Barnett *v.* Guildford, 11 Ex. 19. See Anderson *v.* Radcliffe, 29 L. J. Q. B. 128. But possession in many cases impliedly follows the property; Hebbert *v.* Thomas, 1 Cr., M. & R. 861; Rex *v.* Mayor of London, 4 T. R. 26; and the party entitled is constructively in possession and may sustain trespass. Ib. This applies, it would seem, particularly in those cases where from the nature of the property constant manual occupation cannot well be had. Thus the lord of a manor claiming the wastes, or the owner of the soil of a public highway, may maintain trespass against persons injuring the soil, &c. of the waste or highway, on proof of title, without showing actual possession, it not being proved by defendant to have been at the time in another person. Lade *v.* Shepherd, 1 Wils. 110; Mayor of Northampton *v.* Ward, 1 Wils. 107; 2 Stark. Ev. *ubi supra.*

And a party having the strict legal title and *possessory right* may, *by entry*, &c. acquire a sufficient constructive possession to enable him to sustain trespass against a wrong-doer in actual possession. Thus in Butcher *v.* Butcher, 7 B. & C. 399, where the plaintiff having the legal title entered on the land (by going thereon and beginning to plough, &c.) with intent to take possession, although he did not declare that such was his intention, it was held he might maintain trespass against a person wrongfully in possession at the time of the entry, and who without quitting possession desired the owner to go away, and in fact continued his wrongful possession afterwards; and see Newton *v.* Harland, 1 M. & G. 644. In these cases entry, &c. upon part and parcel of the estate in the name of the whole, gives sufficient constructive possession of the whole for this purpose. Bulwer *v.* Bulwer, 2 B. & Ald. 470.

It is therefore evident that in trespass a question of *title* may be, and often is, raised and decided, although *ejectment* is more commonly resorted to, and is generally more appropriate for the purpose. [As to how far a judgment in this action of trespass to realty creates an estoppel on the matter of title, see 1 Chitty Pl. 195, note (*u*); Providence *v.* Adams, 10 R. I. 184.]

Prior *actual possession* (see Devett *v.* Brown, 5 Bing. 7; Hall *v.* Davis, 2 C. & P. 33; Dyson *v.* Collick, 5 B. & Ald. 601) is of itself sufficient to enable the possessor to maintain trespass against a wrong-doer, that is a party who enters and cannot prove a superior or better title or possessory right in himself, or in another person who can be proved to have authorized his entry. In other words, a new trespasser cannot, by the very act of trespass, immediately and without acquiescence gain a sufficient possession to enable him to maintain trespass, and drive the person whom he ejects to prove his title. Browne *v.* Dawson, 12 Ad. & E. 629. But actual possession, even under a void lease, or of crown land, suffices. Graham *v.* Peat, 1 East, 244; Chambers *v.* Donaldson, 11 East, 63; Harper *v.* Charlesworth, 4 B. & C. 574; Catteris *v.* Cowper, 4 Taunt. 547.

In trespass *quare clausum fregit*, under this plea the defendant may show title in himself or some other person under whose authority he claims to have acted. Jones *v.* Chapman, 2 Ex. 803; Slocombe *v.* Lyall, 6 Ex. 119; as even possession is title against a wrong-doer; Parnell *v.* Young, 3 M. & W. 288; Harrison *v.* Dixon, 12 M. & W. 142; 1 D. & L. 454; 13 L. J. Ex. 247; but it will be safer to plead *liberum tenementum*, together with the plea that the close is not the plaintiff's. These two pleas, with not guilty, and the plea, form 2,

Obs. *post*, 719, will all be allowed together. Morse *v.* Apperley, 6 M. & W. 145; 8 Dowl. 203; Slocombe *v.* Lyall, *ubi sup.*

Under not possessed the defendant may show that the part on which the alleged trespass was committed is his, and it is not necessary that he should prove a title to the whole. Bassett *v.* Mitchell, 2 B. & Ad. 99.

Plea denying Plaintiff's Possession,

That the said close [*or* "messuage"] was not the plaintiff's, as alleged.

1. *Liberum Tenementum.*

Obs. — See Harvey *v.* Brydges, 14 M. & W. 437. The plea of *liberum tenementum* is supported by proof of *any* estate of *freehold*, whether in fee, in tail, or for life only, and whether in possession or expectant on the determination of a *term* of years; but it does not apply to the case of a freehold estate in remainder or reversion, expectant on a particular estate of *freehold*, nor to *copyhold* tenure (1 Saund. 347 *d*, note (6); 1 Chit. Pl. 7th ed.), nor is the plea sustained by evidence of a tenancy in common. Voyce *v.* Voyce, Gow R. 201.

Its effect is to admit that plaintiff is in possession, and that defendant is *primâ facie* a wrong-doer, but he can prove title to himself by deed or twenty years' possession; Grice *v.* Lever, 9 Dowl. 246; Lempriere *v.* Humfrey, 3 Ad. & E. 186; Morse *v.* Apperley, 6 M. & W. 149; 9 L. J. Ex. 61; Brest *v.* Lever, 7 M. & W. 593; 10 L. J. Ex. 337; in *some* part of the demised close, and that it is on *this part* all the acts complained of have been done; the defendant, therefore, is not bound on this plea to prove a title to the *whole close*. Smith *v.* Royston, 8 M. & W. 381; 10 L. J. Ex. 437; Morse *v.* Apperley, *ubi sup.* [See Providence *v.* Adams, 10 R. I. 184.]

Where in trespass to land, the removal of plaintiff's goods is also charged, and the defendant claims *title* to the land, he should plead it and justify the removal; and it seems to be insufficient *as to the goods*, to plead only that the close was not the plaintiff's; and care should be taken to except from the plea any trespasses charged in the declaration which relate only to personal property (not stated to belong to the close), or to the person, to which, of course, this plea can be no answer. Roberts *v.* Taylor, 1 C. B. 117; 3 D. & L. 4. And then in another plea as to the goods, deny that they were the goods of the plaintiff, if they were not so; or, if they were, plead as to the goods that defendant was possessed of a close, and because the goods were there doing damage, &c. defendant removed them; or the defendant might plead title justifying the removal, *ante*, 712, form 7. In trespass for entering a house and taking goods, if defendant claim both, he may plead that the house and goods were not, nor was either of them the house and goods of plaintiff. See form, Haigh *v.* Belcher, 7 C. & P. 389. The issue on this plea is to be taken distributively, and defendant may succeed as to one close and plaintiff as to another. Phythian *v.* White, 1 M. & W. 216. Where the *freehold* title was in the defendant, the plaintiff cannot safely *deny lib. ten.*, but should plead specially, showing his possessory interest by demise, &c.

Since 3 & 4 W. 4, c. 27, the right of property is dependent for its very existence upon the right of entry, and therefore if the defendant's case be that he has been in possession of the close for twenty years, this would seem the proper plea.

1. *Plea of Liberum Tenementum.*

That at the time of the alleged trespasses the said close [*or* "messuage"] was the freehold of the defendant.

[1*a*. *Answer of the Same as to Part, and General Denial of Trespass on any other Part.*

And the defendant comes and says that a part of the close mentioned in the plaintiff's writ was the soil and freehold of the defendant, the same being de-

scribed as follows [*&c.*]. Upon his own knowledge he denies that he broke or entered any part of said close, except the part above described.

2. *Another Form; justifying as the Servant of the Freeholder.* (*o*)

That at the time of the said alleged trespasses the said close was the freehold of A. B. [and that the said gates [*as in the declaration*] were affixed to the said freehold], and the defendant, as the servant and by the command of the said A. B. broke and entered the said close and committed the said alleged trespasses. (*p*)

3. *Replication to a Plea of Liberum Tenementum, stating a Demise by Defendant to Plaintiff.* (*q*)

Wilkins *v.* Boutcher, 3 M. & G. 807.

4. *In Trespass Quare Clausum Fregit; Plea that Defendant was Tenant to the Freeholder.* (*r*)

Kavanagh *v.* Gudge, 5 M. & G. 727; [Vivian *v.* Jenkin, 3 Ad. & E. 741;

(*o*) See similar pleas justifying as the servant of a copyholder, stating the copyhold grant. Brown *v.* Story, 1 M. & G. 117; Darlington *v.* Pritchard, 4 M. & G. 783.

(*p*) If the freeholder and his servant plead together, say, "the defendant A. B. in his own right, and the defendant C. D. as the servant, &c." The plaintiff may reply, denying that defendant was the servant, or had the authority of the freeholder; Chambers *v.* Donaldson, 11 East, 65; but under such a replication he cannot show a lease from the freeholder; Ewer *v.* Jones, 16 L. J. Q. B. 42; and this replication will not be supported by proof that the freeholder is an infant, and the defendant the receiver of his rents appointed by the court of chancery. Ib.

(*q*) See a form, Ryan *v.* Clark, 14 Q. B. 65, pleaded by way of estoppel. Darlington *v.* Pritchard, 4 M. & G. 783. If the defendant in his rejoinder deny the demise, he cannot give in evidence that the plaintiff at the time it was made had agreed to give up possession to the defendant when he wished. Tomkins *v.* Lawrence, 8 C. & P. 729. Where a lord pleads *lib. ten.* to an action by a copyholder, the latter should not traverse it, but should reply the copyhold grant. Thompson *v.* Harding, 1 C. B. 940; Keyse *v.* Powell, 2 El. & Bl. 132. See form of such a replication, Brown *v.* Story, 1 M. & G. 117.

(*r*) See, as to this plea, Com. Dig. Pleader, 3 M. 40; Vivian *v.* Jenkin, 3 Ad. & E. 742; special form, Phythian *v.* White, 1 M. & W. 216; and see another form of sub-demise and replication of entry (under a power), if rent unpaid, &c; Kavanagh *v.* Gudge, *supra;* and see a form stating a demise from the freeholder for sixty years, and assignment of the residue of the term to A., justifying as A.'s servant, and replication of sub-demise from A. Wilkins *v.* Boutcher, 3 M. & G. 807, and Phythian *v.* White, 1 M. & W. 217. In trespass to land, if the defence be that the plaintiff, who has the freehold, is out of possession by a demise, it is for the defendant to rebut the presumption that possession follows the freehold, by clearly proving a demise. If the *locus in quo* (a yard) be surrounded by several houses demised by the plaintiff, the mere fact that the tenants of the houses use the place in which, &c. for some purposes referable to an easement, is no evidence of a demise of the land or yard with the houses; and there being no evidence whether the yard formed part of the demise or not, the court held that the judge ought not to have left it to the jury to say whether the landlord, at the time of the demise of the houses, had reserved the yard; the question being whether he had *demised* it, not whether he had *reserved* it. Hebbert *v.* Thomas, 1 Cr., M. & R. 861. As to the issue being taken distributively, and plaintiff succeeding as to one close, and defendant as to the other, where there are several closes, see Phythian *v.* White, *ubi supra.* See a similar form that the freeholder demised to an intermediate party for twenty-one years, who subdemised to the defendant. Replication that such intermediate party demised to F. for three years before the said demise to the defendant, and that F. assigned to the plaintiff. Rejoinder, that the last demise was on the terms of keeping in repair and entry for non-repair, &c. Wright *v.* Burroughs, 3 C. B. 685; 16 L. J. C. P. 6. There it was objected that since 8 & 9 Vict. c. 106, ss. 2, 3, livery of seisin is no longer necessary, and therefore that this mode of giving color was now incorrect. The court overruled the objection, but it was not taken on special demurrer. See a form denying demise by an agent of plaintiff's, Wilkins *v.* Boutcher, 3 M. & G. 807. The plaintiff must reply, denying the seisin in fee or the demise; Vivian *v.* Jenkin, 3 Ad. & E. 741; or he may reply a *prior* demise to him from or through

Dyne *v.* Nutley, 14 C. B. 122; Mayhew *v.* Suttle, 4 El. & Bl. 348; Holmes *v.* Newland, 11 Ad. & E. 44.]

5. *Plea in Justification of a Trespass on Plaintiff's Close, that Plaintiff placed Defendant's Goods there, and Defendant entered to retake them.* (*s*)

Patrick *v.* Colerick, 3 M. & W. 483; [Wood *v.* Manley, 11 Ad. & E. 34; Anthony *v.* Haneys, 8 Bing. 196.]

6. *Plea that Defendant entered Plaintiff's House to reclaim his Wife, who was wrongfully harbored there.* (*t*)

Lewis *v.* Ponsford, 8 C. & P. 687.

7. *That Defendant entered Plaintiff's House in perambulating the Boundaries of a Parish under a Custom to that effect.*

Taylor *v.* Devey, 7 Ad. & E. 408.

8. *That Plaintiff had sold Goods to Defendant, and had thereby given him a License to come and take them from and out of his House.*

Wood *v.* Manley, 11 Ad. & E. 34. [See Toms *v.* Wilson, 4 B. & S. 442.]

9. *Plea justifying entering a House because it was let on the Terms that if the Tenant did not repair, &c. the Landlord might reënter without Legal Process; and averring Non-repair, &c.*

That before the plaintiff was possessed of or had any title, estate, or interest in the said house, the defendant (*u*) was seised in his demesne as of fee (*x*) of and in the said house, and being so seised, demised to the plaintiff the said house as tenant thereof to the defendant, for [one] year then next following, and so on from year to year for so long as they should respectively please, the first year to commence from the —— day of —— then last past, and under the yearly rent of £——, payable quarterly on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in each and every year, by even and equal portions, on the terms that the plaintiff should [*as in the instrument of demise*] repair and keep in tenantable repair the said dwelling-house during the continuance of the said demise and tenancy, and that if the said plaintiff should not repair or keep in tenantable repair the said house during the continuance of the said demise and tenancy [*or* "if the said rent, or any part thereof, should be unpaid fourteen days next after any day on which such rent, or any quarterly part thereof, should become due"], then it should be lawful for the defendant to enter on

the freeholder, or that the demise to defendant was surrendered, &c. and a subsequent demise by the freeholder to him, the plaintiff. So the plaintiff may reply a sub-demise by the defendant to the plaintiff before the trespasses were committed.

(*s*) See Anthony *v.* Haneys, 8 Bing. 186.

(*t*) As to right to enter to reclaim goods which have been stolen, Webb *v.* Beavan, 6 M. & G. 1055. See, also, Pratt *v.* Pratt, 2 Ex. 413; [Welling *v* Leak, 16 C. B. 652.]

(*u*) Or the plea might state that a third party demised, and justify a reëntry under his authority. See form, Roberts *v.* Taylor, 3 D. & L. 4; 1 C. B. 117.

(*x*) Or title might be *derived* from the freeholder. See Wright *v.* Burroughs, 3 C. B. 685; 16 L. J. C. P. 6.

the said house without any ejectment or process at law, and to have again and repossess the same, and all occupiers thereof to expel and remove; and the plaintiff entered into the said house under and by virtue of the said demise, and became possessed thereof for the said term and tenancy as aforesaid, the reversion of and in the said house then and during all the time hereafter mentioned being in the defendant; and afterwards and during the continuance of the said demise and tenancy, and before the said alleged trespass, the plaintiff omitted and neglected to, and did not nor would, repair (*y*) nor keep in tenantable repair the said [house], and the same was then suffered to be, and was in bad and untenantable repair, and continued so, whereupon the defendant entered into and upon the said house, the outer door thereof being then open, and took possession thereof, (*z*) which are the alleged trespasses.

10. *Replication to the last Form, showing Facts making the Defendant a Trespasser ab initio by converting Goods which he found in the House.*

Roberts *v.* Taylor, 3 D. & L. 4; 7 M. & G. 660.

Obs. — See, also, Kavanagh *v.* Gudge, 5 M. & G. 727; 1 D. & L. 928; and as to the right of forcible reëntry against a person wrongfully withholding possession, see Ib. and Newton *v.* Harland, 1 M. & G. 644; and, also, Harvey *v.* Brydges, 14 M. & W. 437; 3 D. & L. 55; Wright *v.* Burroughs, 3 C. B. 685. The 1 Geo. 4 c. 87, s. 1, does not extend to cases of a subsisting lease forfeited by condition broken. Doe *v.* Sharpley, 15 L. J. Ex. 341. If the defendant has waived a forfeiture incurred, that should be specially replied. Worrall *v.* Clare, 2 Camp. 629.

11. *Similar Justification for entering a Farm, on the Ground of Breach by the Tenant of the Conditions of Cultivation, and also for mortgaging the Lease.*

Hammond *v.* Colls, 3 D. & L. 164.

12. *Similar Justification on the Ground that the Landlord had let the Farm on the Terms that after Notice to quit the Incoming Tenant might enter, and averring such Notice, and that Defendant was the Incoming Tenant.*

Milner *v.* Myers, 15 L. J. Q. B. 157.

13. *Plea justifying Entry into a Dwelling-house under a Power in a Deed from a Lessee who possessed the Premises before Plaintiff.*

Foulkes *v.* Scarfe, 4 M. & G. 126; 4 Scott N. R. 714.

(*y*) The breach of the stipulation to repair, &c. may be stated as in the precedents in covenant, *ante*, 185–187.

(*z*) A plea which went on to justify assaulting the plaintiff because he resisted being turned out of the house, was held bad, inasmuch as such an assault can only be justified in defence of *defendant's* possession; whereas the former part of the plea admits a *possession* in the plaintiff. Roberts *v.* Taylor, 3 D. & L. 11; 1 C. B. 117. It would seem these defences could not be given in evidence under a general plea of leave and license. Tomkins *v.* Lawrence, 8 C. & P. 731.

Obs. might be proved: first, a mere taking of the goods, and second, their total destruction; now the first would be justified if the plaintiff and defendant were joint owners, but in that case the plea would confess only a conversion *in fact*, and not one of a wrongful character; and the second could not be justified at all. See Thomas *v.* Brown, 25 L. J. Ex. 345. But under not guilty the plaintiff's property in the goods cannot be contested. Barton *v.* Brown, 5 M. & W. 298; Jones *v.* Davies, *ubi sup.*

In conformity with the above principles, it would seem that the defendant might show under not guilty the facts pleaded specially in Bonzi *v.* Stewart, 7 M. & G. 746; 2 D. & L. 836; viz. that the defendant bought the goods of plaintiff's agent, intrusted (under 5 & 6 Vict. c. 39) with authority to sell them; so leave and license either from the plaintiff himself, or from a person who was jointly interested in the goods with him, pleaded specially in Keiran *v.* Sanders, 5 Ad. & E. 515, or by a bankrupt or insolvent whom the plaintiff represents as assignee (pleaded specially in Jackson *v.* Thompson, 2 Q. B. 887; and similar special pleas in Hunt *v.* Robins, 3 Q. B. 300), would seem (as negativing a *wrongful* conversion) to be admissible under not guilty; as would also a justifiable taking of the goods, such as a distress for rent, or for damage feasant (pleaded specially in Weeding *v.* Abitbol, 9 Ad. & E. 861; see the observations of Parke B. on this case, Unwin *v.* St. Quintin, 11 M. & W. 281; and Gregory *v.* Duke of Brunswick, 6 M. & G. 218, note (*a*)), or toll due (see Webb *v.* Trip, 1 Dowl. N. S. 589; Com. Dig. Act. on Case, Trover, G. 6), or by a sheriff under a *fi. fa.* (pleaded specially, Whitmore *v.* Robertson, 8 M. & W. 463; Rawdon *v.* Wentworth, 10 M. & W. 36; 2 Dowl. N. S. 287; Ascue *v.* Sanderson, Cro. Eliz. 433; Bacon's Abridg. Trover, F. 2). The observations in Samuel *v.* Duke, 3 M. & W. 630, can scarcely be supported consistently with more recent cases. By an execution creditor setting such sheriff in *motion*. Pleaded specially in Kelsey *v.* Winter, 1 Bing. N. C. 721; Legg *v.* Evans, 6 M. & W. 36; Turquand *v.* Hawtrey, 9 M. & W. 727; Cheston *v.* Gibbs, 12 M. & W. 111; 1 D. & L. 420. See plea to trover by assignees, justifying under a *fi. fa.* against the bankrupt before fiat, and without notice of the act of bankruptcy, and replication that the judgment was, on a warrant of attorney, given by way of fraudulent preference. Aldred *v.* Constable, 4 Q. B. 676; Scott *v.* Lewis, 7 C. & P. 347. By a bailiff that he acted under an attachment out of the county court, to compel the plaintiff to appear there by seizing his goods. Pleaded specially in Brown *v.* Copley, 7 M. & G. 558, where the plaintiff replied that a supersedeas had issued, and the court held that the sheriff was not liable for the tort of the bailiff after the supersedeas had issued.

2. *Not possessed.* — This plea denies, 1, the plaintiff's right of *property* in the goods; and 2, his right of *possession* at the time of the conversion. If the defendant has a lien on the goods, that negatives the latter of these propositions, and therefore may be given in evidence under this plea. Owen *v.* Knight, 4 Bing. N. C. 54; White *v.* Teal, 12 Ad. & E. 113; and see Mason *v.* Farnell, 12 M. & W. 674; Scarfe *v.* Morgan, 4 M. & W. 273; Brandao *v.* Barnett, 1 M. & G. 908; Broadwood *v.* Granara, 10 Ex. 417; 24 L. J. Ex. 1; but see per Alderson B. in White *v.* Spettigue, 13 M. & W. 603; and see Barnewall *v.* Williams, 7 M. & G. 403. So may a detention, because the goods are subject to a toll which has not been paid. Turquand *v.* Hawtrey, 1 Dowl. N. S. 925.

As instances that the plaintiff had no right of property in the goods at the time of the conversion, may be mentioned the following: that before the conversion he had *parted* with his property, title, or possessory right, and had none left to enable him to sue. Vernon *v.* Shipton, 2 M. & W. 11. That the goods really belong to third persons; thus, in trover by a bankrupt against a sheriff for seizing his goods, the latter may show that the goods really belong to the plaintiff's assignees. Leake *v.* Loveday, 4 M. & G. 972; 2 Dowl. N. S. 632; and see Unwin *v.* St. Quintin, 11 M. & W. 277; 2 Dowl. N. S. 796. So in trover against the assignees of a bankrupt, the defendants may show under this plea that the goods were in the bankrupt's possession as reputed owner, and thus passed to the assignees. Isaac *v.* Belcher, 5 M. & W. 139; 8 C. & P. 714; Edwards *v.* Scott, 1 M. & G. 962; Bingham *v.* Clements, 12 Q. B. 260; 17 L. J. Q. B. 289. So where a party conveys his goods to an-

Obs. other by a deed or bill of sale which is fraudulent against creditors (as to which, see Chit. on Contr. Index, Fraud; Chit. Coll. Stat. Fraudulent Conveyances, vol. ii. p. 179; 2 Harr. Ind. Deed), such deed, &c. passes no property in the goods, and therefore a sheriff under a writ of execution against the assignor is bound to seize the goods; Imray *v.* Magnay, 11 M. & W. 275; and if afterwards sued in trover by the pretended assignee, he may give the facts in evidence under the above plea. Howarth *v.* Tollemache, 4 M. & G. 429; Nicholls *v.* Bastard, 2 Cr., M. & R. 659, per Parke B. So a sheriff, when sued by the assignees of a bankrupt, may give in evidence under this plea, that he seized the goods under a *fi. fa.* against the bankrupt before fiat and without notice of the bankruptcy. Unwin *v.* St. Quintin, 11 M. & W. 277; Belcher *v.* Magnay, 12 M. & W. 102. See special pleas raising this defence in the preceding cases, and in Edmunds *v.* Lawley, 6 M. & W. 286; Moore *v.* Phillips, 7 M. & W. 536; Aldred *v.* Constable, 6 Q. B. 370; Belcher *v.* Magnay, 12 M. & W. 102; and see replication in Cheston *v.* Gibbs 12 M. & W. 111, that the judgment was on a warrant of attorney executed by the bankrupt after the act of bankruptcy, within two months of the sale, and that the sheriff sold after notice.

The defendant might also show under this plea that the plaintiff as owner had let the goods for an unexpired term, or that he had voluntarily allowed a third person to sell them to the defendant; Gregg *v.* Wells 10 Ad. & E. 90; or a stoppage *in transitu* before they reached the plaintiff; Jackson *v.* Nicholl, 4 Bing. N. C. 508; Wentworth *v.* Outhwaite, 10 M. & W. 436; and as to sale by sheriff of goods let to hire, see Tancred *v.* Allgood, 28 L. J. Ex. 362; 4 H. & N. 438; Lancashire &c. Co. *v.* Fitzhugh, 30 L. J. Ex. 231; 6 H. & N. 502; 1 Chit. Arch. 12th ed. 667.

The mere possession of goods is sufficient to maintain trover against a wrongdoer. Jeffries *v.* The Great Western Ry. Co. 5 El. & Bl. 802; 25 L. J. Q. B. 802. But the defendant can justify under the *jus tertii*. Thorne *v.* Tilbury, 27 L. J. Ex. 407; 3 H. & N. 534; Sheridan *v.* New Quay Co. 4 C. B. N. S. 618; Cheesman *v.* Exall, 6 Ex. 34; Freshney *v.* Wells, 26 L. J. Ex. 129; Biddle *v.* Bond, 34 L. J. Q. B. 137; 6 B. & S. 225. Under this plea it may also be shown that the conduct of the plaintiff estops him from maintaining the action. Pickard *v.* Sears, 6 Ad. & E. 469; and see Cornish *v.* Abington, 28 L. J. Ex. 262. The verdict may be entered distributively. Freshney *v.* Wells, 26 L. J. Ex. 228.

PLEA OF NOT GUILTY. *Ante*, 636.

NOT POSSESSED.

1. *Plea that the Plaintiff was not possessed of the Goods.* (*b*)

That the said goods and chattels were not, nor were any of them, the plaintiff's, as alleged.

[1*a*. *Answer denying Property and Conversion.*

And the defendant comes and upon his personal knowledge denies that the [horse] mentioned in the plaintiff's writ was the property of the plaintiff, and also denies that he converted the same to his own use.]

(*b*) Not guilty will not put the plaintiff's title to the goods in issue even to mitigate damages. Finch *v.* Blount, 7 C. & P. 478; Speck *v.* Phillips, 5 M. & W. 286, per Alderson J. The issue in this plea is distributive, and may be found partly for the plaintiff and partly for the defendant. Routledge *v.* Abbott, 8 Ad. & E. 592. See per Parke B. Samuel *v.* Morris, 6 C. & P. 620.

2. *Plea of Property in the Defendant, namely, that the Tree grew on a Close, of which Defendant was seised in Fee, wherefore he cut it and delivered it to R. R., who delivered it to Plaintiff, from whom Defendant took it.* (c)

[3. *Answer of Special Property.*

And the defendant comes and upon his knowledge and belief admits that said [horse] is the general property of the plaintiff, but avers that the defendant has a special property therein by reason of his having attached the same as the plaintiff's property, by virtue of a writ [*here describe it*], which was delivered to the defendant, who was then a deputy sheriff in the said county of ——, for service, and the action is now pending; and so the defendant denies upon his personal knowledge that he has converted said [horse] to his own use.]

ASSIGNEES OF A BANKRUPT.

Obs. — The observations made on the effect of the plea of not guilty, *ante*, 636, and the plea of "not possessed," *ante*, 725, apply in general to pleas in actions of trover by and against assignees of a bankrupt. In trover *by* assignees to recover goods claimed by them as having been fraudulently assigned by the bankrupt before his bankruptcy, if the defendant rely upon the validity of the transfer to him, he may dispute the title by a simple denial of the allegation, that the bankrupt, or the plaintiff as assignee, as the case may be, was possessed of the goods. In trover by assignees, a plea denying that the plaintiffs are assignees, &c. see *ante*, 312, will put in issue the trading, act of bankruptcy, petitioning creditor's debt, fiat, and proceedings, provided notice to dispute those facts be also given. Buckton *v.* Wray, 8 Ad. & E. 844; Butler *v.* Hobson, 4 Bing. N. C. 290. These facts cannot be disputed under a plea denying that plaintiffs were possessed, &c. Byers *v.* Southwell, 9 C. & P. 320. In trover *against* assignees, a plea that the plaintiff was not possessed, will enable the assignees to contend that the property in the goods has passed

(c) This form was held good on demurrer in Morant *v.* Sign, 2 M. & W. 95; and see the above case commented on in Acraman *v.* Cooper, 10 M. & W. 585; 2 Dowl. N. S. 495. See a plea framed on the same principle in an action by a lord of a manor against a copyholder, justifying taking coals on the ground of a custom for the copyhold tenants to have them. Anglesea *v.* Hatherton, 10 M. & W. 218; and see Unwin *v.* St. Quintin, 11 M. & W. 277; and Cooper *v.* Shepherd, 15 L. J. C. P. 237. Formerly it was necessary that a special plea of this kind should give what was called *color*. In some cases the real facts themselves invest the plaintiff with a colorable title. Ward *v.* Robins, 15 M. & W. 237. To an action of trespass for taking the plaintiff's corn, the defendant may plead in confession and avoidance that he was rector, and that the corn was set out for tithe, and that he took it as such rector. Now it is to be observed, that this is not an absolute confession that he took the *plaintiff's corn* as alleged in the declaration. The defendant asserts on the contrary a title to the corn in himself. But still he admits that the plaintiff was the *original owner and entitled against all the world except the defendant.* There is therefore a confession so far as to admit some *sort of apparent right or color* for the action, and the plea consequently complies with the terms of the rule now under consideration (*that pleas in confession and avoidance should give color*), and is sufficient. Leyfield's case, 10 Co. Rep. 88; Reg. Plac. 304. So to an action of trespass for taking the plaintiff's sheep, the defendant may plead in confession and avoidance that J. P. was possessed of them and sold them to him, the defendant, in *market overt*, for though this does not admit the sheep to have been the plaintiff's when the defendant took them as alleged in the declaration; yet it admits them to have been his *subject to the effect of the sale in market overt*, and therefore gives some color to the plaintiff's claim. Comyns *v.* Boyer, Cro. Eliz. 485; Fancourt *v.* Bull, 1 Bing. N. C. 681. But formerly if to a similar declaration the defendant were to plead that J. S. was possessed of the sheep as *his own property*, and sold them to him in *market overt*, the plea would be bad, because it tends to deny that the property was *ever* in the plaintiff, and gives *no color* to the claim. Vin. Abr. Color, G.; Doct. Pl. 77.

OBS. to them as being in the reputed ownership of the bankrupt at the time of the bankruptcy; and this plea will also suffice in actions brought against them by the bankrupt to try the validity of the fiat. Assignees cannot plead the general issue "by statute." Knight *v.* Turquand, 2 M. & W. 101. [What goods may be considered to be in the order and disposition of the bankrupt. Young *v.* Matthews, L. R. 3 C. P. 127; Green *v.* Ingham, L. R. 3 C. P. 525; Priestly *v.* Pratt, L. R. 3 Ex. 101.]

1. *Plea in Trover by Assignees that the Plaintiffs were not possessed as Assignees.* (*d*)

That the said goods and chattels were not, nor were any of them, the goods and chattels of the plaintiffs as assignees, as alleged.

2. *Plea to a Declaration by Assignees of a Bankrupt for not re-delivering to them Goods with which the Bankrupt had intrusted them, that the Bankrupt transferred them before Fiat, and without Notice on the part of the Transferee of any Prior Act of Bankruptcy.*

Tanner *v.* Scovel, 14 M. & W. 28.

3. *Plea of Payment of Money (for Damages) into Court in Trover by the Assignees of a Bankrupt.*

OBS. — Form of plea and replication, Clarke *v.* Nicholson, 6 C. & P. 712, note (*a*). The form *ante*, 449, will apply, describing the plaintiffs "as assignees as aforesaid."

The court will generally stay proceedings upon redelivery of the property and payment of costs and nominal damages, and if the plaintiff should go on for greater damages or other goods and fail, he will have to pay the costs subsequently incurred. See form of summons, Chitty's Forms, 10th ed. p. 811, and 2 Chit. Arch. 12th ed. 1378. Peacock *v.* Nicholls, 8 Dowl. 367. Where the cost price only of the goods was paid into court, the court refused to disturb a verdict for the defendant. Evans *v.* Lewis, 3 Dowl. 819.

BAILEES.

OBS. — A bailee having a special title or possessory interest in the goods, if sued by the general or reversionary owner, or a stranger, may defend upon the common plea traversing the property in the plaintiff. *Ante*, 311, Obs.

BILLS OF EXCHANGE.

OBS. — In trover for a bill a special plea must show, not merely an indorsement to defendant, but also that it was for value and without notice of any defect in a prior party's title, &c.; Fancourt *v.* Bull, 1 Bing. N. C. 681; Hilton *v.* Swann, 5 Bing. N. C. 413; 7 Dowl. 417; see other forms, Brind *v.* Hampshire, 1 M. & W. 365; Palmer *v.* Jarmain, 2 M. & W. 282; but the defence might generally be given in evidence under the plea of not possessed; Brandao *v.* Barnett, 1 M. & G. 908; 6 M. & G. 630; or the general issue; Wilkinson *v.* Whalley, 5 M. & G. 590; 1 D. & L. 9; and no advantage is gained by more special pleas.

PLEAS, &c. IN DETINUE.

OBS. — Com. Dig. Pleader, 2, X. 1, &c.; 7 Wentw. 637, 647; proof thereon, 1 Chit. Pl. 6th ed.; 2 Stark. Ev. tit. Detinue. Plaintiff must prove the goods were in the possession of the defendant or his agent for him. Ib.; Anderson *v.* Passman, 7 C. & P. 193. By R. G. T. T. 1853, r. 15, "the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant,

(*d*) See a form, Scott *v.* Thomas, 6 C. & P. 611, note (*a*).

Obs. but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea." The adverse detention of the goods (not merely that the defendant *has* them) is put in issue by this plea; and therefore a plea of tender of the goods was held bad as amounting to *non detinet* (Clements *v.* Flight, 16 M. & W. 42; 16 L. J. Ex. 11), the word "detain" meaning that the defendant withholds the goods, and prevents the plaintiff from having possession of them. Ib. After the bankruptcy of one of two joint owners of goods, the solvent joint owner may authorize the sale of the goods, and the broker who sells pursuant to such authority, may set it up under *non detinet* in an action by the assignees of the joint owner. Morgan *v.* Marquis, 23 L. J. Ex. 21. The defendant must plead specially that the goods were not the plaintiff's, or that the defendant is justified in detaining them. Richardson *v.* Frankum, 6 M. & W. 420; 8 Dowl. 436. A lien, therefore, must, it is said, be specially pleaded, and so must the defence, that the defendant had a common interest in the goods with the plaintiff. Mason *v.* Farnell, 12 M. & W. 674; Closeman *v.* White, 7 C. B. 43; 18 L. J. C. P. 151; Whitehead *v.* Harrison, 6 Q. B. 423; Barnewell *v.* Williams, 7 M. & G. 403. The court will stay proceedings either in detinue (Phillips *v.* Heyward, 3 Dowl. 363), or in trover (Peacock *v.* Nicholls, 8 Dowl. 367), on delivery up of the property and payment of costs. See *ante*, 723, 724, Obs. Many of the pleas in replevin may be adapted to detinue, which is a form of action not very frequently used.

By the common law procedure act, 1860 (23 & 24 Vict. c. 126), s. 25, "In any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as he or they shall think fit, to pay into court a sum of money to answer the claim of the plaintiff to the value of the goods alleged to be detained, and such payment into court shall be made and pleaded in like manner and according to the provisions of the common law procedure act, 1852; and the like proceedings may be had and taken thereupon as to costs and otherwise." Mere proof of the loss of a bailed chattel is no answer to an action of detinue. Goodman *v.* Boycott, 2 B. & S. 1; 31 L. J. Q. B. 69.

See "Payment into Court," *ante*, 682.

1. *Plea of Non Detinet.*

That he did not detain the said goods [*or* "deeds and writings," *as the case may be*], or any of them, as alleged.

2. *Denial that the Goods are the Plaintiff's.* (*e*)

That the said goods [*or* "deeds and writings"] were not, nor was any part thereof, the goods of the plaintiff [*if the plaintiff declare as assignee of a bankrupt, or as executor, &c. add* "as assignee," *or* "as executor, &c. as afore said"], as alleged.

3. *Pleas of Redelivery of the Goods after Action and Payment into Court of Damages for the Detention.*

Crossfield *v.* Such, 8 Ex. 159; 22 L. J. Ex. 65.

LIEN AND PLEDGE.

Obs. — See, in general, Chit. Contr. Index, Lien; 2 Harr. Index, tit. Lien. By implication of law, every workman has a lien for work done in respect of

(*e*) See *supra*, Obs. A plea traversing the plaintiff's *possession* of the goods would seem to be inapplicable in detinue. Gregson *v.* Rush, 4 Q. B. 745. And it is no defence that other persons, co-tenants with the plaintiff, are not joined as plaintiffs. Broadbent *v.* Ledward, 11 Ad. & E. 209. What property the plaintiff must have to maintain detinue. 1 Chit. Pl. 7th ed. He must show a right to have the goods delivered to him. Land *v.* North, 4 Doug. 266.

Obs. goods for the price of such work and necessary materials, if due and unpaid; see Scarfe *v.* Morgan, 4 M. & W. 270; Jacobs *v.* Latour, 5 Bing. 130; provided there be no outstanding security not due; Hewison *v.* Guthrie, 2 Bing. N. C. 759; or other agreement inconsistent with the lien, and the holder have the right to the uninterrupted possession of the chattel. Jackson *v.* Cummins, 5 M. & W. 342. As to the lien of innkeepers; see Thompson *v.* Lacy, 5 B. & Ald. 283; Proctor *v.* Nicholson, 7 C. & P. 67; it exists against the true owner of a stolen horse, provided the innkeeper did not know of the theft. Bacon's Abridg. Inns, D.; Burn's J. Alehouses, XVII.

[The artificer to whom goods are delivered for the purpose of being worked up into form, and the farrier by whose skill an animal is cured of a disease, and the horse breaker by whose skill he is rendered manageable, have liens on them in respect of their charges. Scarfe *v.* Morgan, 4 M. & W. 270, 283; Parke B. in Jackson *v.* Cummins, 5 M. & W. 342, 349; Steadman *v.* Hockley, 15 M. & W. 553, 556; Hollingsworth *v.* Dow, 19 Pick. 228; Burdict *v.* Murray, 3 Vt. 302; Partridge *v.* Dartmouth College, 5 N. H. 286; Grinnell *v.* Cook, 3 Hill, 491. A carriage-maker has a lien for the repairs done to a carriage delivered to him to be repaired. Green *v.* Shewell, cited 4 M. & W. 277. The keeper of a stallion has a lien on a mare sent to him to be covered. Scarfe *v.* Morgan, 4 M. & W. 270. So, if a person takes a lame or sick horse to keep and cure, he has a lien on the horse for his cure and keeping. Lord *v.* Jones, 24 Maine, 439. A trainer of racehorses has a lien for his charge for keeping and training them; Bevan *v.* Waters, Mo. & M. 235; Forth *v.* Simpson, 13 Q. B. 680; Jacobs *v.* Latour, 5 Bing. 130; but if the owner expressly stipulated for the possession of his horse where required, the trainer has no lien. See Scarfe *v.* Morgan, 4 M. & W. 270, 284; Jackson *v.* Cummins, 5 M. & W. 342, 350. So a livery stable keeper has no lien for the keep of a horse, because the owner impliedly, if not expressly, stipulates for the possession when required; Judson *v.* Etheridge, 1 Cr. & M. 743; Wallace *v.* Woodgate, R. & M. 193; Miller *v.* Marston, 35 Maine, 153; and in like manner, an agister of cattle has no lien, because the nature of the bailment is inconsistent with a detention by him. Jackson *v.* Cummins, 5 M. & W. 342; Goodrich *v.* Willard, 7 Gray, 183; Miller *v.* Marston, 35 Maine, 155; Grinnell *v.* Cook, 3 Hill, 491, 492. An innkeeper has a lien on the goods of his guest for the amount of his bill, also on the horses of his guest, though occasionally taken out for use; Allen *v.* Smith, 12 C. B. N. S. 638; and his lien extends to goods brought to the inn by the guest, though they may turn out to be the property of a third person, Snead *v.* Watkins, 1 C. B. N. S. 267, provided they be such as a person might ordinarily travel with. Snead *v.* Watkins, 1 C. B. N. S. 267; Broadwood *v.* Granara, 10 Ex. 417. But the innkeeper has no lien upon a horse put into his stable, unless belonging to, or brought there by, a guest. Binns *v.* Pigot, 9 C. & P. 208; Fox *v.* McGregor, 11 Barb. 41. See Johnson *v.* Hill, 3 Stark. 172; Robinson *v.* Walter, Popham, 127; Grinnell *v.* Cook, 3 Hill, 487. An innkeeper cannot detain the goods of a *boarder* for the price of his board. Ewart *v.* Stark, 8 Rich. (S. Car.) 423. A lien is given for such a case by statute in Massachusetts. Genl. Sts. c. 151, § 29; see Mills *v.* Shirley, 110 Mass. 158; Bayley *v.* Merrill, 10 Allen, 360. See, further, as to innkeeper's lien, Smith *v.* Dearlove, 6 C. B. 132; Sunbolf *v.* Alford, 3 M. & W. 248; Proctor *v.* Nicholson, 7 C. & P. 67; Turrill *v.* Crawley, 13 Q. B. 197. A carrier has at common law a lien on the goods carried, for the sum due in respect of the carriage of those goods. 1 Chitty Contr. (11th Am. ed.) 688. The work and skill for which the lien is created must be expended on the goods themselves, as in the above examples, and as those expended in assaying gold or jewels, or weighing, measuring, or carrying goods. See per Pollock C. B. in Steadman *v.* Hockley, 15 M. & W. 553, 556. Work and skill expended "with and in respect of" the goods is not sufficient, as where a conveyancer transacted business "with and in respect of" deeds, it was held that he could not claim a lien upon the deeds for his charges for the business. Steadman *v.* Hockley, 15 M. & W. 553. Where several parcels of goods are delivered under one contract for the purpose of having work done upon them, the bailee has a lien on the whole for the whole price, though the goods are delivered at different times. Marks *v.* Lahee, 3 Bing. N. C. 408. A lien is lost by a voluntary

Obs. abandonment of the possession of the property. King *v.* Indian Orchard Canal Co. 11 Cush. 231; Morse *v.* Androscoggin R. R. Co. 39 Maine, 285. But the bailee does not lose his lien by claiming it for other charges besides that for which he is entitled to hold it, or by claiming it for too great an amount, unless the proper amount is tendered. Scarfe *v.* Morgan, 4 M. & W. 270; Allen *v.* Smith, 12 C. B. N. S. 638; Jones *v.* Tarlton, 9 M. & W. 675. Where a chattel is detained for a lien, and charges are incurred in keeping and taking care of it, no claim can be made for those charges. Somes *v.* British Empire Shipping Co. 8 H. L. Cas. 338. A lien cannot be avoided by an offer to set-off a debt against the amount for which the lien is claimed. See Clarke *v.* Fell, 4 B. & Ad. 404; Pinnock *v.* Harrison, 3 M. & W. 532. By express agreement, or by the usage of particular trades and professions, a lien may be created for the general balance of account between the parties; thus an attorney has a lien for his general balance on the deeds and papers of his clients which have come to his hands in the course of his employment. See 1 Chit. Pr. 12th ed. 135. A banker has a general lien upon the securities of his customer. Davis *v.* Bowsher, 5 T. R. 488; Barnett *v.* Brandao, 6 M. & G. 630; as to what is a security within the banker's general lien; see Wylde *v.* Radford, 33 L. J. C. 51; and as to the right of a banker to retain a customer's balance against bills discounted for him, see Agra & Masterman's Bank *v.* Hoffman, 34 L. J. C. 285. A factor has a general lien upon all goods consigned to him as factor. Dixon *v.* Stansfeld, 10 C. B. 398. A wharfinger or warehouseman has a similar lien. Holderness *v.* Collinson, 7 B. & C. 212. A warehouseman cannot assert a general lien against all goods deposited by a factor in his own name whether his own or not. Leuckhart *v.* Cooper, 3 Bing. N. C. 99; and see Dresser *v.* Bosanquet, 4 B. & S. 460. Stockbrokers have a general lien upon the securities of their customers. Jones *v.* Peppercorne, 1 Johns. (Eng.) 430. As to lien between principal and agent, see Bock *v.* Gorrissen, 29 L. J. C. 673; 30 lb. 39. An auctioneer has a lien on the price of property sold by him for his commissions and charges. Robinson *v.* Rutter, 4 El. & Bl. 954; Coppin *v.* Craig, 7 Taunt. 240. A mere lien gives no right of sale, and is not assignable; M'Combie *v.* Davies, 7 East, 5; Thames Ironworks Co. *v.* Patent Derrick Co. 1 Johns. & H. 93; Bradley *v.* Spofford, 23 N. H. 446, 447; D'Aubigney *v.* Duvall, 5 T. R. 606; but a pledge or bailment of goods to secure a loan gives a power of sale upon default of the borrower, and is assignable before default. Pothonier *v.* Dawson, Holt, 383; Martin *v.* Reid, 11 C. B. N. S. 730; Johnson *v.* Stear, 15 C. B. N. S. 330; Pigot *v.* Cubley, 15 C. B. N. S. 701; Donald *v.* Suckling, L. R. 1 Q. B. 585. The defendant may be ordered to deliver particulars under the plea of lien. Owen *v.* Nickson, 30 L. J. Q. B. 125.]

1. *Plea of Lien by a Tradesman for Work.* (*f*)

That the said goods were delivered by the plaintiff to the defendant, to be by him, in the way of his business of a ——, repaired [*as the case may be*] for the plaintiff for reward, (*g*) and the defendant received the said goods and chattels, and supplied materials for and repaired the same, and the reasonable

(*f*) See forms, &c. Judson *v.* Etheridge, 1 Cr. & M. 743; Coombes *v.* Noad, 10 M. & W. 127; 2 Dowl. N. S. 315. This plea will be allowed along with "no property" and "non detinet." Barnewell *v.* Williams, 7 M. & G. 403. In Leuckhart *v.* Cooper, 1 Bing. N. C. 509, the court allowed, 1, the general issue; 2, lien by custom; 3, lien by agreement; 4, a lien by custom, with a statement that the goods were deposited by one having a *primâ facie* title; and 5, a lien by custom, with a statement that the wool was deposited by plaintiff's agent. *Sed quære;* 7 C. & P. 119. Where a particular lien arises in respect of *several chattels* delivered to the defendant under *distinct contracts* (see Chase *v.* Westmore, 5 M. & S. 180), for work to be done in respect of *each* article, it seems there must be a *separate plea* of lien in reference to *each* chattel; and that if the defendant in a plea claim a lien for the total of the debts due to him in respect of the various goods, the plaintiff may successfully reply that the defendant was retained and did work under the separate and distinct contracts; for the claim is properly to separate liens, not to one lien for the whole amount. Marks *v.* Lahee, 3 Bing N. C 408.

(*g*) A contract must be shown. Robertson *v.* Showler, 13 M. & W. 609.

reward payable to the defendant therefor amounted to the sum of £——, whereof the plaintiff had notice, but did not pay the same, and the same is still due and unpaid, wherefore the defendant detained and still detains the said goods as a lien and security for the said sum, being the detention in the declaration mentioned.

2. *Plea of Lien by a Pawnbroker.*

Nickisson *v.* Trotter, 3 M. & W. 130.

3. *Plea of General Lien by an Attorney.* (*h*)

That before the said detention in the declaration mentioned the plaintiff delivered the said instruments in writing to the defendant, then and still being an attorney of [her majesty's court of queen's bench at Westminster, and a solicitor of the high court of chancery, and a practicing conveyancer for fees and reward], as such attorney, solicitor, and conveyancer, for the purpose of enabling the defendant to do and transact divers affairs and businesses for the plaintiff with and in respect to the said instruments in writing, and the same have ever since remained in the possession of the defendant; and the defendant says that the plaintiff, at the time of the detention aforesaid, was and still is indebted to the defendant in a large sum for work and labor done by the defendant, as such attorney, solicitor, and conveyancer, for the plaintiff and upon his retainer, and at his request, and for fees payable to the defendant in respect thereof, and for money paid, laid out, and expended by the defendant as such attorney, solicitor, and conveyancer, for the plaintiff, and at his request, wherefore the defendant detained and still detains the same.

4. *Plea of General Lien by Woolfullers, they carrying on Business on the Terms of such Lien.*

Cumpston *v.* Haigh, 2 Bing, N. C. 449. Replication, Ib.; [Coombs *v.* Noad, 10 M. & W. 127.]

5. *Plea of General Lien by a Warehouse Keeper in London.*

Leuckhart *v.* Cooper, 3 Bing. N. C. 99. (*i*)

[6. *Plea by Bankers of a General Lien on Goods and Securities deposited with them.*

O'Connor *v.* Majoribanks, 4 M. & G. 435; Barnett *v.* Brandao, 6 M. & G. 630. *Plea by an insurance broker of a general lien on a policy of insurance for a balance of account.* Hewison *v.* Guthrie, 2 Bing. N. C. 755. *Plea of a general lien by a factor.* Dixon *v.* Stansfeld, 10 C. B. 398. *Plea of stoppage in transitu and lien by unpaid vendor.* Cooper *v.* Bill, 3 H. & C. 722.]

(*h*) See other forms, Lightfoot *v.* Keane, 1 M. & W. 745; Robertson *v.* Showler, 2 D. & L. 687; 13 M. & W. 609. Attorneys have a general lien against their clients, see Tidd, 9th ed. 337; Chit. Arch. 12th ed. 135; 1 Harr. Ind. Attorney; Davies *v.* Vernon, 6 Q. B. 443; Wakefield *v.* Newbon, 6 Q. B. 276. The legal owner of an estate, Phillips *v.* Robinson, 4 Bing. 106, or the party having the right to the first estate of inheritance, has a right to the possession of the title-deeds. Austin *v.* Croome, 1 Car. & Marsh. 653; Smith *v.* Chichester, 2 Dru. & W. 393; 1 Con. & L. 486, Irish.

(*i*) As to general lien of wharfinger, see Dresser *v.* Bosanquet, 4 B. & S. 460.

[7. *Plea to a Count for the Detention of Deeds, that they were deposited as Security for a Debt.*

That before the alleged detention the plaintiff deposited the said deeds and instruments in writing with the defendant, to be by him kept as a pledge and security for and until the repayment by the plaintiff to the defendant of $——, then lent by the defendant to the plaintiff upon the security of the said deeds and instruments in writing, and the defendant received and had the same for the purpose and on the terms aforesaid, and at the time of the alleged detention the said $—— was and still is due and unpaid to the defendant, wherefore the defendant detained [and still detains] the said deeds and instruments in writing, which is the alleged detention.

Like pleas. Gledstane *v.* Hewitt, 1 Cr. & J. 565; Chilton *v.* Carrington, 15 C. B. 95; Owen *v.* Nickson, 30 L. J. Q. B. 125.]

8. *Equitable Plea that Deeds were deposited by the Plaintiff by way of Equitable Mortgage to secure an Advance to a Third Person.*

Ante, 377, Form 15.

[9. *Plea of Lien by a Coachmaker.*

Pinnock *v.* Harrison, 3 M. & W. 532. *By an engraver.* Marks *v.* Lahee, 3 Bing. N. C. 408. *By a carver and gilder.* Legg *v.* Evans, 6 M. & W. 36. *By a warehouse keeper.* Leuckhart *v.* Cooper, 3 Bing. N. C. 99. *By an innkeeper.* Allen *v.* Smith, 12 C. B. N. S. 638. *By an accountant.* See Atwood *v.* Ernest, 13 C. B. 881.]

10. *A like Plea of a Deposit of Goods in Exchange for other Goods on which the Defendant had a Lien.* (*k*)

Sheppard *v.* Union Bank of London, 31 L. J. Ex. 154; 7 H. & N. 661.

11. *Replication that the Plaintiff tendered the Amount of the Lien.* (*l*)

That before the said detention the plaintiff tendered and offered to pay to the defendant £——, in satisfaction and discharge of the said lien, such sum being sufficient to satisfy and discharge the same, and then requested the defendant to deliver up to the plaintiff the said goods, and the defendant refused to accept the said sum or to deliver up the said goods.

(*k*) See 5 & 6 Vict. c. 39, s. 2.

(*l*) See another form, &c. Marks *v.* Lahee, 3 Bing. N. C. 408. The *rejoinder* denied that the sum tendered was sufficient to satisfy the lien; it was held that this was not an immaterial issue, although the replication laid the sum tendered under a *scilicet*; the sum is material, and the rejoinder should be as above, or that the plaintiff did not tender the sum named, and not that a sufficient sum was not tendered. Ib. See, also, Williams *v.* Price, 3 B. & Ad. 695; and Coombes *v.* Noad, 10 M. & W. 127. A tender of the value of all the work actually done on a chattel, though that be not all contracted for, puts an end to all lien on it. Lillie *v.* Barnsley, 1 Car. & K. 344; 2 Mood. & Rob. 548. A repudiation of plaintiff's title to the chattel operates as a waiver of a lien against him. Dirks *v.* Richards, 4 M. & G. 574; 1 Cr. & M. 626; and a tender of a specific lien is waived, if defendant claim a right of retainer for a *general* balance. Jones *v.* Tarleton, 9 M. & W. 675. The plaintiff might reply a release of the debt. Cooper *v.* Green, 7 M. & W. 633.

12. *To a Plea of Lien; Replication that Defendant wrongfully delivered the Goods to other Persons.* (*m*)

That after the said goods had been delivered by the plaintiff to the defendant as in the last plea alleged, and whilst the defendant held the same as aforesaid, the defendant wrongfully, without the plaintiff's consent, sold and parted with to other persons than the plaintiff the said goods and chattels in the declaration mentioned.

13. *Plea of Lien by a Carrier.*

That the said goods were delivered to the defendant, who received the same to be carried as a common carrier, and at the time of their detention the defendant had a lien upon the said goods for money payable by the plaintiff to the defendant for the carriage of the said goods as aforesaid, which said money has not been paid, wherefore the defendant detained the said goods.

14. *Other Replications to Pleas of Lien.*

Replication to a plea of lien for a sum for work done to several goods, that the works were done under separate and distinct contracts. Marks *v.* Lahee, 3 Bing. N. C. 408.

To a general plea of lien, replication that the goods were not delivered on the terms stated, &c. Cumpston *v.* Haigh, 2 Bing. N. C. 449; 2 Scott, 684.

WAGON OFFICE KEEPER.

Obs. — In an action against a wagon office keeper for not forwarding or losing goods (see *ante*, 624), not guilty would deny the neglect or breach of duty, but not the receipt of the goods for the purpose stated in the declaration. See forms of pleas, and Obs. *ante*, 624, "Carriers."

WARRANTIES.

See declarations in fraud, *ante*, 518; pleas, *ante*, 652.

WASTE.

See "Landlord and Tenant," *ante*, 655; "Reversion," *ante*, 593, 689. As to waste of ornamental fixtures, see Avery *v.* Cheslyn, 3 Ad. & E. 75.

WATERCOURSE.

Obs. — See *ante*, 624. In an action for diverting, &c. a watercourse to which plaintiff was entitled, not guilty denies the mere fact of diversion or disturbance

(*m*) In this case the owner's right of repossession revives. Scott *v.* Newington, 1 Mood. & Rob. 252; and see Howes *v.* Ball, 7 B. & C. 481; Ryall *v.* Rolle, 1 Atk. 165; Reeves *v.* Capper, 5 Bing. N. C. 140; and that without tender of the lien. Jones *v.* Cliff, 1 Car. & M. 540.

Obs. by the defendant. See South Shields Waterworks Co. *v.* Cookson, 15 L. J. Ex. 315. It admits the plaintiff's possession and his title or right to the enjoyment of the water. Frankum *v.* Lord Falmouth, 2 Ad. & E. 452. And see Dukes *v.* Gostling, 1 Bing. N. C. 588. As to the right to obstruct a watercourse by which water was wrongfully discharged on the defendant's land, see Roberts *v.* Rose, 3 H. & C. 162; L. R. 1 Ex. 82.

1. *Denial of Plaintiff's Right to the Use of the Water.* (*n*)

That the plaintiff was not entitled to enjoy the benefit and flow of the said stream or watercourse to the said mill [*as in the declaration*], as alleged.

2. *Denial of the Plaintiff's Possession.*

That the plaintiff was not possessed of the said mill [*as in declaration*], as alleged.

3. *Plea of Immemorial Right at Common Law.* (*o*)

That the defendant at the time of the alleged grievances was seised in fee of a mill, and he and all those whose estate he had therein from time immemorial enjoyed the right of diverting and using the water of the said stream for working the said mill, and the alleged grievances were a use by the defendant of the said right.

4. *Plea* (*under* 2 *&* 3 *W.* 4, *c.* 71) *of a Prescriptive Right to use Water for a Mill.* (*p*)

That the defendant at the time of the alleged grievances was possessed of a mill, the occupiers whereof for twenty [*or* "forty"] years before this suit enjoyed as of right, and without interruption, the right of diverting and using the water of the said river for the working of the said mill, and the alleged grievances were a use by the defendant of the said right.

[*Like plea.* National Manure Co. *v.* Donald, 4 H. & N. 8.]

(*n*) Effect of not guilty. *Ante*, 636. Forms denying plaintiff's right to the water, Drewett *v.* Sheard, 7 C. & P. 465; [Sampson *v.* Hoddinott, 1 C. B. N. S. 590;] Thomas *v.* Thomas, 2 Cr., M. & R. 37; Magor *v.* Chadwick, 11 Ad. & E. 586; and pleas, in the first case, stating, 1, that there was an ancient ditch communicating with the watercourse, through which defendant had a right to direct the water; and 2, claiming a similar right when the water was increased by *flashes*. By 2 & 3 W. 4, c. 71, s. 5, if the general allegation (sanctioned by that statute) of the plaintiff's right to the water be denied, "all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to rebut or sustain such allegation." But when the declaration is framed on the plaintiff's *possession* only, and not on the prescription act, that statute does not apply to the *pleas*. Per Parke B. Ward *v.* Robins, 15 M. & W. 240; *sed qu.*? The defendant should justify specially the obstruction on the ground that he has by prescription a grant or right to use the water in a particular manner; Wright *v.* Williams, 1 M. & W. 77; or that the plaintiff had wrongfully penned back the water. Frankum *v.* Falmouth, 6 C. & P. 529; Ward *v.* Robins, 15 M. & W. 237. As to licenses, see Wood *v.* Leadbitter, 13 M. & W. 838.

(*o*) See a form of plea of immemorial right to discharge water from a tan yard into a stream, Moore *v.* Webb, 1 C. B. N. S. 673. A similar form of plea of prescriptive right to throw cinders into a stream, Murgatroyd *v.* Robinson, 7 El. & Bl. 391. See Carlyon *v.* Lovering, Ib. Ex. 251; 1 H. & N. 784.

(*p*) [See a plea justifying (under a railway act) the obstruction of ancient lights. Turner *v.* Sheffield & Rotherham Ry. Co. 10 M. & W. 426; and see a general plea justifying under a statute, Beaver *v.* Manchester, 8 El. & Bl. 44.]

5. *Plea (under 2 & 3 W. 4, c. 71) of a Prescriptive Right to use Water for Agricultural Purposes.*

That the defendant at the time of the alleged grievances was possessed of land, the occupiers whereof for twenty [*or* "forty"] years before this suit enjoyed as of right, and without interruption, the right of diverting and using the said stream for agricultural purposes for the more advantageous occupation of the said land of the defendant, and that the alleged grievances were uses by the defendant of the said right.

6. *Plea to a Declaration for lowering a Weir and thereby obstructing the Water from flowing to Plaintiff's Mill, that for Twenty Years before Suit the Defendant had a Right to lower the Weir for the purpose of Irrigation.*

Ward *v.* Robins, 15 M. & W. 237. (*q*)

7. *Plea justifying Trespass Quare Clausum Fregit because the Occupiers of a Mill had the Easement of going on to the Close to repair Banks of a Stream which flowed to the Mill.*

Clay *v.* Thackrah, 9 C. & P. 47; 2 Mood. & Rob. 244.

8. *Plea of the Right to fetch Water from a Public Pond.*

Manning *v.* Wasdale, 5 Ad. & E. 764; and see Form 4, *post*, "Ways," 738.

[9. *Plea, by a Tenant, of a Right by Non-existing Grant to use the Water for a Mill.*

That at the times of the alleged grievances J. K. was seised in fee of a mill called —— Mill; and long before the times of the alleged grievances, by a deed made between [L. M.] the then owner of the said land now of the plaintiff, and which said owner [*or* "L. M."] was then seised thereof in fee, and [N. O.] the then owner of the said mill who was then seised in fee of the said mill, and whose estate therein the said J. K. had at the times of the alleged grievances respectively (but which said deed has been lost or destroyed by accident), the said then owner of the land now of the plaintiff [*or* "the said L. M."] granted to the said then owner of the said mill [*or* "the said N. O."] and to his heirs and assigns the right for himself and themselves, his and their tenants and servants, of diverting and using the water of the said river for the working of the said —— Mill; and by virtue of the said grant, the defendant, at the times of the alleged grievances respectively, as and being the tenant of the said J. K. of the said mill, was entitled to the right of diverting and using the water of the said river for the working of the said mill, and the alleged grievances respectively were uses by the defendant of the said right. [*If the*

(*q*) This plea was held good on special demurrer, alleging that it was an argumentative traverse of the plaintiff's right, on the ground that the defendant's right under 2 & 3 W. 4, c. 71, was not complete until *the commencement of the suit*, and therefore not inconsistent with the plaintiff's right at the time of the committing the grievances. See Sampson *v.* Hoddinott, 1 C. B. N. S. 590; 26 L. J. C. P. 148; Northam *v.* Hurley, 1 El. & Bl. 665. See, also, National Manure Co. *v.* Donald, [4 H. & N. 8.]

defendant is himself seised in fee, instead of being a tenant, the plea must be modified accordingly.

Plea of an express grant of a right to discharge refuse from bleaching works into the stream, justifying pollution under the right. Hall *v.* Lund, 1 H. & C. 676. *Plea by a mill-owner of a prescriptive right to take water from a canal for the use of steam-engines and other purposes.* Rochdale Canal Co. *v.* Radcliffe, 12 Q. B. 287. *Plea justifying the use of the water of a stream as a riparian proprietor.* Embrey *v.* Owen, 6 Ex. 353. *Plea of a prescriptive right to discharge noxious water into a stream.* Wright *v.* Williams, 1 M. & W. 77; Moore *v.* Webb, 1 C. B. N. S. 673. *Plea of a prescriptive right to scour and amend the channel of a watercourse.* Peter *v.* Daniel, 5 D. & L. 501. *Plea justifying the obstruction of a watercourse because the plaintiff thereby wrongfully discharged water on to the defendant's land.* Roberts *v.* Rose, L. R. 1 Ex. 82.]

WAYS.

Obs. — See declaration, &c. in case for disturbing a right of way, and notes, *ante*, 632. See 2 & 3 W. 4, c. 71; 1 Chit. Pl. tit. Prescription; Gale on Easements, by Willes. Before that statute a right of way could only be claimed on the ground of its having existed *continuously* from time immemorial. But this *continuity* of enjoyment could be defeated by evidence of any fact (such as unity of seisin at any time of the several properties in the same person), which actually negatived it. To obviate this, the plea of non-existing grant of way from a former freeholder was adopted. See Blewett *v.* Tregonning, 3 Ad. & E. 554. On proof that the pretended grantor and grantee (for it was necessary to mention names; Hendy *v.* Stevenson, 10 East, 55) were concurrently freeholders, with evidence of long enjoyment of the way, the grant of the latter was *presumed*. See 1 Saund. 323 *a*.

These difficulties are obviated by the 2d and 4th sections of the statute (cited *ante*, 479, and 624, Obs.), which provide that proof of enjoyment for twenty years next before suit (but for no less time, s. 6), as of right (*post*, 737, note (*s*)), and without adverse (Carr *v.* Foster, 3 Q. B. 581) interruption acquiesced in for a whole year (s. 4), shall not only be deemed presumptive evidence of the right (unless in the case of a tenancy for life, disability from infancy, &c.), but shall not be defeated merely by showing that the enjoyment *first* took place at a time prior to that period, and that a forty years such user shall confer an absolute right (even against disabilities, s. 7), unless it was originally granted by writing, or unless in the case of a tenancy for life. S. 8; Clayton *v.* Corby, 2 Q. B. 817.

1. *Not Guilty.*

Ante, 636.

Obs. — By r. 16, T. T. 1853, "In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way." The plaintiff's right of way therefore must be specially traversed.

2. *Traverse of the Right of Way.* (*r*)

That the plaintiff was not entitled to the said right of way, as alleged.

(*r*) The plaintiff might also deny that "the said fences, &c. and posts were erected or standing, or were in, upon, or across any part of the said footway," &c. and also new assign *extra viam*; may deny that defendant was the *occupier* of the close in respect of which the way was claimed at the times the trespasses were committed, or may traverse

3. *Plea (under 2 & 3 W. 4, c. 71) of a Private Right of Way enjoyed for Twenty Years. (s)*

That the defendant at the time of the alleged trespasses was possessed of land, the occupiers whereof for twenty years before this suit enjoyed as of as above the right of way. Under this traverse the plaintiff may show, without new assigning, that the defendant had a right of way for certain purposes only, and that he used it for other purposes; Cowling *v.* Higginson, 4 M. & W. 245; or that the way claimed has been extinguished by unity of possession. Onley *v.* Gardiner, 4 M. & W. 496; Clayton *v.* Corby, 2 Q. B. 815. And the same applies to a similar traverse of the forty years' plea. Clay *v.* Shackery, 2 M. & Rob. 244; England *v.* Wall, 10 M. & W. 701. The plaintiff also might show under this traverse any fact inconsistent with the enjoyment of the way "as of right," such as that it was enjoyed by stealth, as a trespasser would have done, or by grant; Bright *v.* Walker, 1 Cr., M. & R. 211; or in the absence or ignorance of the parties interested in opposing the claim; Ib.; and Beasley *v.* Clarke, 2 Bing. N. C. 705; or by leave occasionally asked. *Post*, 742, form 11. The principle and decisions upon the statute 2 & 3 W. 4, in regard to the effect and operation of the general denial of the right of way are noticed. As to replying *specially* the *exceptions* in the statute, see Ib.; Wright *v.* Williams, 1 M. & W. 77. According to the cases it is rarely necessary to reply specially. Where there is an undoubted right of way, but the defendant has deviated from the track, or been guilty of excess, the plaintiff should *new assign* (*as ante*). See Ib. as to *replying excess*. The interruption to defeat a prescriptive right must be an *adverse* interruption, not a mere discontinuance of user by the claimant, and this is a question for the jury. Carr *v.* Foster, 3 Q. B. 581.

(*s*) Form as given by the common law procedure act, 1852 (15 & 16 Vict. c. 76), sch. B, 46. See forms, Payne *v.* Shedden, 1 M. & R. 382; Jones *v.* Price, 2 Bing. N. C. 52; Winship *v.* Hudspeth, 10 Ex. 5; [Williams *v.* James, L. R. 2 C. P. 577.] Justification by trustees of a road under a local act to make a new road. Lister *v.* Lobley, 7 Ad. & E. 124. The plea claiming by virtue of forty years' enjoyment will be precisely similar to the above, only substituting the word *forty* for *twenty*. A previous user of fifty years not carried later than four years before suit, will not support such a plea. Parker *v.* Mitchell, 11 Ad. & E. 788. The word "next" is not essential. Jones *v.* Price, 3 Bing. N. C. 52. Though by the 4th section of the prescription act, cited *ante*, 479 and 625, Obs., the twenty years must be counted as those next before the action (see Ward *v.* Robins, 15 M. & W. 240), it is sufficient to allege an user for twenty years before the commencement of the suit; it would be incorrect to allege it to have been for twenty years before the trespasses complained of. Wright *v.* Williams, 1 M. & W. 77; Richards *v.* Fry, 7 Ad. & E. 698. The period is twenty years next before *any* suit or action wherein the claim to the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action. Cooper *v.* Hubback, 12 C. B. N. S. 456. The effect of the statute is to legalize, by relation back, all acts within the prescribed period, if such period elapsed before *suit*, although at the time they were committed they were trespasses, and might be so treated, if, when the action was brought, there had not been an enjoyment for the requisite term. Instead of alleging the right here to have existed from time immemorial, it is now sufficient to allege the enjoyment as of right by the occupiers of the tenement for twenty or forty (as the case may be) years. 2 & 3 W. 4, c. 71, s. 5. The words "as of right" are essential here, and the omission would not be cured by verdict. Holford *v.* Hankinson, 5 Q. B. 584. "If the way has been enjoyed by the claimant, not openly and in the manner a person rightfully entitled would have used it, but by stealth, as a trespasser would have done — if he should have occasionally asked the permission of the occupier of the land — no title would be acquired, because it was not enjoyed 'as of right;' for the same reason it would not, if there had been *unity of possession* during all or part of the time, for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself." Bright *v.* Walker, 1 Cr., M. & R. 211. Evidence of enjoyment with all manner of carriages does not necessarily prove a right of way for all manner of cattle; but it is evidence of a drift way for the jury to consider together with the other evidence; for the extent of the usage is evidence of a right only commensurate with the user. Bullard *v.* Dyson, 1 Taunt. 279. The termini of a *public* way need not be stated; *aliter* in the case of *private* ways. Com. Dig. Chimin, D. 2; Bac. Ab. Highways, C.; 2 Saund. 158 *d*. But it is not necessary to describe all the closes intervening between the two termini. Therefore, where the claim was in the form in the text, and it appeared that the way was from plaintiff's close over *land of third persons*, and *thence* into the defendant's close, &c. it was held that the plea was sufficiently proved. Simpson *v.* Lewthwaite, 3 B. & A. 226; Duncan *v.* Louch, 6 Q. B. 904. There is no rule that lays down that because a road forms an acute angle in order to reach a terminus, it does not lead "towards and unto" the terminus. Rex *v.* Marchioness of Downshire, 4

right and without interruption a way on foot, and with cattle, from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the said land of the defendant, and that the alleged trespasses was a use by the defendant of the said way. (*t*)

4. *Plea justifying the Removal of Obstructions in Exercise of a Right of Way to water Cattle.*

That at the said times when [*&c.*], he, the defendant, was possessed of land, the occupiers whereof for twenty [*or* "forty"] years before this suit enjoyed as of right and without interruption the right of watering their cattle levant and couchant on the said land of the defendant, at a certain watering-place

Ad. & E. 232, 240. If the user and right be limited to particular periods or purposes, the plea must state the fact accordingly, A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such way for general and universal purposes. Jackson *v.* Stacey, Holt N. P. R. 455; Cowling *v.* Higginson, 4 M. & W. 245. Right of way to carry minerals. Monmouth Canal Co. *v.* Harford, 1 Cr., M. & R. 614; David *v.* Kingscote, 6 M. & W. 174. [As to the proof of qualified rights of way, see Cowling *v.* Higginson, 4 M. & W. 245; Dare *v.* Heathcote, 25 L. J. Ex. 299. Any use of the way beyond what is justified by the right is a trespass. Colchester *v.* Roberts, 4 M. & W. 769; Henning *v.* Burnett, 8 Ex. 187; Skull *v.* Glenister, 16 C. B. N. S. 81; Williams *v.* James, L. R. 2 C. P. 577. A right of way to a piece of land is *primâ facie* restricted to the purposes necessary for the ordinary and reasonable use of such land. Williams *v.* James, L. R. 2 C. P. 577; Davenport *v.* Lamson, 21 Pick. 72; Washburn's Easements (2d ed.), 87, 240 *et seq.*; Shroder *v.* Brenneman, 23 Penn. St. 348. Pleas of rights of way for special purposes, Parker *v.* Mitchell, 11 Ad. & E. 788; Bennison *v.* Cartwright, 5 B. & S. 1.] Upon a plea of right of way to fetch water and goods from a river, the jury having found the right to fetch water and negatived the right to fetch goods, the court ordered judgment to be entered for defendant as to the right to fetch water, and for the plaintiff as to the right to fetch goods. Knight *v.* Woore, 3 Bing. N. C. 3; Phythian *v.* White, 1 M. & W. 216. To enable the verdict to be entered distributively, the plea must contain within itself the right found by the jury; a general right of way will not, in this sense, include a right for carting timber only; Higham *v.* Rabbett, 5 Bing. N. C. 627; 7 Dowl. 653; nor will a claim of a right of way to *lead and carry away* manure include a right of way *on foot and for horses and cattle.* Brunton *v.* Hall, 1 Q. B. 792. And see as to taking pleas distributively, Common Law Procedure Act, 1852, s. 75. Proof of a way over *any* part of the close will support this allegation, and plaintiff must new assign if he goes for damages for destroying the posts, &c. they not being situated on the way in question. Webber *v.* Sparkes, 10 M. & W. 485; and see Smith *v.* Royston, 8 M. & W. 381; Wood *v.* Wedgwood, 2 D. & L. 809; 2 C. B. 276; Bracegirdle *v.* Peacock, 15 L. J. Q. B. 73. In the case of a *private* way there is no right to go out of the way because the way is impassable, unless it was the duty of the owner of the land to repair the way, and it was impassable through his default; Bullard *v.* Harrison, 4 M. & S. 387; Taylor *v.* Whitehead, 2 Doug. 475; *aliter* in the case of a *public* way. Add a plea claiming by virtue of forty years' enjoyment; other pleas should also be added, one claiming the right by non-existing grant, *post*, form 7, if it be probable that the right really claimed may be defeated by any facts, such as unity of possession, which shows that there has not been a *continuous* enjoyment *as of right* for the twenty years. See Onley *v.* Gardiner, 4 M. & W. 501. Another plea may sometimes be judiciously added claiming the right immemorially. The plea is not proved by evidence of a long enjoyment not carried later than two years before suit. Lowe *v.* Carpenter, 6 Ex. 825. In an action against a railway for obstructing a right of way under the canal clauses act, special damage must be shown. Watkins *v.* Great Northern Ry. Co. 20 L. J. Q. B. 391. Form of plea of right of way by grant, Ackroyd *v.* Smith, 10 C. B. 164; [Senhouse *v.* Christian, 1 T. R. 561; Campbell *v.* Wilson, 3 East, 294; Plant *v.* James, 5 B. & Ad. 791; Henning *v.* Burnet, 8 Ex. 187; Pearson *v.* Spencer, 1 B. & S. 571;] by non-existing grant, Tatton *v.* Hammersley, 3 Ex. 279; 18 L. J. Ex. 163.

(*t*) [A plea, justifying a trespass on the ground of a right of way, will not protect servants, unless it is alleged therein that the privilege of passing in the way extends to them. Bartlett *v.* Prescott, 41 N. H. 493, where see a form of plea, which was held defective on demurrer, because this allegawas not made.]

and brook in and upon the said close of the plaintiff, and for that purpose the right of going on foot and with cattle in and upon and over the said close of the plaintiff to the said watering-place and brook at all times of the year, for the more convenient occupation of the said land of the defendant, and at the said times when [*&c.*], the defendant broke and entered the said close of the plaintiff for the purpose aforesaid, and because at the said times when [*&c.*], the said fences had been placed and were then wrongfully in and upon the said close obstructing and preventing the defendant from watering his said cattle at the said watering-place and brook, the defendant necessarily threw down, and removed, and damaged, and injured the said fences for the purpose of exercising, and in exercising the said rights doing no unnecessary damage in that behalf [which are the alleged trespasses].

5. *Replication traversing a Right of Way.* (*u*)

That the occupiers of the said land did not for twenty [*or* "forty," *as the case may be*] years before this suit enjoy as of right and without interruption the alleged way.

6. *Replication* (*to a Plea of Forty Years' Enjoyment of a Way*) *that the Plaintiff was a Tenant for Life.*

Wright *v.* Williams, 1 M. & W. 77.

OBS.—By 2 & 3 W. 4, c. 76, s. 8, "When any land or water, upon, over, or from which any such *way* or other convenient *watercourse* or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof." A replication of a life estate under this act must show that the plaintiff is the person entitled to the reversion expectant on the determination of the life estate. Wright *v.* Williams, *supra*. A tenancy for life during *any portion* of the *twenty* years for which the way has been enjoyed, as stated in the plea, prevents the full period of twenty years being computed either as against the tenant for life or even his lessee, though the latter may have acquiesced in the user of the way; Bright *v.* Walker, 1 Cr., M. & R. 211; but the defendant may rejoin that the enjoyment was either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended. See forms of these pleadings. Clayton *v.* Corby, 2 Q. B. 817. During the period of a tenancy for life no exercise of an easement will affect the fee.

7. *Plea of a Right of Way by lost Grant.*

OBS.—There is nothing in the prescription act to interfere with a claim of a right of way by express *grant*, whether by will (as to which see Whalley *v.* Thomp-

(*u*) Common law procedure act, 1852 (15 & 16 Vict. c. 76), sch. B, 54. A joinder of issue will put in issue the defendant's possession and the right of way claimed. [Under the issue raised by a traverse of the right, the plaintiff may prove unity of possession during part of the period; Onley *v.* Gardiner, 4 M. & W. 496; England *v.* Wall, 10 M. & W. 699; Clayton *v.* Corby, 2 Q. B. 813; Winship *v.* Hudspeth, 10 Ex. 5; or any matter inconsistent with the simple facts of enjoyment as of right as an easement. Bright *v.* Walker, 1 Cr., M. & R. 211, 219; Tickle *v.* Brown, 4 Ad. & E. 369, 383, may be proved under this issue, and need not be specially replied. Bright *v.* Walker, and Tickle *v.* Brown, *supra*.]

Obs. son, 1 B. & P. 371) or by deed. Campbell *v.* Wilson, 3 East, 294; Senhouse *v.* Christian, 1 T. R. 561. Where there is reason to fear that a prescriptive right of way has been extinguished by unity of seisin, it would then be advisable to insert a plea claiming by non-existing grant. Form, evidence, &c. Livett *v.* Wilson, 3 Bing. 115; Plant *v.* James, 5 B. & Ad. 791; 3 Chit. Plead. 7th ed. 393. See *ante*, 735, 736, Obs. per Parke B.; Harr. Ind. tit. Way; Livett *v.* Wilson, 3 Bing. 115; 1 Saund. 323 *a*; Plant *v.* James, 5 B. & Ad. 791; 4 Ad. & E. 749, 765; Blewett *v.* Tregonning, 3 Ad. & E. 554. Right of way under a local act and award. Logan *v.* Burton, 5 B. & C. 513; Basset *v.* Mitchell, 2 B. & Ad. 99.

That the defendant at the said time when [*&c.*], was seised in fee of a close called ——, and before the said time when [*&c.*], by a deed made between E. F., who was then seised in fee of the said close, now of the plaintiff, and G. H., who was then seised in fee of the said close called ——, whose estate therein the defendant had at the said time when [*&c.*], which deed has been lost or destroyed by accident, the said E. F. granted to the said G. H., and to his heirs and assigns, a way on foot, and with cattle and carriages, from a public highway over the said close now of the plaintiff to the said close called ——, and from the said close called —— over the said close now of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the said close called ——, and the defendant being by virtue of the said grant entitled to such way as aforesaid, committed the alleged trespasses in exercise of the said right of way. (*x*)

8. *Right of Way claimed by Immemorial Prescription.*

Obs. — Forms, Arlett *v.* Ellis, 7 B. & C. 346; Tapley *v.* Wainwright, 5 B. & Ad. 395; and see, in general, 1 Saund. 339–353; 2 Saund. 1, 324. It is necessary in this plea to deduce title from the freeholder, or to justify as his servant, and then to prescribe in a *que* estate, that is, in right of the freeholder's "and those whose estate he had." See Attorney General *v.* Gauntlett, 3 Y. & J. 93. Before the prescription act, a right of way or common, or other easement or profit, to be enjoyed or taken in the soil of another, could not be established without showing that it existed from time immemorial, or, in pleading language, "from time whereof the memory of man runneth not to the contrary" (being in legal contemplation the whole period of time from the reign of King Richard the First; see the recital in the act). It is true that the courts held that proof of twenty years adverse user or enjoyment of the easement furnished a *presumption* that the right had existed from time immemorial. Still this presumption was subject to be rebutted by evidence that at any one given period of time since the commencement of legal memory the right had become extinguished, as by unity of seisin of the several properties in the same person, and thus the *continuity* of enjoyment *from* time immemorial had been destroyed. See Stamford *v.* Dunbar, 13 M. & W. 822. The above plea is therefore, upon a traverse thereof, always open to be defeated at the trial, by such proof. It was to obviate this difficulty that it became the practice to plead a right of way by what was termed a "*non-existing grant.*" *Supra*, form 6.

That at the time of the alleged trespasses he was seised in fee of land, and he and all those whose estate he then had therein from time immemorial enjoyed a way on foot and with cattle and with carriages from a public highway

(*x*) Before the common law procedure act, 1852, it was necessary to give the date of and parties to the deed; see Hendy *v.* Stephenson, 10 East, 55; Blewett *v.* Tregonning, 3 Ad. & E. 554; but it would now probably be held sufficient to state the deed to be between a certain person and a certain other person. [A like plea by a tenant. Bailey *v.* Stevens, 12 C. B. N. S. 91.]

over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the said land of the defendant, and the alleged trespasses were a use by the defendant of the said way.

9. *Right of Way of Necessity.*

Obs. — See Forms, &c. 3 Chit Plead. 7th ed. 395; Harr. Ind. Way, XII. 3, and 2 Bing. 76; Proctor *v.* Hodgson, 10 Ex. 824; Pinnington *v.* Galland, 9 Ex. 1; forms in cases there cited. Buckby *v.* Coles, 5 Taunt. 311; Holmes *v.* Goring, Pearson *v.* Spencer, 1 B. & S. 571; Eastern Counties Ry. Co. *v.* Dorling, 5 C. B. N. S. 821.

[A right of way of necessity is an incident to a grant of land, where there is no access to the land granted except over remaining land of the grantor; also where there is no access to remaining land of the grantor except over the land granted. 1 Wms. Saund. 323 (6); Howton *v.* Frearson, 8 T. R. 50; Pinnington *v.* Galland, 9 Ex. 1; Brigham *v.* Smith, 4 Gray, 297; Seymour *v.* Lewis, 13 N. J. 444; White *v.* Bass, 7 H. & N. 732; Collins *v.* Prentice, 15 Conn. 39; Brice *v.* Randall, 7 Gill & J. 349; Marshall *v.* Trumbull, 28 Conn. 183; Kimball *v.* Cocheco R. R. 27 N. H. 449; Nichols *v.* Luce, 24 Pick. 102; Wissler *v.* Hershey, 23 Penn. St. 333. Mere necessity, apart from the relation of grantor and grantee does not give any right of way over the land of another. Bullard *v.* Harrison, 4 M. & Sel. 387; and see Proctor *v.* Hodgson, 10 Ex. 824; Tracy *v.* Atherton, 35 Vt. 52. And the plea of a right of way of necessity must show how it arises by way of grant. Bullard *v.* Harrison, 4 M. & Sel. 387. This right of way continues only so long as the necessity lasts, and is extinguished by the grantor or grantee obtaining access to the land by other ways; Holmes *v.* Goring, 2 Bing. 76; Pierce *v.* Selleck, 18 Conn. 321; Viall *v.* Carpenter, 14 Gray, 126; Nichols *v.* Luce, 24 Pick. 102; Gayetty *v.* Bethune, 14 Mass. 49; Dodd *v.* Burchell, 1 H. & C. 122; Collins *v.* Prentice, 15 Conn. 39; White *v.* Leeson, 5 H. & N. 53; hence the plea must show a necessity, by reason of no other way at the time of the trespass. Holmes *v.* Goring, 2 Bing. 76; Proctor *v.* Hodgson, 10 Ex. 824; Gayetty *v.* Bethune, 14 Mass. 49; M'Donald *v.* Lindall, 3 Rawle, 492. It seems that the way of necessity is the way most convenient for the purpose. See Morris *v.* Edgington, 3 Taunt. 24. As to the selection of the course in which the way of necessity is to pass, see Nichols *v.* Luce, 24 Pick. 102; Holmes *v.* Seely, 19 Wend. 507; Capers *v.* Wilson, 3 McCord, 170; Smiles *v.* Hastings, 24 Barb. 44; Pearson *v.* Spencer, 1 B. & S. 584. A right of way may be implied by reason of necessity, upon the devise of lands in several parcels. Pearson *v.* Spencer, 1 B. & S. 571; 3 Ib. 761.

9*a*. *Plea of Private Right of Way of Necessity.*

That at the time of the alleged trespass he was seised in fee of a close called ——, next adjoining to the said close of the plaintiff; and J. K., whose estate in the said close called —— the defendant then had, was at the time of the making of the conveyance hereinafter mentioned seised in fee as well of the said close of the plaintiff as of the said close called ——, and the said J. K. being so seised of the said closes respectively, before the alleged trespass granted the said close of the plaintiff to L. M. and his heirs and assigns; and at the time of the said grant the said J. K. had not, nor had he at any time afterwards, nor had the defendant, or any other person having the estate of the said J. K. in the said close called ——, at any time any way to or from the said close called —— otherwise than from or to a public highway over the said close of the plaintiff; and by reason thereof the said J. K. and all other persons having the estate of the said J. K. in the said close called —— and

the said defendant so having the estate of the said J. K. therein as aforesaid, from and after the time of the said grant necessarily had and of right ought to have had a way on foot and with horses and carriages from the said public highway over the said close of the plaintiff to the said close called ——, and from the said close called —— over the said close of the plaintiff to the said public highway, at all times of the year, for the necessary use and occupation of the said close called ——, the same way being the nearest and most convenient way over the said close of the plaintiff to the said close called ——, and the alleged trespass was a use by the defendant of the said way.

Like pleas. Howton *v.* Frearson, 8 T. R. 50; Buckby *v.* Coles, 5 Taunt. 311; Holmes *v.* Goring, 2 Bing. 76. *Plea of a right of way of necessity created by devise of the tenements to separate devisees, there being no way to the one except over the other.* Pearson *v.* Spencer, 1 B. & S. 571; 3 Ib. 761.]

10. *New Assignment extra viam.* (*y*)

Ante, 673.

11. *Replication to a Plea of Twenty Years' Enjoyment of a Way, that it was enjoyed by Leave and License of the Plaintiff extending over the Whole Time.*

Obs. — See Colchester *v.* Roberts, 4 M. & W. 769; [Bennison *v.* Cartwright, 5 B. & S. 1.] A parol license must be replied to a twenty years' plea, if it cover *the whole* of that time, because under such a license the party may be said to enjoy the way "of right and without interruption" for the period mentioned in the plea; and therefore the replication must be in confession and avoidance. Tickle *v.* Brown, 4 Ad. & E. 383.

But if the license has been renewed from time to time, on applications by the defendant to use the way during the twenty years, then since every time such applications were made the occupiers admitted that the former license had expired, and that the *continuance* of the enjoyment was thereby broken, that may be shown on a simple traverse of the twenty years' right. Monmouth Canal Co. *v.* Harford, 1 Cr., M. & R. 614; [Bennison *v.* Cartwright, 5 B. & S. 1.]

See an instance of a replication in confession and avoidance falling within this principle, and showing that the defendant could not have exercised the right by custom, prescription, or grant. Kinlock *v.* Neville, 6 M. & W. 795.

But the license must be in writing to defeat the forty years' plea. See 2 & 3 W. 4, c. 72, s. 2; Tickle *v.* Brown, *supra*. Under a simple denial, therefore, of that plea, the plaintiff may show that the previous enjoyment of the way was by *parol* license. Beasley *v.* Clark, 2 Bing. N. C. 709.

12. *Plea of Justification under a Public Right of Way.* (*z*)

That before and at the time of the alleged trespasses there was and of right ought to have been a certain common and public highway (*a*) into, through, over, and along the said close, for all persons to go, return, pass, and re-pass, on foot and *with horses and other cattle and carriages*, at all times of the year,

(*y*) If it is alleged that the acts complained of were not done in exercise of the right set up, a new assignment is necessary. A joinder of issue would merely deny the defendant's possession and the existence of the right. See Eastern Counties Ry. Co. *v.* Dorling, 28 L. J. C. P. 202; 5 C. B. N. S. 821.

(*z*) Pipe *v.* Fulcher, 28 L. J. Q. B. 12; El. & El. 111; Petrie *v.* Nuttall, 25 L. J. Ex. 200; 11 Ex. 569.

(*a*) The plea for a footpath will be similar, substituting the word "footway" for "highway," and omitting the averments about horses, cattle, and carriages, &c. A simple denial of this plea, would let in evidence that the way had ceased by the award of inclosure commissioners under a local statute. Williams *v.* Wilcox, 8 Ad. & E. 331.

at their free will and pleasure; wherefore the defendant, having occasion to use and using the said way, committed the alleged trespasses. (*b*)

[13. *Plea of a Public Highway justifying the Removal of Obstructions.*

That at the time of the alleged trespasses there was and of right ought to have been a common and public highway over the said land of the plaintiff for all persons to go and return, on foot and with horses, cattle, and carriages, at all times of the year, at their free will and pleasure; and the defendant, having occasion to use the said way, then entered into and upon the said land of the plaintiff and along the said highway, then using the same as he lawfully might for the cause aforesaid, and because the said [wall] had been erected and then was wrongfully in and across the said highway, obstructing the same and preventing the convenient use thereof, the defendant necessarily pulled down and destroyed the said [wall] for the purpose of using the said highway, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Like pleas. Webber *v.* Sparks, 10 M. & W. 485; Elwood *v.* Bullock, 6 Q. B. 383; Bracegirdle *v.* Peacock, 8 Q. B. 174; Dawes *v.* Hawkins, 8 C. B. N. S. 848; Morant *v.* Chamberlain, 6 H. & N. 540. *Plea of a public right of way along a navigable river, justifying the destruction of a weir fixed in the channel.* Williams *v.* Wilcox, 8 Ad. & E. 314. *A like plea justifying trespasses on a landing-stage of the plaintiff.* Eastern Counties Ry. Co. *v.* Dorling, 5 C. B. N. S. 821.]

14. *Replication to a Plea of Right of Way justifying the Removal of Obstructions, that the Obstruction removed was a Booth which Plaintiff had erected at a Fair under a Custom, and that in erecting the Booth the Plaintiff had left sufficient Space for the Public to pass.*

Elwood *v.* Bullock, 6 Q. B. 383; Webber *v.* Sparks, 10 M. & W. 485; Dawes *v.* Hawkins, [8 C. B. N. S. 848;] see Morant *v.* Chamberlain, [6 H. & N. 541.

[*Replication of a prescriptive right to place goods upon the public way.* Morant *v.* Chamberlain, 6 H. & N. 541.]

WEIRS.

Plea that a Weir was wrongfully erected across a Navigable River, and Law.

Williams *v.* Wilcox, 8 Ad. & E. 314.

WINDOWS. See "Ancient Lights."

WITNESSES.

Obs. — See the declarations against a witness for not obeying a subpœna, *ante*, 633, and law, &c. in the notes. Forms of pleas, Betteley *v.* M'Leod, 3 Bing. N.

(*b*) If the removal of an obstruction is to be justified, see form 4, *ante*, 738.

Obs. C. 405. Not guilty would put in issue only the default or breach of duty, *i. e.* the non-attendance alleged, and not the inducement of the preliminary proceedings. It is necessary to traverse specially the allegation in the declaration, that the plaintiff had a good cause of action, and that he could have proceeded to trial without the testimony of the defendant, otherwise those facts will be *conclusively* admitted. Needham *v.* Fraser, 3 D. & L. 190; 1 C. B. 815; *ante*, 634, note (*p*). The defendant might also traverse any other of the material allegations in the declaration, as that the plaintiff prosecuted out of the said court the said writ of subpœna, that he caused to be shown or made known such writ to the defendant a reasonable time before, &c.; see Barber *v.* Wood, 2 Moo. & R. 172; *ante*, 633, note (*l*); that he paid a reasonable sum for his costs and charges, &c.; *ante*, 634, note (*o*); that the defendant's testimony was material, &c.; *ante*, 634, note (*q*); or in the case of an action for not attending on a *subpœna duces tecum*, he might deny that he could have produced the documents, &c. or that they were material.

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